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ANNOTATED CONSOLIDATED LAWS

OF THE

STATE OF NEW YORK

AS AMENDED TO JANUARY 1, 1918

CONTAINING ALSO

THE FEDERAL AND STATE CONSTITUTIONS

WITH

NOTES OF BOARD OF STATUTORY CONSOLIDATION,
TABLES OF LAWS AND INDEX

EDITED BY

CLARENCE F. BIRDSEYE, ROBERT C. CUMMING
AND FRANK B. GILBERT

SECOND EDITION

EDITED BY

ROBERT C. CUMMING AND FRANK B. GILBERT

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Office of the Secretary of State, }
State of New York, } ss.

In pursuance of the authority vested in me, by section 932 of the Code of Civil Procedure, as amended by chapter 594 of the Laws of 1895, I, Francis M. Hugo, Secretary of State, hereby certify that the copies of the laws contained in this volume are correct transcripts of the text of the original laws, and in accordance with such section are entitled to be read in evidence.

L. S.

Given under my hand and the seal of office of the Secretary of State, at the Capitol in the City of Albany, this 31st day of July, 1917.

FRANCIS M. HUGO,
Secretary of State of the State of New York.

ANNOTATED CONSOLIDATED LAWS

OF THE

STATE OF NEW YORK

EXECUTIVE LAW.

L. 1909, ch. 23.—An act in relation to executive officers, constituting chapter eighteen of the consolidated laws.

[In effect February 17, 1909.]

CHAPTER XVIII OF THE CONSOLIDATED LAWS.

- Article 1. Short title (§ 1).
2. Governor (§§ 2-10).
 3. Secretary of state (§§ 20-34).
 4. Comptroller (§§ 40-44).
 5. State treasurer (§§ 50-54).
 6. Attorney-general (§§ 60-67).
 7. State engineer (§§ 70-76).
 8. Provisions applicable to two or more executive officers (§§ 80-84).
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 10. Miscellaneous officers (§§ 100-109).
 11. Laws repealed; when to take effect (§§ 120, 121).

ARTICLE I.

SHORT TITLE.

Section 1. Short title.

§ Short title.—This chapter shall be known as the "Executive Law."

Source.—Former Ex. L. (L. 1892, ch. 683) § 1.

General note.—A careful examination has been made of all general statutes which refer to the subject matter of this chapter and all live provisions thereof have been incorporated as well as all amendments to the Executive Law as originally enacted, including those of the session of nineteen hundred and seven. About two hundred and fifty statutes have been recommended for repeal with reasons as expressed in the notes to schedule. (Report of Board of Statutory Consolidation, p. 1728.)

ARTICLE II.

GOVERNOR.

Section 2. Office and residence of governor.

3. Acting governor.
4. Secretary and counsel to the governor.
5. Annual expenditures of governor.
6. Executive records.
7. Petitions on behalf of state.
8. Examinations and inspections by the governor.
9. Limiting operation of holiday.
10. Registration of aliens.

§ 2. Office and residence of governor.—The office of the governor shall be known as the executive chamber, and his residence, as the executive mansion.

Source.—Former Ex. L. (L. 1892, ch. 683) § 1.

References.—Constitutional provision as to election of governor, and the executive residence. Const., art. 4, §§ 3, 4. Term of office, Id. § 1; qualifications, Id. § 2; powers and duties, Id. § 4; reprieves and pardons, Id. § 5.

Executive mansion to be in charge of trustees of public buildings. Public Buildings Law, §§ 2, 3.

§ 3. Acting governor.—Every provision of law relating to the governor shall extend to the lieutenant-governor, and to the president of the senate, respectively, while acting as governor in pursuance of law.

Source.—Former Ex. L. (L. 1892, ch. 683) § 2; originally revised from R. S., pt. 1, ch. 8, tit. 1, § 19.

References.—Constitutional provisions as to lieutenant-governor acting as governor, Const., art. 4, § 6; qualifications of lieutenant-governor, Id. § 7, ante; salary, Id. § 8. Lieutenant-governor member of canal board, commissioner of land office, and commissioner of canal fund, Id., art. 5, § 5; also member of state fair commission, Agricultural Law, § 291.

§ 4. Secretary and counsel to the governor.—A secretary to the governor shall be appointed by the governor, and shall be paid an annual salary of four thousand dollars. The governor may also appoint and at pleasure remove a counsel to the governor, who shall be paid an annual salary of not exceeding five thousand dollars. It shall be the duty of such counsel to advise the governor in regard to the constitutionality, consistency and legal effect of bills presented to the governor for his approval.

Source.—Former Ex. L. (L. 1892, ch. 683) § 3, as amended by L. 1899, ch. 11; L. 1900, ch. 664; originally revised from R. S., pt. 1, ch. 5, tit. 3, § 13; R. S., pt. 1, ch. 9, tit. 1, § 5; R. S., pt. 1, ch. 8, tit. 1, § 24, as added by L. 1858, ch. 64.

§ 5. Annual expenditures of governor.—There shall be annually appropriated to be expended by the governor,

1. Not exceeding ten thousand five hundred dollars for the employment of such clerks, counsels, stenographers, messengers and doorkeepers in the executive chamber as may be necessary.

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Governor.

§§ 6, 7.

2. Not exceeding two thousand dollars for rewards which may be offered by him and necessary expenses in the apprehension of criminals and fugitives from justice.

3. Not exceeding one thousand dollars for compensation, expenses and fees of witnesses and sheriffs upon applications for executive clemency.

4. Not exceeding four thousand dollars for other incidental expenses of the executive chamber and the administration of his office.

5. Not exceeding two thousand dollars for repairs, furniture and incidental expenses of the executive mansion.

Source.—Former Ex. L. (L. 1892, ch. 683) § 4; originally revised from R. S., pt. 1, ch. 9, tit. 1, §§ 13-15; R. S., pt. 1, ch. 8, tit. 1, § 24, as added by L. 1858, ch. 64. The general appropriation acts of each year modify the amounts to be expended pursuant to the above section.

References.—Constitutional provisions as to salary of governor, Const., art. 4, § 4, ante. Governor not to receive any fees to his own use, Id. art. 10, § 9.

Appropriation for incidental expenses; accounting.—Where the legislature made an appropriation of a certain sum to the governor for incidental expenses in administering the government it was held that the propriety of the items charged for these incidental expenses was not a subject of judicial cognizance, but was necessarily left to the discretion of the governor, under the control of the legislature, and that the governor was not liable, in an action at the suit of the people to recover back any part of the money so received and expended on the ground of its having been improperly expended. *People v. Lewis* (1810), 7 Johns. 73.

§ 6. **Executive records.**—The governor shall cause to be kept in the executive chamber,

1. Journals of the daily transactions of his office.

2. Registers, containing classified statements of such transactions.

3. Separate registers containing classified statements of all applications for pardon, commutation or other executive clemency, and of his action thereon.

4. An account of his official expenses and disbursements, including the incidental expenses of his department, and of all rewards offered by him for the apprehension of criminals, and also the expense incurred by him in sending the reports and copies of the laws of this state to other states.

5. Files of all official records upon which applications for executive clemency are founded; of statements made by judges to him; of sentences to death and of the testimony in capital cases; and of such other papers relating to the transactions of his office as are deemed by him of sufficient value for preservation.

Source.—Former Ex. L. (L. 1892, ch. 683) § 5; originally revised from R. S., pt. 1, ch. 8, tit. 1, §§ 20-23, as added by L. 1858, ch. 64.

§ 7. **Petitions on behalf of state.**—The governor of the state may sign any petition required by law for any change or improvement to be made to a street, avenue or public place on behalf of the state, the people of the state or any other officer, commission, department or trustee for the state where the title of any property fronting upon any street, avenue or public

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Governor.

L. 1909, ch. 23.

place in a city, is vested in or held by the people of the state, or is vested in or held by any officer, commission or department of or on behalf of the state.

Source.—Former Ex. L. (L. 1892, ch. 683) § 6; originally revised from L. 1885, ch. 252, § 1.

Petition may be signed on behalf of state, although the property of the state does not appear on the tax rolls of the city. *People ex rel. Holler v. Bd. of Contract, etc., of Albany* (1885), 2 How. Pr. N. S. 423.

§ 8. Examinations and inspections by the governor.—The governor is authorized at any time, either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the state. The governor and the persons so appointed by him are empowered to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material. Whenever any person so appointed shall not be regularly in the service of the state his compensation for such services shall be fixed by the governor, and said compensation and all necessary expenses of such examinations and investigations shall be paid by the treasurer out of any appropriations made for the purpose upon the order of the governor and the warrant of the comptroller.

Source.—Former Ex. L. (L. 1892, ch. 683) § 7, as added by L. 1907, ch. 539.

Effect of expiration of governor's term of office.—Neither the governor nor any person or persons appointed by him under this section have any power or authority to continue to make investigations instituted pursuant to the provisions of this section after the expiration of the term of office of the governor making the appointment. Rept. of Atty. Genl. (1915) Vol. 2, p. 353, 5 State Dept. Rep. 500.

Testimony before committee as giving immunity from prosecution.—An attorney at law, indicted for bribery of the superintendent of a State hospital, in violation of section 378 of the Penal Law, is not entitled to immunity from prosecution, either under section 381 of the Penal Law, or under section 3 of article 13 of the State Constitution, because of the fact that when subpoenaed by an investigating committee appointed under this section he appeared and denied ever having attempted to bribe the superintendent in any way, and claimed that the superintendent asked him for a bribe, which he refused to give. *People v. Anhut* (1914), 162 App. Div. 517, 148 N. Y. Supp. 7, *affd.* 213 N. Y. 643, 107 N. E. 1082.

Section cited.—Rept. of Atty. Genl. (1909) 276.

§ 9. Limiting operation of holiday.—The governor in issuing any proclamation appointing any day as a day of thanksgiving or fasting and prayer, or other religious observance, under section twenty-four of the general construction law is authorized, in his discretion, to limit or restrict the effect and operation of such proclamation to any city or county to be designated by him in such proclamation, and the day so appointed for the purposes aforesaid shall be deemed to be a public holiday for the purposes mentioned in said section only within the city or county so specified in such proclamation.

Source.—L. 1889, ch. 198.

References.—Holidays generally and effect thereof, General Construction Law, §§ 24, 25.

§ 10. **Registration of aliens.**—Whenever a state of war exists between the United States and a foreign country, or, in the judgment of the governor public safety or necessity requires such action, the governor may, by proclamation, direct every subject or citizen of such foreign countries as the governor may designate in such proclamation, who are in this state, or who may from time to time come into the state, to appear within twenty-four hours after the date specified in such proclamation or after arrival within the state, before such public authorities as the governor may designate in such proclamation, and personally register his or her name, residence, business, length of stay and such other information as the governor shall prescribe. Such proclamation shall be published in such newspapers as the governor may designate. Every person to whom such proclamation is applicable shall also comply with such rules of personal identification as the governor shall from time to time prescribe. The occupant of every private residence, and the owner, lessee or proprietor, operating or managing every hotel, inn, boarding or rooming house, shall, within twenty-four hours after the date specified in such proclamation, notify such public authorities of the presence therein of every subject or citizen of a foreign country to whom such proclamation is applicable, and shall each day thereafter notify such public authorities of the arrival thereat or departure therefrom of every such subject or citizen. A failure to comply with any such proclamation or to perform any act required by this section shall be a misdemeanor, punishable by a fine of not exceeding one thousand dollars, or imprisonment for one year or both. (Added by L. 1917, ch. 159, in effect Apr. 10, 1917).

ARTICLE III.

SECRETARY OF STATE.

- Section 20. Salary and expenses.
21. Deputies.
 22. Custody of records.
 23. Distribution of acts of congress.
 24. Supplying statutes to new counties and towns.
 25. Legislative manual.
 26. Fees.
 27. Exchange of laws and reports with other states.
 28. Completing unfinished papers.
 29. Record of terms of judges of courts of record.
 30. Copies of amendments to rules for admission of attorneys.
 31. Copyright of notes prepared by court reporters.
 32. Distribution of court of appeals and appellate division reports.
 33. Publication of appointments of terms of appellate division and supreme court.
 34. Publication of statement of names changed.

§ 20. **Salary and expenses.**—The secretary of state shall be paid an annual salary of six thousand dollars.

There shall be annually appropriated to be expended by the secretary of state:

1. Not exceeding twenty thousand three hundred dollars for the employment of clerks and messengers in his office;

2. Not exceeding two thousand dollars for furniture, books, binding, blanks, printing and the other necessary incidental expenses of his office. (*Amended by L. 1910, ch. 691, in effect Jan. 1, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 20; originally revised from R. S., pt. 1, ch. 9, tit. 1, § 5, and the appropriation bills of each year.

References.—The amount to be expended by the secretary of state is regulated by the amount appropriated each year for the purposes specified in the appropriation acts. Constitutional provision providing for the election of secretary of state, Const., art. 5, §§ 1, 2. Salary not to be increased or diminished during term, Id. § 1. Secretary of state one of commissioners of land office and of commissioners of canal fund, and also member of canal board, Id., art. 5, § 5. Removal by senate, Public Officers Law, § 32; resignation to legislature, Id. § 31; vacancy filled by legislature, Id. § 41.

§ 21. **Deputies.**—The secretary of state shall appoint a deputy who shall be paid an annual salary of four thousand dollars and who may perform all the duties of the secretary of state, except as commissioner of the canal fund and state canvasser.

The secretary of state is authorized, whenever he may deem it necessary, to appoint one of his clerks as second deputy secretary of state, who shall have power to perform any and all of the duties of the deputy secretary of state excepting the duties of such deputy as clerk of the commissioners of the land office, and such second deputy secretary of state shall not receive any extra salary by reason of such appointment.

Source.—Former Ex. L. (L. 1892, ch. 683) § 21; L. 1895, ch. 107, § 2; originally revised from R. S., pt. 1, ch. 8, tit. 2, § 22.

References.—As to powers and duties as deputies, see Public Officers Law, § 9. Deputy as clerk of land board, Public Lands Law, § 2.

Certificates of authenticity of New York commissioner to acknowledgment of deeds should be signed by the Secretary of State personally, and not by a deputy secretary of state, except in case of absence or inability of the Secretary to act, or vacancy in said office. Rept. of Atty. Genl. (1901), 259.

§ 22. **Custody of records.**—The secretary of state shall have the custody of all laws and concurrent resolutions of the legislature, all documents issued under the great seal, all books, records, deeds, parchments, maps and papers deposited or kept in his office, and shall properly arrange and preserve them.

Source.—Former Ex. L. (L. 1892, ch. 683) § 22; originally revised from R. S., pt. 1, ch. 8, tit. 2, §§ 1-3; R. S., pt. 1, ch. 8, tit. 8, § 18; L. 1880, ch. 86, § 2.

Reference.—Completion and signature of records and papers left incomplete by predecessor, Executive Law, § 28.

Census schedules.—Right to permit temporary removal of. Rept. of Atty. Genl. (1906) 277.

L. 1909, ch. 23.

Secretary of state.

§§ 23-26.

§ 23. **Distribution of acts of congress.**—The secretary of state shall distribute the acts of congress received at his office in the same manner as the laws of this state.

Source.—Former Ex. L. (L. 1892, ch. 683) § 23; originally revised from R. S., pt. 1, ch. 8, tit. 2, § 11.

§ 24. **Supplying statutes to new counties and towns.**—The secretary of state shall, at the expense of the state, transmit to the clerk of every new county and town, the latest legislative revision of the general laws of the state, and, if practicable, a complete set of the volumes of the session laws, passed since the session of eighteen hundred and thirty. Whenever the revision of the general laws of the state, or any of the volumes of the session laws passed since eighteen hundred and thirty, belonging to any town, shall be destroyed by fire, the secretary of state shall, if practicable, replace them at the expense of the state.

Source.—Former Ex. L. (L. 1892, ch. 683) § 24; originally revised from R. S., pt. 1, ch. 8, tit. 2, §§ 2, 12, 13, and L. 1844, ch. 176.

References.—Annual distribution of session laws to county and town clerks, Legislative Law, § 46. Publication of session laws, Id. § 45; distribution of slips to county clerks, Id. § 49.

§ 25. **Legislative manual.**—The secretary of state, at the expense of the state, shall annually prepare and publish the legislative manual, and a map of the state, exhibiting the route of all railroads and canals that are completed or in course of construction. The manual shall contain the constitutions of the United States and of the state of New York, diagrams of the senate and assembly chambers, and such other information of the nature heretofore published therein, as he may consider useful, and shall be printed and bound in substantially the same style as heretofore. Within two weeks after the commencement of each regular session of the legislature, and earlier, if practicable, he shall deliver a copy of the manual and map to each member and officer of the legislature, and to each state officer entitled to the session laws, with the name of each officer or member lettered on the copy of the manual sent to him.

Source.—Former Ex. L. (L. 1892, ch. 683) § 25; originally revised from concurrent resolution (L. 1840, p. 347).

Publication of the legislative manual and number of copies to be distributed are within the discretion of the Secretary of State. Rept. of Atty. Genl. (1911) 18.

§ 26. **Fees.**—The secretary of state shall collect the following fees:

1. For entering a caveat, twelve and a half cents.
2. For searching the records in his office for any one year and for every other year in which such search is made, six cents.
3. For a copy of any paper or record not required to be certified or otherwise authenticated by him, ten cents per folio.
4. For a certified or exemplified copy of any law, record or paper, fifteen cents per folio, and one dollar additional for the certificate under the seal of his office, attached thereto; and this fee shall be the same whether

such copy be made by the secretary of state or previously prepared and presented to him for certification, any other law to the contrary notwithstanding.

5. For a certificate under the great seal of the state, two dollars.

6. For recording a certificate, notice or other paper required to be recorded, except as otherwise provided by this section, twenty-five cents per folio.

7. For a certificate as to the official character of a commissioner of deeds residing in another state or a foreign country, twenty-five cents, and for every other certificate under the seal of his office, two dollars.

8. For every patent for lands under water, five dollars for each parcel included therein, and for every other patent the sum of five dollars except when the parcels conveyed exceed five in number, when an additional sum of one dollar shall be charged for each lot in excess of five embraced in such patent.

9. For each license granted to a peddler, the sum of two dollars.

10. For filing the original certificate of incorporation of a railroad corporation, fifty dollars; for filing the original certificate of incorporation of any other stock corporation, twenty-five dollars; for filing any original certificate of incorporation drawn under article three or article twelve of the membership corporations law, twenty-five dollars; for filing a consent to, or certificate of, increase of capital stock, pursuant to either section six or sixty-three or sixty-four of the stock corporation law, ten dollars; for filing a certificate of merger, pursuant to section fifteen of the stock corporation law, twenty-five dollars; for filing an agreement for the consolidation of two or more railroad corporations, fifty dollars; for filing an agreement for the consolidation of two or more corporations other than railroad corporations, twenty-five dollars; for filing an amended certificate of incorporation, pursuant to either section seven of the general corporation law or section eighteen or twenty-two of the stock corporation law, ten dollars; for filing a certificate of change of number of directors, pursuant to section twenty-six of the stock corporation law, ten dollars; for filing a certificate of re-organization, pursuant to section nine of the stock corporation law, twenty-five dollars; for filing a certificate of extension or revival of corporate existence, twenty-five dollars.

11. For filing the statement and designation and copy of certificate of incorporation of a foreign corporation desiring to do business in the state, fifty dollars.

12. For certified copies of the evidence and proceedings of the board of audit on appeal to the supreme court, to be paid by the appellant on serving notice of appeal, fifteen cents per folio.

13. For registering a notice of a mining claim as required by section eighty-three of the public lands law, and recording same, five dollars.

14. For registering a trade mark, name, brand, device or label, in pursuance of law, for the registry of which no other fee is exacted, five dollars.

L. 1909, ch. 23.

Secretary of state.

§§ 27, 28.

15. For a certificate under subdivision three of section nine of the general corporation law, twenty-five dollars.

No fee shall be collected for copies of records furnished to state officers for use in their official capacity. (*Amended by L. 1917, ch. 69, in effect July 1, 1917.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 26, as amended by L. 1904, ch. 26; L. 1907, ch. 213; L. 1897, ch. 411; L. 1899, ch. 197; originally revised from R. S., pt. 1, ch. 9, tit. 1, § 3; L. 1850, ch. 270, § 6; L. 1857, ch. 788, § 3; L. 1875, ch. 136, § 5; L. 1882, ch. 156, §§ 1, 2; L. 1881, ch. 468.

References.—Secretary of state cannot receive any fees to his own use, Const., art. 5, § 1. And see Penal Law, §§ 855, 1826. Fees for certifying unofficially printed copies of laws, Code Civ. Pro. § 932. Quarterly accounts of fees, Executive Law, § 81. But see State Finance Law, § 37, which provides that state officers shall make monthly payments of receipts from fees to the state treasurer.

Statutes of foreign government cannot be read without proof of their authenticity. *Munroe v. Guillaume* (1866), 3 Abb. App. Dec. 334.

§ 27. **Exchange of laws and reports with other states.**—The secretary of state shall transmit to the executive of each state in the union, three copies of the laws of each year and of the reports of the court of appeals, as soon as published, and request a similar transmission to be made to him of the laws and reports of the highest courts of the several states, and when the laws of another state are received he shall cause one copy thereof to be deposited in the state library, one in the senate library and one in the assembly library; if but one copy be received, it shall be deposited in the state library. The expenses incurred thereby shall be included in the incidental expenses of the administration of his office.

Source.—Former Ex. L. (L. 1892, ch. 683) § 27, as added by L. 1893, ch. 248, § 2.

Reference.—Distribution of session laws among states, Legislative Law, § 46. The state library makes the distribution provided for in this section pursuant to an item in the appropriation act providing for the purchase of the required number of court reports.

Statutes of other jurisdictions as evidence.—Under an earlier statute (1 Rev. St. p. 165, § 17) providing that the statutes of every other state should be deposited in the state library, and another statute directing that printed volumes of statutes enacted by any other state, purporting to have been published by authority thereof should be admitted as presumptive evidence thereof, it was held to be competent to read therefrom, on the argument in court, any statute so deposited, published by the authority of any state. *Cutler v. Wright* (1860), 22 N. Y. 472.

But the statutes of a foreign government cannot be so read without proof of their authenticity. *Murray v. Binninger* (1866), 3 Abb. Dec. 336.

§ 28. **Completing unfinished papers.**—The secretary of state shall have power to complete and sign and certify in his own name, adding to his signature the date of so doing, all records of incorporation papers and other papers left incomplete or unsigned by any of his predecessors, with the same force and effect as though said records had been duly signed by such predecessors.

Source.—L. 1895, ch. 107.

§§ 29-32.

Secretary of state.

L. 1909, ch. 23.

§ 29. **Record of terms of judges of courts of record.**—The secretary of state must keep a record of the time of the commencement and termination of the official term, of each judge of a court of record.

Source.—Code Civ. Pro. § 54, in part. For remainder of section, see Judiciary Law, § 23.

§ 30. **Copies of amendments to rules for admission of attorneys.**—The secretary of state must transmit a printed copy of each amendment to the rules established by the court of appeals for the admission of attorneys and counselors, filed with him pursuant to the judiciary law, to the clerk of each county, and to the presiding justice of the appellate division of the supreme court, in each judicial department, and also cause the same to be published in the next ensuing volume of the session laws.

Source.—Code Civ. Pro. § 57, in part, as amended by L. 1895, ch. 946. Remainder of section re-enacted in Judiciary Law, § 53.

References.—Publication of rules of practice, Judiciary Law, §§ 52, 59.

Requirements directory.—The rules of the court of appeals relative to the admission of attorneys are not invalid because they have not been published in the session laws and a copy filed in the office of the clerk of each county; the requirements of this section are directory only. *Matter of Maxwell* (1891), 60 Hun 581, 38 N. Y. St. Rep. 479, 14 N. Y. Supp. 658.

§ 31. **Copyright of notes prepared by court reporters.**—The copyright of the statements of facts, of the head notes and of all other notes or references prepared by the state reporter, the supreme court reporter and the miscellaneous reporter must be taken by and shall be vested in the secretary of state for the benefit of the people of the state. The secretary of state is authorized by a writing filed in his office to grant to any person, firm or corporation, under such terms and conditions as he may determine to be for the best interests of the state, the right to publish the above mentioned copyrighted matter in an annotated edition of the volumes of law reports prepared by the reporters hereinbefore mentioned which have been heretofore issued. Said publication shall be made without cost to the state, and nothing in this section contained shall otherwise affect the obligation of any contract for the publication of such reports. (*Amended by L. 1916, ch. 171, in effect Apr. 7, 1916.*)

Source.—Code Civ. Pro. § 212, in part, as amended by L. 1877, ch. 416; Id. § 249, in part, as amended by L. 1905, ch. 164; L. 1892, ch. 598, § 6. Remainder of sections re-enacted in Judiciary Law, §§ 435, 444.

References.—Preparation and publication of court of appeals reports, Judiciary Law, §§ 431-434; of appellate division reports, Id. §§ 439-443; of miscellaneous reports, Id. § 446-454.

§ 32. **Distribution of court of appeals and appellate division reports.**—Of the copies of each volume of the reports of the court of appeals and of the appellate division furnished to the secretary of state, he must deliver one to the clerk of each county, for the use of the county, deposit one in the office of the attorney-general, deliver one to the clerk of the court of appeals, for the use of that court and one copy for each judge thereof,

L. 1909, ch. 23.

Comptroller.

§§ 33, 40.

deliver one to each justice of the supreme court, and to each county judge, and deposit three copies in the state library.

Source.—Code Civ. Pro. § 213, as amended by L. 1894, ch. 218; L. 1899, ch. 278; Id. § 249, as amended by L. 1905, ch. 164.

References.—See notes to preceding section.

§ 33. **Publication of appointments of terms of appellate division and supreme court.**—The secretary of state must immediately publish a copy of an appointment, filed with him, of a term or terms of an appellate division in the newspaper printed in Albany in which legal notices are required to be published at least once in each week for four successive weeks and he must publish a copy of an appointment, filed with him, of a term or terms of the supreme court in such newspaper at least once in each week, for three successive weeks before the holding of a term in pursuance thereof.

Source.—Code Civ. Pro. § 226, in part, as amended by L. 1895, ch. 946; Id. 233, in part.

References.—Appointment of terms to be filed in office of secretary of state, Judiciary Law, § 79. Expense of publication paid out of state treasury, State Finance Law, § 46.

Necessity for publication.—It is the right of every citizen to know the times and places of holding courts. The legislature has required a publication to be made before any court shall be held under any designation. To sanction the court at which a prisoner was convicted, and the designation of which was not published as so required, is to annul the statutory provisions relating thereto. *Northrup v. People* (1867), 37 N. Y. 203. What publication should be given to the appointments of the terms of courts is fixed by the legislature, and the court cannot enlarge the terms of the statute. *People ex rel. Cole v. Hill* (1885), 36 Hun 619.

Publication in local newspaper cannot be ordered by a special term of the supreme court, and the board of supervisors of a county cannot be compelled to audit a claim therefor. *People ex rel. Cole v. Supervisors of Greene* (1886), 39 Hun 299; *People ex rel. Cole v. Hill* (1885), 36 Hun 619.

Extra terms.—Publication of notice of appointment of an extra or additional trial term by the Appellate Division is not required by this section. *People v. Duffy* (1914), 212 N. Y. 47, 105 N. E. 839, L. R. A. 1915 B 103, Ann. Cas. 1915 D 176.

§ 34. **Publication of statement of names changed.**—(*Repealed by L. 1913, ch. 617, in effect May 21, 1913.*)

ARTICLE IV.

COMPTROLLER.

Section 40. Salary and expenses.

41. Deputies.

42. Fees.

43. Supervision of money paid into court.

44. Comptroller to provide life-saving medals.

§ 40. **Salary and expenses.**—The comptroller shall be paid an annual salary of eight thousand dollars and his reasonable expenses when neces-

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sarily absent on public business pertaining to the duties of his office. There shall be annually appropriated to be expended by the comptroller:

1. Not exceeding eight hundred dollars for a messenger.
2. Not exceeding thirty-two thousand dollars for clerk hire.
3. Not exceeding four thousand dollars for furniture, books, binding, blanks, printing and other necessary incidental expenses in his office. (*Amended by L. 1910, ch. 691, in effect Jan. 1, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 30; originally revised from R. S., pt. 1, ch. 9, tit. 9, § 5, subd. 3, § 10, subd. 2; L. 1841, ch. 274; L. 1875, ch. 145, § 1. The salary of the comptroller and the amount authorized to be expended for the purposes specified in this section have changed from time to time, and are now regulated by the appropriation acts of each year.

References.—Constitutional provision respecting the election of comptroller, Const., art. 5, §§ 1, 2. Comptroller to be commissioner of land office, commissioner of canal fund, and member of canal board, Id. § 5; to appoint clerks of prisons, Id. § 4. Duties of comptroller, generally. See State Finance Law, art. 1.

§ 41. **Deputies.**—The comptroller shall appoint four deputies; one shall be paid an annual salary of six thousand dollars, three, of whom one shall be the warrant clerk in the comptroller's office, annual salaries of five thousand dollars each. Each of such deputies may perform any of the duties of the comptroller, except as commissioner of the land office, commissioner of the canal fund and as state canvasser. The comptroller may also appoint from the clerks in his office two assistant deputies, who shall assist the deputies in performing such duties as the comptroller may direct, and such assistant deputies shall receive such compensation as shall be fixed by the comptroller, not in excess of the appropriation made for the clerks so designated. (*Amended by L. 1910, ch. 189 and L. 1911, ch. 568, in effect June 30, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 31, as amended by L. 1897, ch. 217; L. 1901, ch. 40; L. 1907, ch. 359; originally revised from R. S., pt. 1, ch. 8, tit. 8, § 18.

Reference.—As to powers and duties of deputies, Public Officers Law, § 9.

Section cited.—Rept. of Atty. Genl. (1909) 487.

§ 42. **Fees.**—The comptroller shall collect the following fees:

1. For copies of all papers and records not required to be certified or otherwise authenticated by him, ten cents per folio.
2. For certified or exemplified copies of all records and papers, fifteen cents per folio.
3. For every certificate under the seal of his office, one dollar.
4. For opening a new account for part of the consideration due on any lot or piece of land, or for a discharge for any such part, where no new account shall have been opened, two dollars.
5. For a deed of land sold for taxes containing the description of but one piece, fifty cents, and for every additional piece described in the same, ten cents.

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6. For searching the records in his office, on request, fifteen cents for the first book examined, and ten cents for each subsequent book.

Source.—Former Ex. L. (L. 1892, ch. 683) § 32, subd. 6, added by L. 1903, ch. 603; originally revised from R. S., pt. 1, ch. 9, tit. 1, § 3; L. 1831, ch. 320, § 16.

References.—Comptroller cannot receive fees to his own use, Const., art. 5, § 1. Public officers taking unlawful fees, Penal Law, §§ 855, 1826, 1830. Comptroller to account quarterly for fees received, Executive Law, § 81. But see State Finance Law, § 37, which requires monthly payment of fees into state treasury.

§ 43. Supervision of money paid into court.—The comptroller is authorized to employ such examiner or examiners as he may deem necessary to carry out the provisions of law in relation to his duty as to money paid into court, and he shall cause an examination of the accounts of the officers having charge of such funds to be made at least once in each year, and shall enforce the provisions of law concerning the same. The comptroller and each examiner shall have power, at any time, to examine the books, papers, records and accounts of any public officer, department or bureau of the state, or subdivision thereof, in any wise relating to moneys and securities paid or deposited into court, or ordered by any court of record, or required by statute, to be so paid or deposited. (*Amended by L. 1910, ch. 193, in effect Apr. 29, 1910.*)

Source.—L. 1892, ch. 651, § 8.

§ 44. Comptroller to provide life-saving medals.—The state comptroller shall cause to be prepared medals of honor with suitable devices, to be distinguished as life-saving medals of the first and second class, which shall be bestowed by him upon persons who shall hereafter endanger their own lives in saving or endeavoring to save lives from perils of the sea or waters, within or adjacent to the state of New York, at such times and in such manner as he shall prescribe. Medals of the first class shall be confined to cases of extreme and heroic daring, and medals of the second class shall be given in cases of less distinguished conduct, but no award of either medal shall be made to any person until sufficient evidence of his heroism shall have been filed with the state comptroller and entered upon the records of the department.

Source.—L. 1897, ch. 208, §§ 1, 2.

§ 45. Posting of bulletins of appointments, licenses and designations.—
1. The comptroller shall keep in his office, in a place accessible to the general public, a bulletin board upon which he shall cause to be posted at noon on Friday of each week a detailed statement, signed by him, or in case of his absence from Albany or inability to act, by a deputy, giving the following items of general information with regard to appointments, licenses and designations, which he may have made or issued by him since the preceding statement:

(a) A statement of all appointments to positions made by the comp-

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troller during the preceding week, giving the name, residence, position and salary of each appointee.

(b) A statement of all applications for licenses as private detectives, giving the name of the applicant and whether individual, firm or corporation, and the proposed business address.

(c) A similar statement of all licenses as private detectives issued during the preceding week.

(d) A similar statement of all licenses as private detectives revoked during the preceding week.

(e) A statement of all institutions designated during the preceding week as depositories of funds under state control, giving the name of each such depository and its principal place of business.

2. Every such statement shall remain so posted for the period of one week and shall then be placed on a file for such statements to be kept in the office of the comptroller. All such statements shall be public documents and at all reasonable times shall be open to public inspection. (*Added by L. 1910, ch. 159, in effect Apr. 23, 1910.*)

§ 45. **Examiners.**—Whenever the comptroller may deem it necessary to enable him to perform the duties imposed upon him by law with regard to the inspection, examination and audit of the fiscal affairs of the state and the several officers, departments, institutions and municipal divisions thereof, he may assign to the work of inspection, audit and examination of such fiscal affairs, examiners appointed by him pursuant to the provisions of section forty-three of this article and of section thirty-four of article three of the general municipal law. (*Added by L. 1911, ch. 213, in effect May 31, 1911.*)

ARTICLE V.

STATE TREASURER.

Section 50. Salary and expenses.

51. Undertaking.

52. Deputy.

53. Collection of notaries' fees.

54. Accountant and transfer officer.

§ 50. **Salary and expenses.**—The treasurer shall be paid an annual salary of six thousand dollars. There shall be annually appropriated to be expended by the treasurer:

1. Not exceeding twelve thousand dollars for salaries of clerks and messengers in his office.

2. Not exceeding one thousand five hundred dollars for furniture, books, binding, blanks, printing and other necessary incidental expenses in his office. (*Amended by L. 1910, ch. 691, in effect Jan. 1, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 40; originally revised from R. S., pt. 1, ch. 9, tit. 1, §§ 5, 10; L. 1875, ch. 145.

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References.—Constitutional provisions as to election of state treasurer, Const., art. 5, §§ 1, 2; not to receive fees to his own use, Id. § 1; term of office, Id. § 2; to be commissioner of land office, of canal fund, and member of canal board, Id. § 5; suspension of, by governor, Id. § 7. General duties of treasurer as to state finances. See State Finance Law, art. 1. The salary of the state treasurer and the amounts authorized to be expended for the purposes specified in this section, have been modified from time to time by the appropriation acts of each year.

§ 51. **Undertaking.**—The treasurer shall give an official undertaking in the sum of fifty thousand dollars, approved by the president of the senate, speaker of the assembly and comptroller. After the appointment and qualification of his successor, upon filing in the office of the secretary of state a certificate from the committee who shall have examined and settled his accounts of the preceding year, certifying that such accounts are regularly stated and balanced, and that the balance, if any, is actually in the treasury, or deposited as required by law, such undertaking shall be delivered to him for cancellation.

Source.—Former Ex. L. (L. 1892, ch. 683) § 41; originally revised from R. S., pt. 1, ch. 8, tit. 4, §§ 2, 3, 4.

References.—Execution and filing of undertaking, Public Officers Law, §§ 11–13. Vacancy for failure to execute and file undertaking, Id. § 30.

Force and effect.—The Attorney-General has ruled that this section is of no practical force or effect for the reason that there is no warrant of law for the appointment of the committee therein mentioned. Rept. of Atty. Genl. (1905) 536.

§ 52. **Deputy.**—The treasurer shall appoint a deputy, for whose conduct he shall be responsible, who shall be paid an annual salary of four thousand dollars. Such deputy may perform any of the duties of the treasurer, except the duties of the treasurer as commissioner of the land office, commissioner of the canal fund, and state canvasser. The treasurer may, by notice in writing filed with the state comptroller, designate his deputy to sign checks during his absence from the office. (*Amended by L. 1909, ch. 268, in effect Apr. 28, 1909.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 42; originally revised from L. 1831, ch. 320, § 21.

Reference.—Powers and duties of deputies, Public Officers Law, § 9.

Bonds of subordinates.—The State Treasurer can require a bond of each of the appointees in exempt positions in his office, the accountant and transfer officer, and subordinates within the competitive class occupying positions of fiduciary responsibility, but cannot require bonds of other civil service employees. Rept. of Atty. Genl. (1903) 222.

Payment for bonds of employers cannot be made from the appropriation for office expenses. There is no provision therefor. Rept. of Atty. Genl. (1911) 7.

Bond of deputy state treasurer should run to the state treasurer and not to the people of the state. Rept. of Atty. Genl. (1911) 22.

Investigations.—The Deputy State Treasurer may do whatever the State Treasurer may do under section 61 of the Public Officers Law in carrying on an investigation of the official conduct of officers or employees of his office. Rept. of Atty. Genl. (1914), Vol. 2, p. 143.

Delegation of authority to endorse drafts.—*People v. Bank of North America* (1879), 75 N. Y. 547.

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§ 53. **Collection of notaries' fees.**—The state treasurer shall promptly collect from county clerks the sums due from them to the state for qualification fees paid by notaries public; and on the last day of each month report to the attorney-general for prosecution such county clerk as may be delinquent in payment of such qualification fees due from him to the state treasurer for the month then next preceding.

Source.—Former Ex. L. (L. 1892, ch. 683) § 83, as amended by L. 1894, ch. 88; amended by L. 1908, ch. 246.

Reference.—Payment of fees received by county clerks, Executive Law, §§ 103-104.

§ 54. **Accountant and transfer officer; employee to sign receipts.**—The treasurer is authorized to designate from the employees of his office a person who shall act as an accountant and transfer officer in his department who shall give to the treasurer a bond in such penalty as he may deem secure, and who shall keep the books of the department, the records of, and have power to sign all transfers of securities required by law to be made by the superintendent of insurance and the superintendent of banks, and shall have power, in the absence of the treasurer and deputy, to sign receipts and indorse deposits. The treasurer is also authorized to designate from the employees of his office a person who shall have power, in the absence of the treasurer and deputy, to sign receipts. (*Amended by L. 1913, ch. 441, in effect May 1, 1913.*)

Source.—L. 1896, ch. 466.

Section cited.—Rept. of Atty. Genl. (1911), Vol. 2, p. 7; Rept. of Atty. Genl. (1903) 222.

ARTICLE VI.

ATTORNEY-GENERAL.

Section 60. Salary and expenses.

61. Deputies.
62. General duties.
63. Costs recovered.
64. Register.
65. Additional counsel.
66. Annual report.
67. Deputy attorney-general to act as special district attorney.

§ 60. **Salary and expenses.**—The attorney-general shall be paid an annual salary of ten thousand dollars. (*Amended by L. 1910, ch. 691 and L. 1911, ch. 204, in effect May 31, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 50; originally revised from R. S., pt. 1, ch. 9, tit. 1, §§ 5, 10; L. 1875, ch. 145, § 1; L. 1888, ch. 269, and each subsequent annual appropriation act. The amounts authorized to be expended for the purposes specified in this section are now fixed in the appropriation acts of each year. See L. 1901, ch. 644.

References.—Constitutional provisions regulating the election of attorney-general, Const., art. 5, §§ 1, 2. Fees not to be received to his own use, Id. § 1; to be

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commissioner of land office, of canal fund, and a member of the canal board, Id. § 5. Indebtedness not to be contracted without appropriation, State Finance Law, § 35. Specific appropriations not to be used for other purposes, Id. § 36.

§ 61. **Deputies.**—The attorney-general may appoint such deputies as he may deem necessary and fix their compensation. (*Amended by L. 1911, ch. 204, in effect May 31, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 51; originally revised from L. 1878, ch. 40, § 1.

Reference.—Powers and duties of deputies, generally, Public Officers Law, § 9.

Service of papers upon a deputy at a place other than the office of the Attorney-General is irregular but an order made thereon cannot be disregarded or attacked collaterally, and the only remedy of the Attorney-General, if aggrieved, is to move to vacate it. *Townsend v. Oneonta, C. & R. S. R. Co.* (1903), 41 Misc. 295, 84 N. Y. Supp. 117.

§ 62. **General duties.**—The attorney-general shall:

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state, but this section shall not apply to any of the military department bureaus or military offices of the state.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury such criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge. (*Subd. 2, amended by L. 1911, ch. 14.*)

3. Upon the request of the governor, secretary of state, comptroller, treasurer, or state engineer and surveyor, prosecute every person charged by either of them with the commission of an indictable offense in violation of the laws, which such officer is specially required to execute, or in relation to matters connected with his department.

4. Cause all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or any commissioner of the land office, to be brought to trial.

5. When required by the comptroller or the state engineer, prepare proper drafts for contracts, obligations and other instruments for the use of the state.

6. Upon receipt thereof, pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state.

7. He may, on behalf of the state, agree upon a case containing a statement of the facts and submit a controversy for decision to a court of record which would have jurisdiction of an action brought on the same case, pursuant to the provisions of article two of chapter eleven of title two of the code of civil procedure. He may agree that a referee, to be appointed in an action to which the state is a party, shall receive such compensation at such rate per day as the court in the order of reference may specify. He may with the approval of the governor retain counsel to recover moneys or property belonging to the state, or to the possession of which the state is entitled, upon an agreement that such counsel shall receive reasonable compensation, to be fixed by the attorney-general, out of the property recovered, and not otherwise.

8. Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation. All appointments made pursuant to this subdivision shall be immediately reported to the governor, and shall not be reported to any other state officer or department. Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the legislature for such purposes, which shall be deposited in a bank or trust company in the names of the governor and the attorney-general, payable only on the draft or check of the attorney-general, countersigned by the governor, and such disbursements shall be subject to no audit except by the governor and the attorney-general. The attorney-general, his deputy, or other officer designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the attorney-general, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. Each deputy or other officer appointed or designated to conduct such in-

quiry shall make a weekly report in detail to the attorney-general, in form to be approved by the governor and the attorney-general, which report shall be in duplicate, one copy of which shall be forthwith, upon its receipt by the attorney-general, transmitted by him to the governor. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor. (*Subd. 8, added by L. 1917, ch. 595, in effect May 21, 1917.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 52, as amended by L. 1895, ch. 821; L. 1895, ch. 821; subd. 7, as added by L. 1904, ch. 179; originally revised from R. S., pt. 1, ch. 8, tit. 5, §§ 1, 4, 5, 7, 8, 15.

Consolidators' note.—The words "a court of oyer and terminer" omitted and "any term of the supreme court," inserted. Change made necessary because courts of oyer and terminer were abolished by Constitution of 1894, art. 6, § 6, and their jurisdiction vested in the supreme court.

References.—Duties as to removal of public officers, Public Officers Law, §§ 32, 34, post; as to charitable devises and bequests, Real Property Law, § 113, and Personal Property Law, § 12; as to dissolution of corporations, General Corporation Law, §§ 91, 102; as to receivers of corporations, accountings, etc., Id. § 311; duties as to actions against corporations and their officers, Id. § 304; as to actions to try title to public office, Code Civ. Pro. §§ 1957–1965; as to public or escheated property, etc., Code Civ. Pro. §§ 1969–2003; compromise of judgments and debts, State Finance Law, § 34; foreclosure of state mortgages, Id. § 26; Defense of proceedings respecting canals, Canal Law, § 46. Legal adviser to Adjutant-General, Military Law, § 21. Member of state board of canvassers, Election Law, § 441; corrupt practices act, relative to elections, duties, Id. §§ 551, 559.

Secret service.—Subdivision 8, as added by L. 1917, ch. 595, enables the state to establish a secret service force. L. 1917, ch. 758 appropriated \$50,000 for the purpose of the subdivision.

Constitutionality of a law.—Attorney general cannot be compelled to maintain an action to settle question of constitutionality of an act. *People ex rel. Demarest v. Fairchild* (1876), 67 N. Y. 334.

Individuals and private rights.—The Attorney-General, in an action brought by him, represents the whole people and public interests. No question can be presented in such an action affecting only mere individuals and private rights. *People v. Brooklyn, F. & C. I. R. Co.* (1882), 89 N. Y. 75.

Where real property has vested in the state, making the Attorney-General a party to an action affecting such real property, without legislative sanction, does not give the court jurisdiction of the action, as a state cannot be sued without its consent. *Seitz v. Messerschmitt* (1907), 117 App. Div. 401, 102 N. Y. Supp. 732, *affd.* 188 N. Y. 587, 81 N. E. 1175.

Successive incumbents of the office of Attorney-General need not be individually substituted as attorney in an action. *People ex rel. Lardner v. Carson* (1894), 78 Hun 544, 29 N. Y. Supp. 619.

A decision by one attorney general that a *quo warranto* action should not be brought is not binding upon his successors. *People v. McClellan* (1907), 118 App. Div. 177, 103 N. Y. Supp. 146, *affd.* (1907), 188 N. Y. 618, 81 N. E. 1171.

Actions maintainable by attorney general.—The attorney general can maintain an action to recover moneys unlawfully raised by public officers of a county or

municipal corporation and converted to their own use. *Supervisors of New York v. Tweed* (1872), 13 Abb. Pr. N. S. 152.

The Attorney-General has power to proceed against the State of New Jersey to restrain the construction or operation of a sewer proposed to empty into New York bay. *Rept. of Atty. Genl.* (1904) 383.

Under the Revised Statutes of 1830 it was for the Attorney-General, and not the supreme court, to determine whether, in any particular case, it was proper that an action to try the right to an office should be brought. Consequently mandamus would not lie to compel the Attorney-General to prosecute an action of that nature. *People v. Attorney-General* (1856), 22 Barb. 114.

An action to prevent the unlawful use or exercise of a street railway franchise may be maintained by the Attorney-General upon his own information or upon the complaint of a private person in pursuance of the provisions of section 1948 of the Code of Civil Procedure. *People v. Bleecker St. & Fulton F. R. R. Co.* (1910), 67 Misc. 577, 124 N. Y. Supp. 782, *affd.* 140 App. Div. 611, 125 N. Y. Supp. 1045 *affd.* 201 N. Y. 594, 95 N. E. 1136.

An action to dissolve a corporation against persons not duly incorporated may be brought by the attorney general without leave of the court. *People v. Boston. Hoosac T. & W. R. Co.* (1882), 27 Hun 528. Where a corporation fails to use or misuses its franchise, the attorney general has the discretionary power to have its charter annulled or to apply for a mandamus. *People v. N. Y. C. & H. R. R. R. Co.* (1883), 28 Hun 543.

An injunction suit may be maintained by the attorney general against the canal board. *People v. Canal Board* (1874), 55 N. Y. 390.

The attorney general is a necessary party where the people of the state or community are interested. *Davis & Palmer v. Mayor, etc., of N. Y.* (1853), 9 Super. (2 Duer) 663, *affd.* (1854), 10 Super. (2 Duer) 119, *revd.* on other grounds (1856), 14 N. Y. 506, 67 Am. Dec. 186; *Henry Bergh's Case* (1875), 16 Abb. Pr. N. S. 266, 280.

A municipal corporation may be restrained by the attorney general from exercising authority not possessed by it under its charter or by law. *People v. Mayor, etc., of New York* (1895), 32 Barb. 35, 10 Abb. Pr. 144, 19 How. Pr. 155; *People v. Lowber* (1858), 28 Barb. 65, 7 Abb. Pr. 158; *People v. Ingersoll* (1874), 58 N. Y. 1, 17 Am. Rep. 178.

Attorney general may maintain an action to enforce charitable trusts. *People v. Powers* (1894), 83 Hun 449, 458, 31 N. Y. Supp. 1131, *revd.* on other grounds (1895), 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502.

Action may be maintained for the abatement of a purpresture or to restrain the unauthorized appropriation of public property. *Attorney General v. Cohoes Co.* (1836), 6 Paige 133, 29 Am. Dec. 755; *People v. Marcy* (1881), 62 How. Pr. 65; *People v. Clark* (1869), 53 Barb. 171, 176; *People v. Vanderbilt* (1863), 26 N. Y. 287, *republished* 28 N. Y. 396, 25 How. Pr. 139, 84 Am. Dec. 351; *People v. Met. Tel. Co.* (1884), 31 Hun 596.

The attorney general may ask the court to pass upon the regularity of the proceedings of a state commission and to vacate a judgment and stipulation if improperly made. *People v. Santa Clara Lumber Co.* (1908), 126 App. Div. 616, 110 N. Y. Supp. 280, *revg.* 55 Misc. 507, 106 N. Y. Supp. 624.

Actions not maintainable by attorney-general.—Issue of town bonds by commissioners cannot be restrained by the Attorney-General. *People v. Miner* (1868), 2 Lans. 396. A civil action cannot be maintained in the name of the people for the redress of private wrongs. *People v. Alb. & Susq. R. R. Co.* (1874), 57 N. Y. 161. Action cannot be maintained by attorney general to prevent waste by trustees or executors. *People v. Simonson* (1891), 126 N. Y. 299, 27 N. E. 380.

The Attorney-General cannot maintain an action in the name of the People

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against a corporation to restrain the commission of a nuisance in a city street by a corporation, where local officials have authority to protect the street. *People v. Equity Gas Light Co.* (1894), 141 N. Y. 232, 36 N. E. 194.

Discontinuance of action to forfeit corporate charter.—The Attorney-General, in an action by the people against a corporation, has power, and may in his discretion, discontinue such action. *People v. Tobacco Manufacturing Co.* (1871), 42 How. Pr. 162.

Practice on appeal.—Parol agreement by attorney general to waive his right to appeal is binding upon his successor. *People v. Stephens* (1873), 52 N. Y. 306. Attorney general may appeal from final order discharging the accused. *Matter of Scrafford* (1891), 59 Hun 320, 12 N. Y. Supp. 943. Order discontinuing an appeal, entered by stipulation, should not be vacated except in a case presenting strong merits. *People v. Cent. Cross-Town R. R. Co.* (1880), 21 Hun 476.

Designation of the attorney-general by the governor to conduct certain prosecutions. *Rept. of Atty. Genl.* (1908) 155.

The board of embalming examiners has no legal authority to employ an attorney or special counsel for any purpose. *Rept. of Atty. Genl.* (1908) 320.

The Governor should make his demand under subdivision 2 in an official form, defining the powers to be conferred upon the Deputy Attorney-General and correspondingly withdrawn from the local district attorney, but a special provision superseding the district attorney is not necessary. *People ex rel. Osborne v. Supervisors of Westchester* (1915), 168 App. Div. 765, 154 N. Y. Supp. 266.

Compensation of deputy attorney-general; liability of local county.—An attorney appointed upon the oral direction of the Governor, of which there is no official record, as a Special Deputy Attorney-General authorized to pursue a definite line of investigation of charges relating to the conduct of a State prison, and to prosecute persons involved in the charges, but whose compensation has not been fixed by the Attorney-General, is not entitled under subdivision 2 of this section to compel the board of supervisors of the local county to pay him in accordance with the evidence submitted. *It seems, that the appointment was made under section 65 of the Executive Law.* *People ex rel. Osborne v. Supervisors of Westchester* (1915), 168 App. Div. 765, 154 N. Y. Supp. 266.

Keeping minutes of grand jury secret.—The statute (L. 1907, ch. 587), which in terms requires the district attorney to keep in his custody the original minutes of a grand jury and to keep them secret, does not apply where the Attorney-General or one of his deputies, under this section, supersedes the district attorney. *Matter of Osborne* (1909), 62 Misc. 575, 117 N. Y. Supp. 169.

Section cited.—*People ex rel. Frost v. Woodbury* (1914), 213 N. Y. 51, 106 N. E. 932, revg. 161 App. Div. 25, 146 N. Y. Supp. 389; *U. S. Radiator Co. v. State of New York* (1913), 208 N. Y. 144, 101 N. E. 783; *People v. Fitzgerald* (1904), 96 App. Div. 242, 89 N. Y. Supp. 268, affd. 180 N. Y. 269, 73 N. E. 55; *Kirby v. State* (1910), 68 Misc. 626, 125 N. Y. Supp. 742; *Carroll v. State* (1910), 68 Misc. 41, 124 N. Y. Supp. 888; *People v. Welz* (1910), 70 Misc. 183, 128 N. Y. Supp. 484.

§ 63. **Costs recovered.**—Costs recovered by the attorney-general may be applied by him in payment of the expenses incurred by him in the action or proceeding in which they are received, or of any expenditure which he is authorized to incur not otherwise provided for. He shall, at the close of each fiscal year, render to the comptroller an account of such costs received, with vouchers of such expenditures.

Source.—Former Ex. L. (L. 1892, ch. 683) § 53; originally revised from R. S., pt. 1, ch. 8, tit. 5, §§ 2, 15; L. 1873, ch. 643, § 1.

Costs.—It is unnecessary for a certificate holder of an insurance company to

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intervene to guard the fund of the company against dissipation. *People v. Empire Order of Mut. Aid* (1893), 70 Hun 439, 444, 24 N. Y. Supp. 376.

§ 64. **Register.**—The attorney-general shall keep a register of all actions and proceedings prosecuted or defended by him, and of all proceedings in relation thereto, and shall deliver the same to his successor.

Source.—Former Ex. L. (L. 1892, ch. 683) § 54; originally revised from R. S., pt. 1, ch. 8, tit. 5, § 17.

§ 65. **Additional counsel.**—The governor or attorney-general may designate and employ such additional attorneys or counsel as may be necessary to assist in the transaction of any of the legal business mentioned in section sixty-two of this chapter and such attorneys or counsel shall be paid a reasonable fee upon the certificate of the governor and attorney-general, the amount thereof to be audited and allowed by them or to be paid by the attorney-general out of any costs, penalties and judgments collected by him, prior to the payment thereof to the state treasurer as required by section thirty-seven of the state finance law. (*Amended by L. 1911, ch. 791, in effect July 26, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 55, as amended by L. 1895, ch. 821, § 2; originally revised from R. S., pt. 1, ch. 8, tit. 1, §§ 13–15; L. 1848, ch. 357.

When counsel may be employed.—The original act authorized the attorney general to employ additional counsel when he could not attend himself, owing to official duties. *Attorney General v. Continental Life Ins. Co.* (1882), 88 N. Y. 571.

The attorney general may employ additional counsel in certain cases where the interests of the state will be thus promoted. *Allen v. Stevens* (1899), 33 App. Div. 485, 511, 54 N. Y. Supp. 8, revd. on other grounds, 161 N. Y. 122, 55 N. E. 568.

The power of the Attorney-General to employ counsel necessary to assist in the transaction of legal business is not limited by the provisions of section 35 of the State Finance Law which forbids incurring indebtedness in excess of appropriations. *Kirby v. State of New York* (1910), 68 Misc. 626, 125 N. Y. Supp. 742.

Under former statute (L. 1848, ch. 357, § 2), it was held that the Attorney-General had no authority to appear by special counsel on the trial, at circuit, of an action brought by the people. *People v. Metropolitan Telephone, etc. Co.* (1882), 11 Abb. N. C. 304.

Payment of counsel designated by attorney-general.—While the attorney-general under this section may employ additional counsel to assist in the transaction of any legal business in which the state is interested, such law requires that counsel shall be designated by the attorney-general, and payment for his services rendered under such designation is to be made from the appropriation available for such purposes upon audit by the attorney-general and from the treasury of the state. *People ex rel. Frost v. Woodbury* (1914), 213 N. Y. 51, 106 N. E. 932.

In order to be properly chargeable against the state, services of counsel must be rendered upon retainer by the Attorney-General. Therefore a bill for services of counsel employed by a county superintendent of highways in a proceeding to remove a town superintendent, is not a proper charge against the State. *Rept. of Atty. Genl.* (1911), vol. 2, p. 429.

Where a check was sent to the Governor in settlement of a claim of the state against the United States which was prosecuted by counsel appointed by the Attorney-General, the Attorney-General ruled that the Governor should deposit the check to his credit as Governor until such time as the Attorney-General should fix the compensation of the attorney prosecuting the claim when his compensation

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should be paid out of the amount received and the balance paid into the state treasury. Rept. of Atty. Genl. (1911), vol. 2, p. 258.

Appointment of deputy attorney-general.—People ex rel. Osborne v. Supervisors of Westchester (1915), 168 App. Div. 765, 154 N. Y. Supp. 266.

§ 66. **Annual report.**—The attorney-general shall annually, on or before the first day of February, report to the legislature:

1. As to all moneys belonging to the state received by him during the preceding year by way of costs, damages or otherwise;
2. The title and subject-matter of all actions on appeal, pending and undetermined, and the condition thereof at the date of such report;
3. What actions, if any, have been brought by him during the year for the recovery of real property claimed to be owned by the state, and the condition of such actions at the date of such report;
4. The title of every action brought by him during the year against a corporation to vacate its charter or annul its existence,* and the condition thereof at the date of such report, with a brief statement of the cause for which such action was brought; and the proceedings during such year in such actions previously brought;
5. Copies of his official opinions during the preceding year, which are deemed by him of general public interest.

Source.—Former Ex. L. (L. 1892, ch. 683) § 56; originally revised from L. 1889, ch. 200, § 1.

Reference.—Printing and distribution of reports, State Printing Law, § 5.

§ 67. **Deputy attorney-general to act as special district attorney and as counsel to state superintendent of elections.**—Whenever the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced, the attorney-general shall require from the district attorney of such county, and it shall be the duty of such district attorney forthwith to make to the attorney-general a report of all prosecutions and complaints within his county during the year then last past for offenses under the election law and article seventy-four of the penal law and of the action had thereon. The attorney-general may require from the state superintendent of elections, and it shall be that officer's duty forthwith to make a report of all prosecutions within such county during the year then last past for such offenses upon complaints made by said superintendent, or his deputy superintendents of elections, and of the action had thereon. The attorney-general shall assign one or more of his deputies to act as counsel for the state superintendent of elections and to take charge of prosecutions under the election law and article seventy-four of the penal law. Such deputy shall represent the people of this state in all such prosecutions before all magistrates and in all courts and before any grand jury having cognizance thereof; and shall act as special counsel and adviser to

* So in original.

said state superintendent of elections in the performance of his duties. The deputies so assigned shall be appointed pursuant to section sixty-one of this chapter. They may be especially appointed thereunder for the purpose of such assignment and for the performance of duties herein described. Whenever the attorney-general shall advise the governor that there is occasion for an extraordinary term in any such county to inquire into and try cases arising under said article seventy-four of the penal law, the governor may appoint an extraordinary term of the supreme court to be constituted and held for the trial of criminal cases in such county, pursuant to section one hundred and fifty-three of the judiciary law. Grand and petit juries shall be drawn and summoned for said term in the manner provided by law, and such cases shall be brought before such inquest and court as the attorney-general shall direct. All the provisions of sections sixty-two and sixty-five of this chapter shall apply to such extraordinary term. It shall be the duty of the district attorney of the county, and of the assistants, clerks and employees in his office, and of all police authorities, officers and men within any such county, to render to the attorney-general and his deputy, whenever requested, all aid and assistance within their power in such prosecutions and in the conduct of such cases. The jurisdiction conferred upon the attorney-general herein to prosecute crimes, is concurrent in each county with that of the district attorney; but whichever of such officers shall first assume jurisdiction of a particular offense shall have exclusive jurisdiction to prosecute for the same unless or until the governor shall, by written order filed with both such officers, give such jurisdiction to the other. (*Amended by L. 1916, ch. 359, in effect May 1, 1916.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 57, as added by L. 1899, ch. 302, amended by L. 1900, ch. 737.

Signature to indictment.—It is not necessary that an indictment should be signed by the district attorney in a criminal action that is properly prosecuted by the Attorney-General and not by the district attorney. *People v. Foster* (1908), 60 Misc. 3, 112 N. Y. Supp. 706.

Appearance before grand jury.—The Attorney-General has ample power to act for the people under the Election Law, to present matters to the grand jury himself or by a deputy without any designation by the Governor, and to try cases wherein persons are accused of violations of said law; and his presence or that of his deputy before the grand jury will not invalidate an indictment for such offense. *People v. Brennan* (1910), 69 Misc. 548, 127 N. Y. Supp. 958; *People v. Kramer* (1900), 33 Misc. 209, 68 N. Y. Supp. 383; *People v. Acritelli* (1908), 51 Misc. 574, 110 N. Y. Supp. 430. See also *People v. Glasser* (1908), 60 Misc. 410, 112 N. Y. Supp. 323.

§ 68. **Attorney-general to appear in cases involving the constitutionality of an act of the legislature.**—Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such

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question to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court of justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute. (*Added by L. 1913, ch. 442, in effect May 2, 1913.*)

Section cited.—Rept. of Atty. Genl. (1913), vol. 2, p. 347.

ARTICLE VII.

STATE ENGINEER.

Section 70. Salary and expenses.

71. Deputy.

72. General duties.

73. Documents may be inspected by public.

74. Use of official seal.

75. Fees.

76. Bridge designers and inspectors.

§ 70. Salary and expenses.—The state engineer and surveyor may be known as the state engineer, and shall be paid an annual salary of eight thousand dollars, and shall be authorized to incur expenditures to be paid by the state:

1. Not exceeding nine thousand two hundred dollars for the employment of clerks, stenographers and messengers in his office;

2. Not exceeding two thousand dollars for furniture, books, binding, blanks, printing and other necessary incidental expenses of his office. (*Amended by L. 1910, ch. 691, in effect Jan. 1, 1911.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 60; originally revised from R. S., pt. 1, ch. 9, tit. 1, §§ 5, 10; L. 1875, ch. 145, § 1. The amounts authorized to be expended for the purposes specified in this section are fixed in the appropriation acts of each year.

References.—Constitutional provisions as to election of state engineer, Const., art. 5, §§ 1, 2; to be commissioner of land office and member of canal board, Id. § 5. Indebtedness not to be contracted without appropriation, and specific appropriations not to be used for other purposes, State Finance Law, §§ 35, 36.

§ 71. Deputy.—The state engineer shall appoint a deputy, who shall be paid an annual salary of five thousand dollars, and who may perform all the duties of the state engineer and surveyor, except as commissioner, trustee or member of any board.

Source.—Former Ex. L. (L. 1892, ch. 683) § 61, as amended by L. 1907, ch. 586; originally revised from L. 1857, ch. 633, § 3.

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Reference.—Powers and duties of deputy, Public Officers Law, § 9.

Certificates as to performance of state work may be made by the deputy state engineer. *People ex rel. Grannis v. Roberts* (1899), 45 App. Div. 145, 154, 61 N. Y. Supp. 148, *revd. on other grounds* (1900), 163 N. Y. 70, 57 N. E. 98.

§ 72. **General duties.**—The state engineer shall,

1. Superintend the surveys and sales of lands belonging to the state, in the manner required by law and according to the directions of the commissioners of the land office, when such directions shall have been given;

2. Retain in his office a map of the state, and delineate thereon all changes in the bounds thereof, or of the counties therein;

3. Collect and preserve all maps, plans, drawings, field notes, levels and surveys of every description made for the use of the state, and all engineering instruments belonging to the state;

4. Pay into the treasury all moneys received by him in behalf of the state;

5. Appoint and fix the compensation of such engineers and other assistants as may be necessary to execute such duties as shall be confided to him by statute.

Source.—Former Ex. L. (L. 1892, ch. 683) § 62; originally revised from R. S., pt. 1, ch. 8, tit. 6, §§ 1, 2, 7; L. 1840, ch. 259, § 1.

References.—Duties as to canals, appointment of resident and division engineers, etc., Canal Law, § 4, and art. 4, §§ 60-67; as to barge canal, L. 1903, ch. 147, ante p. 521; as to public lands, Public Lands Law, §§ 31-37.

Appointment of additional division engineers and surveyors by state engineer. Rept. of Atty. Genl. (1909) 312.

§ 73. **Documents may be inspected by public.**—The maps, drawings and other documents deposited in the office of the state engineer shall be open for inspection of the public at all reasonable hours, but shall not be removed or taken from the office.

Source.—Former Ex. L. (L. 1892, ch. 683) § 63; originally revised from L. 1842, ch. 220, §§ 1-3.

§ 74. **Use of official seal.**—All certificates of the sale of state lands, copies of maps, surveys, field books, official papers, reports or records certified by the state engineer or his deputy, shall be sealed with the seal of his office.

Source.—Former Ex. L. (L. 1892, ch. 683) § 64; originally revised from L. 1878, ch. 18, § 2.

§ 75. **Fees.**—The state engineer shall collect the following fees:

1. For filing every paper, six cents;
2. For all original drafts, twenty-five cents;
3. For drawing original papers, ten cents per folio;
4. For recording papers, ten cents per folio;
5. For copies of papers on file, ten cents per folio;
6. For every search, ten cents;
7. For copies of maps, the sum usually charged therefor;

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8. For surveys, at the rate of three dollars per day for the surveyor, exclusive of the reasonable expenses for the hire of men, horses, and for provisions.

Source.—Former Ex. L. (L. 1892, ch. 683) § 65; originally revised from R. S., pt. 1, ch. 9, tit. 1, § 3.

References.—State engineer not to receive fees for his own use, Const., art. 5, § 1. Fees to be paid quarterly, Executive Law, § 81, post. But see State Finance Law, § 37, which provides that all fees shall be paid into the state treasury monthly.

§ 76. **Bridge designers and inspectors.**—The state engineer and surveyor may appoint and at pleasure remove a chief designer and inspector of bridges, two assistant designers and inspectors of bridges, and needed draughtsmen. It shall be the duty of the designers and inspectors of bridges to design and inspect, under the direction of the state engineer and surveyor, all bridges built under his supervision, and also inspect any bridge whose plans are subject to his approval. The persons appointed under this section shall perform any duty connected with the department work required of them by the state engineer and surveyor; and he shall fix their compensation, which shall be paid monthly by the state treasurer on the warrant of the comptroller, and shall not exceed in the aggregate the sum annually appropriated for that purpose by the legislature.

Source.—Former Ex. L. (L. 1892, ch. 683) § 66, as added by L. 1899, ch. 476, § 1.

ARTICLE VIII.

PROVISIONS APPLICABLE TO TWO OR MORE EXECUTIVE OFFICERS.

Section 80. Special reports to legislature.

81. Quarterly account of fees.

82. Publication at Albany of certain public notices.

83. Publication of notices required to be published in state paper.

84. Certain searches ordered by state officers to be gratuitous.

§ 80. **Special reports to legislature.**—The secretary of state, the comptroller, the treasurer, the attorney-general and the state engineer shall report upon all matters referred to them by the legislature or by either house.

Source.—Former Ex. L. (L. 1892, ch. 683) § 70; originally revised from R. S., pt. 1, ch. 8, tit. 8, § 14.

§ 81. **Quarterly account of fees.**—The secretary of state, the comptroller and the state engineer shall, on the first days of January, April, July and October, file with the treasurer an account in writing of all fees by them respectively received during the preceding quarter, and pay the amount thereof into the treasury.

Source.—Former Ex. L. (L. 1892, ch. 683) § 71; originally revised from R. S., pt. 1, ch. 8, tit. 8, § 15.

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Reference.—Monthly payment of fees into state treasury, State Finance Law, § 37.

§ 82. Publication at Albany of certain public notices.—The secretary of state, comptroller and treasurer shall, on or before the first day of January in each year, designate a daily newspaper, published in the city of Albany, to be known as the state paper, in which shall be published during the following year, all appointments of terms of the supreme court; the rules of practice adopted from time to time by the justices of the supreme court and the judges of the court of appeals; the laws of the state; and notices and advertisements required to be published in a newspaper by the attorney-general, the superintendent of insurance, the superintendent of banks, or in actions against foreign corporations. The publication of such notices and advertisements shall be additional to their publication in other newspapers.

Source.—Former Ex. L. (L. 1892, ch. 683) § 73, as added by L. 1893, ch. 248, § 2.

State paper also designated as county paper.—Where a paper was designated as the state paper and also as the county paper for the publication of the session laws and printed the laws only once, but received payment for two publications, it was held, in an action by the state to recover the payment, in excess of the amount for a single publication, that although both the officers who approved the bills and the defendant which presented them acted in good faith, the double payment was illegal, and the audit of the claim by the comptroller was not a defense to the action. *People v. Journal Company*, 213 N. Y. 1, 106 N. E. 759, affg. 158 App. Div. 326, 143 N. Y. Supp. 389.

Amendments to Consolidated Laws; publication.—L. 1909, ch. 87, providing that the Consolidated Laws passed in 1909 should be distributed by the Secretary of State and need not be published as required by this section, does not apply to a general amendment to the Consolidated Laws passed at a subsequent session for the printing and distribution of which there is no provision. Rept. of Atty. Genl. (1910) 409.

Payment for publication of the laws of the State in the State Paper, as required by this section should be at the rate of seventy-five cents per folio. Rept. of Atty. Genl. (1912) 97.

Publication for proposals to furnish uniforms and equipment for the National Guard should be made in the state newspaper although not expressly mentioned in this section. Rept. of Atty. Genl. (1908) 292.

Former law construed.—*Weed v. Tucker* (1859), 19 N. Y. 422.

§ 83. Publication of notices required to be published in state paper.—The state paper established by chapter one hundred and ninety-seven of the laws of eighteen hundred and fifty-four has been abolished. A notice or advertisement in an action or special proceeding, required or allowed by law to be published in the state paper on the first day of January, eighteen hundred and eighty-four, shall be published in the county of the place of trial or in which the papers in such special proceeding are required to be or are filed, in a newspaper designated by the court or judge. Every other notice or advertisement required or allowed by law to be published in the state paper on the first day of January, eighteen hundred and eighty-four, shall be published in a newspaper to be desig-

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nated by the officer, person, board or body allowed or required to so publish, in the county in which such officer, person, board or body shall have a principal place of business, fixed by law, or if there is no such place of business, in the county where such officer or person or a member of such board or body resides; or if all are non-residents of the state and have no place of business therein, in any newspaper published in the state. If there is no newspaper published in the county wherein any such notice or advertisement is required or allowed to be published, or not a sufficient number for the requisite publication thereof, or the newspapers therein decline or refuse to publish the same at the rates allowed by law, the publication thereof may be made in such newspaper published elsewhere as may be designated by such court or judge, or the officer, person, board or body. Proof by affidavit of the publisher, printer or foreman of the publication in the newspaper in which such notice or advertisement is published shall, within ten days after the last publication, be made and tendered to the attorney or person ordering, directing or interested in such publication; but delivery thereof shall not be compulsory in the case of private persons until payment of the charges of publication.

Source.—Former Ex. L. (L. 1892, ch. 683) § 74, as added by L. 1893, ch. 248, § 2.

§ 84. Certain searches, the filing of papers, and certified copies, ordered by state officers to be gratuitous.—Each of the following officers, to wit: the secretary of state, the comptroller, the treasurer, the attorney-general, and the state engineer and surveyor, may require search to be made, in the office of either of the others, or of a county clerk, or of the clerk of a court of record, for any record, document, or paper, where he deems it necessary for the discharge of his official duties, and a copy thereof or extracts therefrom, to be made and officially certified or exemplified, without the payment of any fee or charge.

No salaried officer of any city, county, or court, of this state, or any public officer who is required by law to deposit the fees collected in his office into any city or county treasury, shall be entitled to receive from said state officers, or from a bureau of state officers, any fee for entering, filing, docketing, registering or recording any paper, record or document required by law to be filed in the office of any such city, county, court, or public officer, or for a certified copy, transcript or extract of any paper, document or record on file in such office which he deems necessary for the discharge of his official duties, and every such officer must, upon application therefor, furnish to said state officers, or a bureau of said state officers, for such official use, a certified copy, extract or transcript of any paper, record or document on file in such office without the payment of the fee prescribed by law therefor. (*Amended by L. 1913, ch. 570, in effect May 16, 1913.*)

Source.—Code Civ. Pro. § 3290.

Application.—This section does not apply where a person who has contracted to

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convey land to the state orders a county clerk to search the titles for the purpose of satisfying the attorney general of their validity. *Matter of Snyder* (1896), 12 App. Div. 139, 42 N. Y. Supp. 1065.

The provision of this section authorizing the Attorney-General to require the county clerk to search the records in his office without the payment of any fee or charge does not require a county clerk to search for a period of years and prepare abstract of title to lands without compensation. *People v. Franey* (1910), 68 Misc. 107, 124 N. Y. Supp. 963, *affd.* (1910), 140 App. Div. 885, 125 N. Y. Supp. 1136.

ARTICLE IX.

STATE HISTORIAN.

Section 90. Appointment of state historian.

91. Term of office, salary and expenses.

§ 90. Appointment of state historian.—The governor shall appoint, by and with the advice and consent of the senate, a state historian, whose duty it shall be to collect, collate, compile, edit and prepare for publication all official records, memoranda and data relative to the colonial wars, war of the revolution, war of eighteen hundred and twelve, Mexican war and war of the rebellion, together with all official records, memoranda and statistics affecting the relations between this commonwealth and foreign powers, between this state and other states and between this state and the United States.

Source.—L. 1895, ch. 393.

Reference.—Transfer of office to Department of Education, see Education Law, §§ 1190–1192, as amended by L. 1913, ch. 424.

Sale of publications.—The State Historian has no authority to sell the publications prepared and issued by him in his official capacity. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 584.

§ 91. Term of office, salary and expenses.—Said appointment is to continue for a period of four years from the date thereof. Said historian shall receive for his services the sum of four thousand five hundred dollars per annum, which shall include all necessary traveling expenses, and he shall have the power to employ a chief clerk, whose compensation shall not exceed fifteen hundred dollars per year.

Source.—L. 1895, ch. 393, § 2, as amended by L. 1900, ch. 63, § 1.

ARTICLE IX-A.

(Article added by L. 1917, ch. 161, in effect Apr. 11, 1917.)

DEPARTMENT OF STATE POLICE.

Section 92. Department of state police created; superintendent; offices.

93. Deputy; clerk; stenographers.

94. Organization; salaries; qualifications; appointment and reappointment; term; rules and regulations.

95. Equipment.

96. Acquisition of lands; power of superintendent.

97. Duties and powers of members of the state police.

§ 92. Department of state police created; superintendent; offices.—A department of state police is hereby created, the executive and administrative head of which shall be a superintendent who shall be appointed by the governor by and with the advice and consent of the senate for a term of five years, and shall receive an annual salary of five thousand dollars and shall be removable by the governor after charges have been preferred and a hearing granted. The superintendent shall before entering upon the duties of his office file in the office of the secretary of state a bond to the people of the state of New York in the sum of twenty-five thousand dollars, with a surety or sureties to be approved by the governor, conditioned on the faithful performance of his duties. Suitable offices for the department of state police shall be provided in Albany by the trustees of public buildings. (*Added by L. 1917, ch. 161, in effect Apr. 11, 1917.*)

§ 93. Deputy; clerk; stenographers.—The superintendent may appoint a deputy at an annual salary of twenty-five hundred dollars, a clerk at an annual salary of fifteen hundred dollars and two stenographers at annual salaries of twelve hundred dollars each. (*Added by L. 1917, ch. 161, in effect Apr. 11, 1917.*)

§ 94. Organization; salaries; qualifications; appointment and reappointment; term; rules and regulations.—The state police shall consist of four troops, each composed of one captain at an annual salary of eighteen hundred dollars, one lieutenant at an annual salary of fifteen hundred dollars, one first sergeant at an annual salary of twelve hundred dollars, four sergeants at annual salaries of eleven hundred dollars each, four corporals at annual salaries of nine hundred and fifty dollars each, one saddler and one blacksmith, each having the rank and salary of corporal, and forty-five privates at annual salaries of nine hundred dollars each. The members of the state police shall be appointed by the superintendent and may be removed by him after a hearing. No person shall be appointed to the state police force unless he shall be a citizen of the United States, between the ages of twenty-one and forty years, able to ride, of sound constitution and good moral character, nor until he shall have passed a physical and mental examination based upon standards provided by the rules and regulations of the superintendent. Appointment and reappointment to the force shall be for a term of two years. Voluntary withdrawal from the force during such term without the consent of the superintendent shall be a misdemeanor. Reappointment shall be made by the superintendent in his discretion but no member removed from the force shall be eligible to reappointment. The superintendent shall make rules and regulations subject to approval by the governor for the discipline and control of the force and for the examination and qualifications of applicants for appointment thereto. (*Added by L. 1917, ch. 161, in effect Apr. 11, 1917.*)

§ 95. **Equipment.**—The superintendent shall provide the state police force, within the amount of appropriations therefor, with horses, vehicles, uniforms and suitable equipment and supplies, all of which shall remain the property of the state; and he shall have power to sell the same when they shall become unfit for use, and all moneys received therefor he shall pay into the state treasury. (*Added by L. 1917, ch. 161, in effect Apr. 11, 1917.*)

§ 96. **Acquisition of lands; power of superintendent.**—The superintendent shall from time to time establish headquarters or substations in such localities as he shall deem most suitable for the efficient performance of police duty in the rural portions of the state, and for that purpose he may, with the consent of the governor, acquire the use of lands and buildings for the accommodation of the members of the force, their equipment and horses. (*Added by L. 1917, ch. 161, in effect Apr. 11, 1917.*)

§ 97. **Duties and powers of members of the state police.**—It shall be the duty of the state police to prevent and detect crime and apprehend criminals. They shall also be subject to the call of the governor and are empowered to co-operate with any other department of the state or with local authorities. They shall have power to arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law, to serve and execute warrants of arrest or search issued by proper authority and to exercise all other powers of peace officers of the state of New York. But they shall not exercise their powers within the limits of any city to suppress rioting and disorder except by direction of the governor or upon the request of the mayor of the city with the approval of the governor. (*Added by L. 1917, ch. 161, in effect Apr. 11, 1917.*)

L. 1917, ch. 161, § 2, appropriates \$500,000.

ARTICLE X.

MISCELLANEOUS OFFICERS.

Section 100. Appointment and salary of state superintendent of weights and measures.

101. Appointment and number of notaries public.
102. Notary public acting in more than one county.
103. Notice of appointment and fees payable by notaries public.
104. Disposition of fees paid by notaries public.
105. Powers and duties of notary public.
106. Commissioners of deeds within the state.
107. Commissioners of deeds in other states, territories and foreign countries.
108. Powers of such commissioners.
109. Fees of such commissioners.

§ 100. Appointment and salary of state superintendent of weights and

measures.—Upon the occurrence of a vacancy by expiration of term or otherwise in the office of the state superintendent of weights and measures, a scientific man of sufficient learning and mechanical tact to perform the duties of the office shall be appointed such superintendent by the governor, by and with the advice and consent of the senate. Such superintendent shall be appointed for a term of five years and shall receive a salary of three thousand five hundred dollars a year. The superintendent shall be allowed for salaries for a deputy and inspectors, clerical services, traveling and contingent expenses for himself, his deputy and his inspectors such sums as shall be appropriated by the legislature. (*Amended by L. 1910, ch. 698, in effect June 25, 1910.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 80; originally revised from L. 1851, ch. 134, §§ 16, 18.

References.—Weights and measures generally, General Business Law, §§ 2-17. Office transferred to department of farms and markets, Farms and Markets Law, § 21; office continued as bureau in one of divisions of department of farms and markets, Id. § 25; salary to be fixed by farms and markets council, Id. § 28; farms and markets council to enforce provisions of law relative to weights and measures, Id. § 30.

The Deputy State Superintendent of Weights and Measures is in the exempt class. Rept. of Atty. Genl. (1911), vol. 2, p. 3.

§ 101. **Appointment and number of notaries public.**—The term of office of each notary public hereafter appointed, unless to fill a vacancy, shall be two years from the thirtieth day of March of the year in which he shall be appointed. The governor shall appoint, by and with the advice and consent of the senate, such number of notaries public in and for the several counties of the state as may be necessary, and of such number the governor is authorized to appoint one notary for each bank applying therefor, and he may also during the recess of the senate appoint to fill existing vacancies, and notaries so appointed shall hold office for the unexpired term for which they are named without confirmation by the senate.

Source.—Former Ex. L. (L. 1892, ch. 683) § 81, as amended by L. 1905, ch. 178; originally revised from L. 1863, ch. 508; L. 1864, ch. 29, § 3, as amended by L. 1880, ch. 160; L. 1867, ch. 420; L. 1868, ch. 479; L. 1869, ch. 317; L. 1869, ch. 448, § 1, as amended by L. 1871, ch. 3; L. 1870, ch. 660; L. 1871, ch. 167; L. 1874, ch. 100; L. 1875, ch. 87, § 1, as amended by L. 1886, ch. 359; L. 1884, ch. 66.

Reference.—Commission of notary public may be signed by secretary of governor, Public Officers Law, § 8.

Public officer.—Notary public is a public officer within provision of Constitution (art. 13, § 5) as to passes. *People v. Rathbone* (1895), 145 N. Y. 434, 40 N. E. 395, 28 L. R. A. 384; See also *People v. Wadhams* (1903), 176 N. Y. 9, 68 N. E. 65. He may hold any other state office, unless the statute relating to that office forbids. Rept. of Atty. Genl. (1899) 267.

Residence.—A notary public is required to reside in the county for which he was appointed. Rept. of Atty. Genl. (1895), 169.

Change of residence by a notary public from the county of his appointment vacates his office. Rept. of Atty. Genl. (1911) 310.

Who may act as notary public.—The office of notary public is not incompatible with the position of messenger or librarian in the office of the district attorney of the city and county of New York, and a notary holding such a position may recover his fees as notary for services rendered at the request of the district attorney, unless he has waived his right thereto. *Merzbach v. Mayor, etc., of New York* (1900), 163 N. Y. 16, 57 N. E. 96.

Cashier of a bank may perform the duties of a notary public. *Dykman v. Northridge* (1896), 1 App. Div. 26, 36 N. Y. Supp. 962, *affd.* (1897), 153 N. Y. 662, 48 N. E. 1104.

§ 102. **Notary public acting in more than one county.**—A notary public appointed for any of the counties of the state, upon filing in the clerk's office in any other county of the state, his autograph signature and a certificate of the county clerk of the county for which he was appointed, setting forth the fact of his appointment and qualification as such notary public, and paying to said county clerk, where said signature and certificate are filed, a fee of one dollar, may exercise all the functions of his office, in the county in which such autograph signature and certificate are filed with the same effect in all respects as if the same were exercised in the county in which he resides and for which he was appointed. The county clerk of a county in whose office any notary public has so filed his autograph signature and such certificate shall, when so requested, subjoin to any certificate of proof or acknowledgment signed by such notary, a certificate under his hand and seal, stating that such notary public has filed a certificate of his appointment and qualifications with his autograph signature in his office, and was at the time of taking such proof or acknowledgment duly authorized to take the same; that he is well acquainted with the handwriting of such notary public and believes that the signature to such proof or acknowledgment is genuine, and thereupon the instrument so proved or acknowledged and certified shall be entitled to be read in evidence or to be recorded in any of the counties of this state in respect to which a certificate of a county clerk may be necessary for either purpose.

Source.—Former Ex. L. (L. 1892, ch. 683) § 82, as amended by L. 1901, ch. 657; originally revised from L. 1872, ch. 703; L. 1873, ch. 807, as amended by L. 1875, chs. 105, 458; L. 1880, ch. 234; L. 1883, ch. 140; L. 1888, ch. 542; L. 1884, ch. 270; L. 1885, ch. 61, § 2.

Certificate of county clerk.—An acknowledgment taken by a notary, outside of the county where he resides, to an instrument to be recorded in the county of his residence, should have attached thereto the certificate of the clerk of the county where the acknowledgment is taken. *Rept. of Atty. Genl.* (1894) 226.

Jurat to show authority to act in another county.—If a notary is authorized to act in another county, in order to show jurisdiction on the face of an affidavit made in that county, the fact should be briefly stated in the jurat or appended to the signature, and the county of his appointment. *Robinson v. Cooper* (1909), 62 Misc. 517, 115 N. Y. Supp. 599.

Filing notary's certificate with other counties.—A notary public duly appointed for one county who complies with this section relating to the filing of his certificate in another county, by forwarding by mail to the clerk of the other county his

autograph signature upon a certificate of the clerk of the county where he was originally registered setting forth his appointment and qualifications and stating that the clerk is well acquainted with his handwriting and believes the signature to be genuine, etc., is entitled to have his certificate filed in the other county. The clerk of the other county, upon receiving the certificate, should not refuse to file it merely because the notary refuses personally to appear before him, in the absence of any valid reasons for requiring him to do so. *People ex rel. Horsey v. Ganly* (1915), 168 App. Div. 856, 154 N. Y. Supp. 371. Compare Rept. of Atty. Genl. (1903) 302.

Fee for filing certificate in Bronx, Kings or New York counties.—This and the following section, construed together, require the payment from all notaries of counties other than Bronx, New York and Kings, for the filing of their certificates, etc., in either of said counties, so as to become qualified to act therein, of the sum of \$7.50. Rept. of Atty. Genl. (1901) 228.

Official acts of de facto notary.—The failure of a notary public appointed for the county of Kings, desiring to exercise his official functions in the county of New York, to set forth in the certificate filed by him pursuant to the above section that he has qualified as a notary in the county of Kings, will not render his official act in taking an affidavit in the county of New York a nullity. *Schiff v. Leipziger Bank* (1901), 65 App. Div. 33, 72 N. Y. Supp. 513.

Effect of failure to file signature.—It seems that the failure of a notary public to file his autograph signature in the office of the register of another county is an irregularity which does not vitiate an acknowledgment taken by him. *Matter of Townsend* (1909), 195 N. Y. 214, 88 N. E. 41, 22 L. R. A. (N. S.) 194, 16 Ann. Cas. 921.

§ 103. **Notice of appointment and fees payable by notaries public.**—The county clerk of each county, forthwith upon the receipt of the commission of a person appointed notary public for such county, shall mail to such person a notice of his appointment inclosed in an envelope with the name and address of such county clerk printed thereon. If a person appointed notary public in and for any county shall not file his oath of office as such notary public, in the office of the clerk of such county, within fifteen days after the notice of his appointment is so mailed, or within fifteen days after the commencement of the term for which he is appointed, his appointment shall be and be deemed to be revoked. No county clerk shall file the oath of office of any notary public until there shall be paid to such county clerk, by such notary public:

1. If he reside in New York county, Kings county or Bronx county, ten dollars;
2. If he reside in a city having a population, as shown by the then last preceding federal or state enumeration, of more than fifty thousand, and less than six hundred thousand, five dollars;
3. If he reside elsewhere, two and one-half dollars.

Neither the county clerk of each of the counties of New York, Kings or Bronx, shall file a certificate of the appointment and qualification of a person appointed to be a notary public in and for any county other than New York, Kings or Bronx, until such notary public shall pay such clerk seven and one-half dollars.

Each county clerk on or before the tenth day of each month shall make

for his county for the preceding month a report in triplicate in which shall be stated:

(a) In a column headed "Appointments revoked by failure to qualify," the name and address of each person appointed a notary public for the county, whose appointment was revoked during said preceding month because of failure to file the oath of office within the time allowed by law.

(b) In a column headed "Notaries public who qualified as such for the county of during the month of, " the name and address of each person appointed a notary public for the county who shall have qualified during said preceding month, together with a statement, opposite the name of each person, showing the total amount paid by him and the amount thereof to be retained by the county clerk.

(c) In a column headed "Open appointments," the name and address of each person appointed a notary public for the county before the end of said preceding month and who shall not have qualified, but whose time to qualify shall not have expired during said month.

(d) In a column headed "Certificates filed," the name and address of every notary public who shall have filed a certificate, as provided for by section one hundred and two, in the office of the clerk of the county for which the report is made, together with a statement, opposite the name of each such person, of the amount paid by him upon filing such certificate. One of said reports shall be transmitted immediately to the governor, one to the secretary of state and one to the state treasurer.

Provided, however, that in any county where there is a register as well as a county clerk, a notary public may file in the office of said register his autograph signature and a certificate of a county clerk as is provided in section one hundred and two for the filing of such signature and certificate in certain cases with a county clerk. No notary public shall, within a county in which there is a register's office, take or certify any acknowledgment or proof of any deed or other instrument to be recorded in the register's office in said county, and no register shall record or accept for record any deed or other instrument proved or acknowledged in the county for which he is register by any notary public, unless said notary public shall have filed in such register's office his autograph signature and the certificate of the proper county clerk as above provided for. The provisions herein for filing of such signature and certificate in the office of a register shall apply whether the notary public is acting in the county for which he was appointed or in a county in which he has qualified, under the provisions of section one hundred and two. In the latter case, however, a certificate from either the county clerk where he was originally appointed or from the county clerk where he has qualified and is acting shall be sufficient. The register in any county shall be paid a fee of twenty-five cents for the filing of each signature and certificates herein provided, and he shall keep a book for entry of the said signatures. (*Amended by L. 1915, ch. 18, in effect March 4, 1915.*)

L. 1909, ch. 23.

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§ 104.

Source.—Former Ex. L. (L. 1892, ch. 683) § 83, as amended by L. 1894, ch. 88; L. 1908, ch. 246; § 83-a, as added by L. 1907, ch. 207, amended by L. 1907, ch. 559; originally revised from L. 1875, ch. 87, § 1, as amended by L. 1886, ch. 359.

Filing oath by notary.—A person appointed a notary public may file his oath either fifteen days after the mailing of his notice of appointment or fifteen days after the commencement of his term. He may take his oath before any of the officers named or file it with the county clerk, but it is desirable that he should personally appear at the county clerk's office where such an appearance can be secured. Rept. of Atty. Genl. (1907) 567.

Where the clerk of New York and Kings counties refuses to file a certificate of a woman notary under her married name unless she pays an additional fee in each county, she may use her maiden name with her married name in parenthesis. Rept. of Atty. Genl. (1909) 68.

Richmond county.—A notary public residing in Richmond county must pay a filing fee of \$2.50. Rept. of Atty. Genl. (1908) 511.

Fee for filing a copy of a notary's commission. Rept. of Atty. Genl. (1898) 127.

§ 104. **Disposition of fees paid by notaries public.**—The county clerk of each of the counties of New York, Kings and Erie may appoint an assistant to be known as notarial clerk. The county clerk of Erie county may retain, from each fee so paid by a notary public as a condition of filing his oath of office, one dollar and a half. The clerk of each of the counties of New York and Kings may retain, from each fee so paid by a notary public as a condition of filing his oath of office, three dollars, but not exceeding the total amount of fifteen hundred dollars in the county of Kings nor three thousand dollars in the county of New York, in any one year, and each of the county clerks of the counties of New York, Kings and Erie may apply the amount so retained by him in payment of the salary of the notarial clerk in his office. The county clerk in each county other than the counties of New York, Kings and Erie, may retain from each fee so paid by a notary public as a condition of filing his oath of office, fifty cents. The amounts so retained by a county clerk of any county shall be in full payment for all his services and disbursements connected with the appointment and qualification of notaries public to act as such in such county. If the office of any such county clerk is a salaried office, such county clerk shall pay over the sum so retained by him, to the officer to whom fees of such county clerk are required by law to be paid. The county clerk of each county shall, within ten days after the end of each month, pay over to the state treasurer all fees received by him from notaries public under the provisions of this chapter during said month, after having deducted so much thereof as he is authorized to retain under the provisions of this section. (*Thus amended by L. 1909, ch. 240.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 84, as amended by L. 1894, ch. 88; L. 1908, ch. 246; originally revised from L. 1875, ch. 87, § 2, as amended by L. 1886, ch. 230; L. 1887, ch. 516.

Sum to be retained by county clerk from filing fee.—Under §§ 103, 104, as amended by Laws of 1915, chap 18, the sum to be retained by the county clerk of Bronx county from each fee paid by a notary public as a condition of filing his oath of office is fifty cents, and not three dollars. Rept. of Atty. Genl. (1915) 150.

A county clerk of Richmond county is entitled to retain fifty per cent. from each fee paid to him by a notary public as a condition of his filing his oath of office. Rept. of Atty. Genl. (1908) 511.

The New York county clerk is not entitled to retain in his hands from fees received for the qualification of notary public, any sum in addition to the salary allowed his notarial clerk. Rept. of Atty. Genl. (1892) 352.

Bronx county.—Under the Bronx County Act (Laws of 1912, chap. 548), and sections 103 and 104 of the Executive Law, it is the duty of the county clerk of Bronx county to collect a fee of ten dollars from each notary public appointed and qualifying, and of the amount so collected to pay three dollars into the treasury of the city of New York, and to remit the balance to the State Treasurer. *People v. Ganly* (1915), 170 App. Div. 702, 156 N. Y. Supp. 671, *affd.* (1916), 218 N. Y. 749.

§ 105. Powers and duties of notary public.—A notary public has authority:

1. Anywhere within the state to demand acceptance and payment of foreign and inland bills of exchange, and of promissory notes, and may protest for the nonacceptance or nonpayment thereof, to exercise such powers and duties as by law of nations and according to commercial usage, or by the laws of any other government, state or county, may be performed by notaries. (*Amended by L. 1911, ch. 668, in effect Aug. 1, 1911.*)

2. In the county in and for which he shall have been appointed and elsewhere, as provided in section one hundred and two of this chapter, to administer oaths and affirmations, to take affidavits and certify the acknowledgment and proof of deeds and other written instruments to be read in evidence or recorded in this state, in all cases in which commissioners of deeds may now take and certify the same, and under the same rules, regulations and requirements prescribed to said last-mentioned officers, not inconsistent with any of the provisions of this chapter; except that a county clerk's certificate authenticating the official character and the signature of such notary shall not be necessary to entitle any deed or other written instrument so proved and acknowledged, to be read in evidence or recorded in a county in which the autograph signature and certificate of appointment and qualification of such notary shall have been filed, pursuant to section one hundred and two of this chapter. A notary public also has authority anywhere within the state to administer oaths and affirmations, to take affidavits and certify the acknowledgment and proof of deeds and other written instruments to be read in evidence or recorded in this state, in all cases in which commissioners of deeds may now take and certify the same within the state, and under the same rules, regulations and requirements prescribed to said last-mentioned officers, not inconsistent with any of the provisions of this chapter, provided that said deeds or other written instruments so proved or acknowledged are to be read in evidence or recorded only in the county for which the notary public shall have been appointed, or in which the autograph signature and certificate of appointment and qualifica-

tion of such notary shall have been filed pursuant to section one hundred and two of this chapter. The acts authorized by this subdivision may be performed by such notary without official seal. For any misconduct in the performance of any such powers, a notary public shall be liable to the parties injured for all damages sustained by him. A notary public shall not, directly or indirectly, demand or receive for the protest for the nonpayment of any note, or for the nonacceptance or nonpayment of any bill or exchange, check or draft, and giving the requisite notices and certificates of such protest, including his notarial seal, if affixed thereto, any greater fee or reward than seventy-five cents for such protest, and ten cents for each notice, not exceeding five, on any bill or note. He shall, except as otherwise provided, when requested, affix his seal to such protest free of expense. A notary public whose oath of office is filed in the office of the clerk in the county of New York, must affix to each instrument acknowledged, in addition to his signature, his official number, as given to him by the clerk of the county when his oath of office is filed; and if the instrument is to be recorded in the office of the register of the county of New York, and the notary has been given a number by such register, he shall affix that number; the numbers to be written or stamped upon the instrument in the following form: New York County, No. ; and New York Register No. But the validity of an instrument or of an acknowledgment shall not be affected by the failure of a notary to so affix his official number. (*Subd. 2 amended by L. 1911, ch. 668, and 1913, ch. 208, in effect Apr. 4, 1913.*)

3. All notaries public, appointed for the county of New York prior to January first, nineteen hundred and fourteen, shall have power, and shall be deemed to have had the power, to administer oaths and affirmations, to take affidavits and acknowledgments and proofs of deeds and other written instruments to be read in evidence or to be recorded in this state, in all cases in which commissioners of deeds had such powers within the boroughs of Manhattan and the Bronx of the city of New York on December thirty-first, nineteen hundred and thirteen, up to the date when this amendment shall take effect, and their official acts subsequent to the passage of the act creating Bronx county are hereby legalized, ratified and confirmed. Hereafter every such notary public residing in the said county of New York shall continue to have the powers above enumerated and may exercise all the functions of his office, within the county of New York up to the expiration of the term for which he was appointed. Hereafter every such notary public residing in the said county of Bronx shall continue to have the powers above enumerated, and may exercise all the functions of his office within the county of Bronx, up to the expiration of the term for which he was appointed, from and after the time of filing in the clerk's office of the county of Bronx his autograph signature and a certificate of the clerk of the county of New York setting forth the fact of his appoint-

ment and qualification as such notary public, and paying to the said clerk of the county of Bronx a fee of one dollar. (*Subd. 3, as added by L. 1913, ch. 248, amended by L. 1914, ch. 6.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 85, as amended by L. 1894, ch. 88; originally revised from R. S., pt. 3, ch. 3, tit. 2, §§ 44, 45, 48; L. 1837, ch. 476, as amended by L. 1865, ch. 356; L. 1859, ch. 360; L. 1863, ch. 508, § 2.

Duties and obligations of a notary. Rept. of Atty. Genl. (1903) 302.

Presentment in person.—The duties of a notary in presenting promissory notes and bills of exchange, cannot be performed by his clerk or a third person. Accordingly, a notarial certificate of protest, stating that the officer caused the note to be presented is insufficient. *Onondaga County Bank v. Bates* (1842), 3 Hill 53; *Sheldon v. Benham* (1843), 4 Hill 129.

Notice to endorsers.—A notary is bound only to demand payment of notes and bills of exchange and to make his protest in case of non payment. It is no part of his official duty to give the notice to the endorsers. *Morgan v. Van Ingen* (1807), 2 Johns. 204; *Bank of Rochester v. Gray* (1842), 2 Hill 227.

The certificate of protest of a notary public is construed by the courts with great liberality. *McLean v. Ryan* (1899), 36 App. Div. 281, 55 N. Y. Supp. 232, *affd.* (1900), 165 N. Y. 620, 59 N. E. 1128.

Statement of residence.—A notary public, in certifying an affidavit, need not add the place of his residence thereto, to show that the venue was within his jurisdiction. *Mosher v. Heydrick* (1865), 1 Abb. Pr. N. S. 258.

Where the venue of an affidavit is a county in which the notary who administered the oath does not appear by the jurat or any statement appended to his signature to be authorized to act the affidavit must be regarded as a nullity, and it cannot be supported by other affidavits showing the notary's authority. *Robinson v. Cooper* (1909), 62 Misc. 517, 115 N. Y. Supp. 599.

An acknowledgment taken outside of the county where the notary resides, to an instrument required to be recorded in the county of his residence, should have attached thereto a certificate by the clerk of the county where such acknowledgment is taken, of the notary's qualification. Rept. of Atty. Genl. (1894) 226.

An affidavit, the venue of which is in the city and county of New York, is insufficient where it is sworn to before a notary public of Kings county, and the notary has not filed in the office of the clerk of the city and county of New York, a certified copy of his appointment for the county of Kings, with his autograph signature. *Produce Bank of New York v. Baldwin* (1875), 49 How. Pr. 277.

Notary has no power to take acknowledgments of deeds outside the county of his appointment. *Mut. Life Ins. Co. v. Corey* (1890), 54 Hun 493, 7 N. Y. Supp. 939, *revd.* on other grounds (1892), 135 N. Y. 326, 31 N. E. 1095. See also *Matter of Booth* (1882), 11 Abb. N. C. 145; *People v. Globe Mutual Life Ins. Co.* (1882), 65 How. Pr. 239.

Notaries public can take acknowledgments of deeds, etc., anywhere within the county for which they are appointed, and in which they reside; and when thus taken they are entitled to be recorded in any other county in the state, when the signature and official character of the notary are attested by the usual county clerk's certificate. *Matter of Utica & B. River Railroad Co. v. Stewart* (1867), 33 How. Pr. 312.

A notary is not presumed to be a lawyer who is to revise or reverse the decision of his employer, and if a bill is delivered to him with directions to make demand and protest upon the wrong day, a right of action does not arise against him on account of the error. *Commercial Bank of Kentucky v. Varnum* (1872), 49 N. Y. 269.

Relationship to party acknowledging.—Taking the acknowledgment of a deed is

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not a judicial act and an officer is not disqualified by his relationship to the parties from taking the acknowledgment of a deed to his wife from his father. *Remington Paper Co. v. O'Dougherty* (1880), 81 N. Y. 474; *Lynch v. Livingston* (1852), 6 N. Y. 422.

Liquor license bond.—The bond to be given by an applicant for a liquor license may be executed before a notary public. *Rept. of Atty. Genl.* (1895) 131.

Certificate of notary as evidence.—A notarial certificate of a Pennsylvania notary, which by a statute of that state is *prima facie* proof of the facts therein stated, is presumptive evidence of the facts certified. *Persons v. Kruger* (1899), 45 App. Div. 187, 60 N. Y. Supp. 1071.

A peremptory writ of mandamus will be issued to compel a notary public, who has taken an acknowledgment to an instrument intended to be recorded, to state in his certificate that he knew the person described in and who executed the instrument, where he does not deny that he knew such person. *People ex rel. Sayville S. B. Co. v. Kempner* (1900), 49 App. Div. 121, 63 N. Y. Supp. 199.

Female notary.—A verification certified to by a female notary is valid as to third persons, and furnishes no grounds for returning the pleadings. *Findlay v. Thorn* (1885), 1 How. Pr. N. S. 76.

Assignment acknowledged before assignee.—An assignment of a bond and mortgage, acknowledged before one of the assignees, as a notary public, is a nullity. *Armstrong v. Combs* (1897), 15 App. Div. 246, 44 N. Y. Supp. 171.

Acknowledgment before attorney for party.—The fact that the officer before whom an affidavit was taken is counsel for the party, is not a valid objection, if he is not the attorney of record. *People v. Spaulding* (1831), 2 Paige 326. It is irregular for a complaint to be sworn to before the plaintiff's attorney, but it cannot be treated as a nullity. The defendant's remedy should be by motion to set aside. *Gilmore v. Hempstead* (1849), 4 How. Pr. 153; *Taylor v. Hatch* (1815), 12 Johns. 340.

Presumption of full age.—The fact that a person performs the duties of a notary public is presumptive evidence that he is of full age. *Loucks v. Hallenbeck* (1900), 48 App. Div. 426, 63 N. Y. Supp. 1.

Liability of notary.—Where a notary public certifies to the acknowledgment and signature of a person without the person being brought before him, and it afterwards turns out to be a forged signature, the notary is liable, in damages to the party who is injured in consequence thereof. *Lesser v. Wunder* (1879), 9 Wkly. Dig. 56.

Necessity and nature of seal.—See *Bank of Rochester v. Gray* (1842), 2 Hill. 227.

Section cited.—*People v. Martin* (1902), 77 App. Div. 396, 79 N. Y. Supp. 340, *affd.* 175 N. Y. 315, 87 N. E. 589.

Former law cited.—*People v. Hascall* (1859), 18 How. Pr. 118.

§ 105-a. **Powers of notaries who are stockholders, directors, officers, or employees of banks or other corporations.**—A notary public, who is a stockholder, director, officer or employee of a bank or other corporation may take the acknowledgment of any party to a written instrument executed to or by such corporation, or administer an oath to any other stockholder, director, officer, employee or agent of such corporation, or protest for non-acceptance or nonpayment, bills of exchange, drafts, checks, notes and other negotiable instruments owned or held for collection by such corporation; but a notary public shall not take the acknowledgment of an instrument by or to a bank or other corporation of which he is a stockholder, director, officer or employee, if such notary be a party executing such

instrument, either individually or as representative of such corporation, or protest any negotiable instrument owned or held for collection by such corporation, if such notary be individually a party to such instrument. All such acknowledgments or proofs of deeds, mortgages or other instruments, relating to real property heretofore taken before the notaries public aforesaid are confirmed. This act shall not affect any action or legal proceeding now pending. (*Added by L. 1913, ch. 334, and amended by L. 1914, ch. 410, in effect Apr. 17, 1914.*)

Cashier protesting own note.—The cashier of a bank, although himself the maker of a note held by the bank, may act for it in protesting such note, and, if notice of protest is duly sent by him as notary to the indorser, the latter will be properly charged thereby. *Dykman v. Northridge* (1896), 1 App. Div. 26, 36 N. Y. Supp. 962, *affd.* 153 N. Y. 662, 48 N. E. 1104.

The credibility of a bank cashier protesting a note presents a question for the jury. *Kingsland Land Company v. Newman* (1896), 1 App. Div. 1, 36 N. Y. Supp. 960.

§ 106. **Commissioners of deeds within the state.**—Commissioners of deeds in the cities of this state shall be appointed by the common councils of such cities respectively, and shall hold office for the term of two years from the date of their appointment, and until others are appointed in their places. A vacancy occurring during the term for which any commissioner shall be appointed, shall be filled by the common council. The common councils of the several cities of this state, except in cities of this state situate in a county which has a population of not less than one hundred and eighty thousand, and not more than six hundred and fifty thousand, according to the last state or federal enumeration, shall, at the end of every even numbered year, by resolution of the board, determine the number of commissioners of deeds to be appointed for such cities respectively. The term of office of each commissioner of deeds appointed by the common council in cities of this state situate in a county which has a population of not less than one hundred and eighty thousand, and not more than six hundred and fifty thousand, according to the last state or federal enumeration, shall expire on the thirty-first of December of the even numbered year next after he shall be appointed. The common council of any such city shall in the month of November in every even numbered year, by resolution, determine the number of commissioners of deeds to be appointed in such cities, respectively, for the next succeeding two years. Such commissioners of deeds may be appointed by the common council by resolution, and the city clerk shall immediately after such appointment, file a certificate thereof with the county clerk of the county in which such city is situate, specifying the term for which the said commissioners of deeds shall have been appointed; the county clerk shall thereupon notify such persons of their appointment, and such persons so appointed shall qualify by taking the oath of office before such county clerk within ten days after giving such notice; and the county clerk shall demand and receive the sum of one dollar from each person so qualifying.

The foregoing provisions of this section shall not apply in the city of New York. Commissioners of deeds in the cities of this state shall have power to take proof and acknowledgment of all written instruments. (*Amended by L. 1917, ch. 24, in effect, Feb. 27, 1917.*)

Source.—Former Ex. L. (L. 1892, ch. 683) § 86, as amended by L. 1894, ch. 88; L. 1898, ch. 583, as amended by L. 1899, ch. 112; originally revised from R. S., pt. 3, ch. 3, tit. 2, § 41; L. 1848, chs. 75, 161.

Statutory office.—The office of commissioner of deeds is entirely the creature of statute. Its creation, its powers, its duties, its compensation, and its term is wholly the work of the legislature. *Parker v. Baker* (1840), 1 Clarke 223, revd. on other grounds 8 Paige 428.

Extent of authority.—"Commissioners of deeds are local officers. They must discharge their duties within specified territorial limits. . . . But the duties themselves are general in their character, and when performed within the proper local jurisdiction are operative throughout the state. These commissioners are vested by the statute with general powers to administer oaths and affirmations, and take proofs and acknowledgments of deeds . . . and may exercise these powers in every case coming before them within their local jurisdiction, without respect to the residence of the parties for whom they act or the place where their certificates is to be used." *People v. Hascall* (1859), 18 How. Pr. 118.

Appointment by the governor.—The Governor has no power to appoint a commissioner of deeds with authority to act in cities of the State. This power is vested, in the City of New York, in the Board of Aldermen, and in other cities in the Common Council. A non-resident of the State is not eligible to appointment. *Rept. of Atty. Genl.* (1914) 62.

Commissioner de facto.—An affidavit, taken before a commissioner of deeds *de facto*, for a city, who is exercising such office under color of an appointment by the governor and senate, may be read in a suit between other persons. The court will not inquire collaterally into the legality of such appointment. *Parker v. Baker* (1840), 8 Paige 428.

Signature.—Where the venue of the verification was "State of New York, County of Kings," and there was no such officer as commissioner of deeds of Kings County, and the officer simply signed as "Commissioner of Deeds," it was held sufficient. *Matter of Sheepshead & Coney Island R. R. Co.* (1877), 5 Wk. Dig. 488.

Commissioner of deeds of city of Lockport has power beyond the municipal limits notwithstanding the enactment of this section. *Reynolds v. City of Niagara Falls* (1894), 81 Hun 353, 30 N. Y. Supp. 954.

New York city.—A commissioner of deeds appointed under the charter of the city of New York who has duly qualified may take oaths, affirmations, proofs and acknowledgments in any of the boroughs of the city of New York. *People ex rel. Title Guaranty Trust Co. v. Haggerty* (1898), 22 Misc. 296, 50 N. Y. Supp. 32.

Verification of petition to surrogate.—Petitions to a surrogate for the probate of a will may be verified before a commissioner of deeds for he has authority to administer oaths, in all cases where no special provision is made by law. *Bolton v. Jacks* (1868), 29 Super (6 Rob.) 166.

Number of commissioners of deeds under earlier law.—See *People ex rel. White v. Brown* (1832), 7 Wend. 493; *People v. Salisbury* (1840), 24 Wend. 409.

Term under earlier law.—See *People v. Waite* (1832), 9 Wend. 58.

§ 107. **Commissioners of deeds in other states, territories and foreign countries.**—The governor may appoint and commission in any other state, territory or dependency, or in any foreign country, such number of commissioners of deeds as he may think proper, each of whom shall be a resi-

dent of or have his place of business in the city, county, municipality or other political subdivision from which chosen, and shall hold office for the term of four years, unless such appointment shall be sooner revoked by the governor, who shall have power to revoke the same. A person applying for appointment as a commissioner of deeds shall state in his application the city, county, municipality or other political subdivision for which he desires to be appointed, and shall inclose with his application the sum of five dollars, which sum, if a commission shall be granted, shall be paid over by the governor to the state treasurer, and if such commission shall not be granted, then the same shall be returned to the person making the application. Each commissioner, before performing any of the duties or exercising any of the powers of his office, shall take the constitutional oath of office, if appointed for a city or county within the United States, before a justice of the peace or some other magistrate in such city or county; and if for a territory or dependency, before a judge of a court of record in such territory or dependency; and if for a city, municipality or other political subdivision in a foreign country, before a person authorized by the laws of this state to administer an oath in such country, or before a clerk or judge of a court of record in such foreign country; and shall cause to be prepared an official seal on which shall be designated his name, the words "commissioner of deeds for the state of New York," and the name of the city or county, and the state, country, municipality or other political subdivision from which appointed; and shall file a clear impression of such seal, his written signature and his oath certified by the officer before whom it was taken, in the office of the secretary of state. The secretary of state upon receipt of such impression, signature and oath, shall forward to such commissioner instructions and forms, and a copy of sections one hundred and seven, one hundred and eight and one hundred and nine of this chapter.

Source.—Former Ex. L. (L. 1892, ch. 683) § 87, as amended by L. 1893, ch. 248; L. 1907, ch. 142; originally revised from L. 1850, ch. 270, §§ 1, 3, as amended by L. 1876, ch. 58; L. 1875, ch. 136, §§ 1, 3, 6; L. 1883, ch. 233, § 1.

Authority to act in this state.—The Governor cannot appoint a commissioner of deeds for another state with authority to act in New York. Rept. of Atty. Genl. (1914), vol. 2, p. 64.

Commissioner for Hawaii.—The Governor has authority to appoint commissioners of deeds for the territory of Hawaii. Rept. of Atty. Genl. (1901) 150.

§ 108. Powers of such commissioners.—Every such commissioner shall have authority, within the city, county, municipality or other political subdivision for which he is appointed, and in the manner in which such acts are performed by authorized officers within the state:

1. To take the acknowledgment or proof of the execution of a written instrument, except a bill of exchange, promissory note or will, to be read in evidence or recorded in this state.

2. To administer oaths.

3. If appointed for a foreign country, to certify to the existence of a patent, record or other document recorded in a public office or under official custody in such foreign country, and to the correctness of a copy of such patent, record or document, or to the correctness of a copy of a certified copy of such patent, record or other document, which has been certified according to the form in use in such foreign country. A written instrument so acknowledged or proved, an oath so administered, or a copy or copy of a certified copy of such patent, record or other document, may be read in evidence or recorded within this state, the same as if taken, administered or certified within the state before an officer authorized to take the acknowledgment or proof of a written instrument, to administer oaths, or to certify to the correctness of a public record, if there shall be annexed or subjoined thereto, or indorsed thereon, a certificate of the commissioner before whom such acknowledgment or proof was taken, by whom the oath was administered, or by whom the correctness of such copy is certified, under his hand and official seal, specifying, if for another state, the day on which, and the city or town in which, the acknowledgment or proof was taken, or the oath administered, without which specification, when required, the certificate shall be void; and authenticated by the certificate of the secretary of state, annexed or subjoined to the certificate of such commissioner, that such commissioner was, at the time of taking such acknowledgment or proof of administering such oath, or of certifying to such patent, record or document, or copy thereof, duly authorized therefor, that he is acquainted with the handwriting of such commissioner, or has compared the signature to the certificate with the signature of such commissioner deposited in his office, that he has compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in his office, and that he verily believes the signature and the impression of the seal upon such certificate to be genuine. The certificate of a commissioner as to the correctness of a copy of a certified copy of a patent, record or other document, as provided by this section, shall be presumptive evidence that it was certified according to the form in use in such foreign country.

Source.—Former Ex. L. (L. 1892, ch. 683) § 88, as amended by L. 1893, ch. 248; L. 1907, ch. 142; originally revised from L. 1850, ch. 270, § 1; L. 1876, ch. 58, §§ 2, 4, 5, as amended by L. 1880, ch. 115; L. 1875, ch. 136, §§ 1, 2, 8, 9.

§ 109. Fees of such commissioners.—The fees of such commissioners shall be as follows:

1. If appointed for another state, territory or dependency, not to exceed four times the amount allowed by the laws of such state, territory or dependency for like services, and not to exceed in any case one dollar for taking the proof or acknowledgment of a written instrument, or administering an oath;

2. If appointed for Great Britain or Ireland, for administering or certifying an oath, one shilling sterling, and for taking the proof or acknowledgment of a written instrument, or for certifying to the existence or

§§ 110, 120, 121.

Laws repealed.

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correctness of a copy of a patent, record or document, four shillings sterling;

3. If appointed for France or any other foreign country, for administering and certifying an oath, one franc and twenty-five centimes, and for taking the proof or acknowledgment of a written instrument, or for certifying to the existence or correctness of a copy of a patent, record or document, five francs.

Source.—Former Ex. L. (L. 1892, ch. 683) § 89, as amended by L. 1907, ch. 143, § 3; originally revised from L. 1875, ch. 136, § 7; L. 1876, ch. 58, § 4.

§ 110. Board of geographic names; powers and duties.—A state board of geographic names is hereby created, to consist of five members, of which the commissioner of education and the state geologist shall be ex-officio members, and three of whom shall be appointed by the governor to hold for terms of two, four and six years, to be designated by him when the appointments are made. Their successors shall be appointed by the governor for terms of six years. Vacancies shall be filled by the governor for the unexpired terms of the offices vacated. The state geologist shall be the secretary and executive officer of such board. All of such members shall serve without compensation. The said board shall have power, and it shall be its duty:

1. To determine and establish the correct historical and etymological form of the place names in this state and to recommend the adoption of such correct forms for public use.

2. To determine the form and propriety of new place names proposed for general use, and no corporation, individual or community shall introduce such new place names without the consent and approval of this board.

3. To co-operate with the United States board of geographic names and with the United States post-office department in establishing a proper, correct and historically accurate form for all place names proposed as designations of new post-offices. (*Section added by L. 1913, ch. 187, in effect Apr. 3, 1913.*)

ARTICLE XI.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 120. Laws repealed.

121. When to take effect.

§ 120. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—Former Ex. L. (L. 1892, ch. 683) § 90.

§ 121. When to take effect.—This chapter shall take effect immediately.

Source.—Former Ex. L. (L. 1892, ch. 683) § 91.

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Laws repealed.

§ 120.

SCHEDULE OF LAWS REPEALED.

		LAWS OF	CHAPTER	SECTION
Revised Statutes.....Part 1, chapter 8,		1806	2	All
title 1,	All	1806	181	3
Revised Statutes.....Part 1, chapter 8,		1806	187	8
title 2,	All	1807	2	All
Revised Statutes.....Part 1, chapter 8,		1807	52	All
title 5,	All	1807	74	2
Revised Statutes.....Part 1, chapter 8,		1808	4	All
title 6,	All	1808	215	3
Revised Statutes.....Part 1, chapter 8,		1808	240	27
title 7,	All	1809	18	All
Revised Statutes.....Part 1, chapter 8,		1810	3	All
title 8,	All	1810	193	4, 16
Revised Statutes.....Part 1, chapter 9,		1810	194	1
title 1,	All	1811	2	All
Revised Statutes.....Part 3, chapter 3,		1811	78	1, 2, 9
title 2, sections 41, 44, 45, 48		1811	246	11, 12
Revised Statutes.....Part 3, chapter 9,		1812	1	All
title 3, section 4		1812	239	50
Revised Statutes.....Part 3, chapter 10,		1813	24	All
title 3, sections 41, 51		1813	79	1
LAWS OF	CHAPTER	SECTION		
1778	26	All	R. L. 1813	2
1779	9	All	R. L. 1813	6
1781	2	All	R. L. 1813	42
1782	3	All	R. L. 1813	77
1783	42	All	1814	10
1784	1	All	1814	120
(8th Sess.)			1815	33
1784	16	All	1815	262
1785	23	1	1816	236
1786	4	All	1817	33
1786	13	All	1818	55
1786	67	26-28	1818	225
1789	7	All	1820	34
1790	58	4, 5	1820	124
1791	1	All	1821	21
1792	7	All	1821	240
(16th Sess.)			1822	19
1792	63	1, 3, 7,	1822	193
last two sentences (15th Sess.)			1822	260
1795	6	All	8, 25, 26	
1795	18	All	1823	25
1796	8	6-8	1823	197
1796	69	12	1823	269
1797	2	All	1826	59
1797	54	2-7	1827	10
1797	75	All	1828	297
1798	36	1, 3, 10, 11	1828	20
1799	2	All	(2d Meet.)	
1799	16	1, 3, 7	1828	21
1800	5	All	1778, 116, 117, 118, 205, 248, 260, 376,	
1800	11	All	391, 400, 492, 495, 543 (2d Meet.)	
1800	56	All	1829	52
1800	85	All	1829	376
1801	41	All	1831	323
1801	72	1-4, 6-10	1833	28
1801	173	1,	1835	52
except part relating to method of pay-			1836	536
ing salaries; 5-7			1837	320
1801	185	22	1837	439
1802	3	All	1837	476
1803	1	4	1839	23
1804	2	All	1839	333
1805	4	All	1840	246
1805	96	5-7	1840	259

LAWS OF	CHAPTER	SECTION	part relating to salary of deputy comptroller and abolishing office of second deputy.
1840	290	All	
1841	218	All	
1841	274	All	
1842	149	All	
1842	207	4	
1842	220	All	
1844	176	All	
1846	24	All	
1846	147	All	
1847	350	All	
1847	499	All	
1848	75	All	
1848	158	All	
1848	161	All	
1848	313	3, 4	
1848	357	All	
1850	270	All	
1851	134	16-19	
1851	390	All	
1851	516	All	
1854	92	All	
1854	288	All	
1854	399	All	
1855	145	1	
1855	355	All	
1857	633	All	
1857	788	All	
1858	44	All	
1858	57	All	
1858	64	All	
1858	308	All	
1859	170	All	
1859	222	All	
1859	360	All	
1859	437	All	
1859	485	All	
1861	229	All	
1862	21	All	
1862	283	All	
1862	387	All	
1863	508	All	
1864	29	All	
1865	356	All	
1865	539	All	
1866	539	All	
1867	420	All	
1868	479	All	
1869	10	2	
1869	317	All	
1869	448	All	
1870	660	All	
1871	3	All	
1871	167	All	
1872	703	All	
1873	643	All	
1873	807	All	
1874	100	All	
1875	87	All	
1875	105	All	
1875	136	All	
1875	145	All	
1875	227	All	
1875	458	All	
1876	58	All	
1876	130	All	
1877	27	1,	
1878	18	All	
1878	40	All	
1878	301	All	
1879	254	All	
1880	86	All	
1880	115	All	
1880	160	All	
1880	234	All	
1880	298	All	
1880	316	All	
1882	156	All	
1883	140	All	
1883	233	All	
1884	66	All	
1884	270	All	
1885	61	All	
1885	63	All	
1885	252	All	
1885	262	All	
1886	230	All	
1886	359	All	
1886	448	All	
1887	516	All	
1888	542	All	
1889	198	All	
1889	200	All	
1889	569	1,	
		part authorizing attorney-general to employ as many deputies, clerks and stenographers as he deems necessary and to fix their compensation.	
1890	260	All	
1892	598	6,	
		part relating to copyright of miscel- laneous reports.	
1892	651	8	
1892	683	All	
1893	248	All	
1893	287	All	
1894	68	All	
1894	88	1	
1895	107	All	
1895	393	All	
1895	821	All	
1896	466	All	
1897	208	All	
1897	217	1	
1897	411	All	
1898	583	All	
1899	11	All	
1899	112	All	
1899	197	All	
1899	302	All	
1899	357	All	
1899	476	All	
1900	63	All	
1900	477	All	
1900	664	2	
1900	737	All	
1901	40	All	
1901	657	All	
1903	603	All	
1904	26	All	

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Consolidators' notes.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1904	179	All	1908	246	All
1905	178	All	Code of Civil Procedure		54,
1907	142	All	57; pt. relating to duty of secretary		
1907	207	All	of state; 212, last sentence; 213; 226,		
1907	213	All	second sentence; 233, from words		
1907	359	All	"who must publish" to "in pursuance		
1907	539	All	thereof"; 249, from words "but the		
1907	559	All	copyright" to "people of the State" in-		
1907	586	All	clusive; 2417, last sentence; 3290.		

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Statutes repealed, which are temporary or obsolete or have been consolidated in the "Consolidated Laws," are given with an explanatory note as follows:

L. 1778, ch. 26.—Appoints Gerard Bancker treasurer of state and provides for his oath of office and his bond. Temporary and obsolete.

L. 1779, ch. 9.—Continues Gerard Bancker in his office as treasurer of state and directs him to take his oath and give his bond. Temporary and obsolete.

L. 1781, ch. 2.—Continues Gerard Bancker in his office of state treasurer and directs him to take his oath of office and give his bond. Temporary and obsolete.

L. 1782, ch. 3.—Continues Gerard Bancker in his office as state treasurer and directs him to take his oath and give the security as required by law. Temporary and obsolete.

L. 1783, ch. 42.—Directs the surveyor-general to ascertain the value of all land granted to or surveyed for any person, the number of buildings thereon and the number of inhabitants in the state, so that a return may be made to congress to aid it in levying a charge upon the state of New York to defray the expenses of the War of the Revolution. Act is a war revenue measure and is obsolete.

L. 1784, ch. 1.—Continues Gerard Bancker in office as state treasurer and provides for his bond and his oath of office. Temporary and obsolete.

L. 1784, ch. 16.—L. 1801, ch. 193, repeals all acts within purview or operation of revised acts. Section 4 is within purview and operation of L. 1801 (R. A.), ch. 72, § 10. Balance of act directs the executors or administrators of Alexander Colden, late surveyor-general of the colony of New York, to deliver to the surveyor-general of this state, the papers, books, maps, records, etc., in their possession that belonged to the office of the surveyor-general or receiver general of the colony of New York. Act further provides that the secretary of state or any other public officer or private person shall deliver to the surveyor-general all such papers and documents in their custody or control. Temporary and obsolete.

L. 1785, ch. 23, § 1.—Directs the late surveyor-general to deliver up to the surveyor-general on or before May 1, 1785, all the papers, certificates, locations, surveys, and returns of surveys, books, maps and records in his possession appertaining to the office of surveyor-general. Temporary and obsolete.

L. 1786, ch. 4.—Continues Gerard Bancker in office as state treasurer, and prescribes the form of his oath and bond, and provides for the discharge of his sureties on his former bonds. Temporary and obsolete.

L. 1786, ch. 13.—Directs the secretary of state to certify transcripts of such records and patents as he and a committee named in the act, shall deem necessary. It also directs the secretary to rebind such books of records in his office as shall seem necessary to him and such committee. It also directs the secretary to report to the legislature the progress of the work herein directed to be done and provides for his compensation. Temporary and obsolete.

L. 1786, ch. 67, §§ 27, 28.—L. 1801, ch. 193, repeals all acts within purview or operation of revised acts. Of the statute cited: §§ 27, 28, part, are within purview and operation of L. 1801 (R. A.), ch. 72, §§ 8, 9. Remainder of § 28 gives surveyor-general, in lieu of his fees, a salary for three years from May 1, 1785. Temporary and obsolete.

L. 1789, ch. 7.—Continues Gerard Bancker in his office as state treasurer, and prescribes the oath to be taken, and security to be given by him, and provides for the discharge of his bond. Temporary and obsolete.

L. 1790, ch. 58, §§ 4, 5.—L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Of statutes examined, § 4 is within the purview and operation of L. 1801 (R. A.), ch. 47, § 3. L. 1828, ch. 21, § 1, ¶ 549, second meeting, repeals all statutes consolidated and re-enacted in or repugnant to the Revised Statutes. The provisions of § 5 of the statute cited are covered by R. S., pt. 1, ch. 8, tit. 5, § 1.

L. 1791, ch. 1.—Continues Gerard Bancker in his office as state treasurer, and prescribes the oath to be taken, and security to be given by him. Temporary and obsolete.

L. 1792, ch. 7.—Continues Gerard Bancker in his office as state treasurer and prescribes oath to be taken and bond to be given. Temporary and obsolete.

L. 1792, ch. 63, §§ 1, 3, 7 part.—L. 1798, ch. 36, repeals § 1 so far as it relates "to a provision for the compensation and expenses of the treasurer of this state."

Section 1, part, all excepting words "To the treasurer the sum of eight hundred pounds." L. 1801, ch. 193, repeals all acts that come within the purview or operation of the revised acts. Statute cited is within purview and operation of L. 1801 (R. A.), ch. 173, § 1.

Section 3 provides for the payment of salaries of state officers only during the current year. Temporary and obsolete.

Sections 1, pt., 7, pt., provide for certain fees as and for the compensation of the secretary of state. Superseded by L. 1795, ch. 18, §§ 1, 2, which gives the secretary a salary in lieu of his fees, but there is no repealing clause in the act.

L. 1794, ch. 54.—Section 11, pt., commencing with words "and that the secretary of this state" to end of section. Statute cited relates to fees of secretary. Superseded by L. 1795, ch. 18, §§ 1, 2.

L. 1795, ch. 6.—Continues Gerard Bancker in his office as state treasurer and prescribes oath to be taken and bond to be given. Temporary and obsolete.

L. 1795, ch. 18.—L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Statute cited comes within purview and operation of L. 1801, (R. A.), ch. 173, §§ 1, 6, 7. Balance of act provides for repairing the house occupied by the secretary of state. Temporary and obsolete.

L. 1796, ch. 8, §§ 6-8.—L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Of statute cited:

Section 6 is within purview and operation of L. 1801 (R. A.), ch. 113, § 6.

Section 7 is within purview and operation of L. 1801 (R. A.), ch. 146, § 1.

Section 8 is within purview and operation of L. 1801 (R. A.), ch. 32, § 9.

L. 1796, ch. 69, § 12.—L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Statute cited comes within purview and operation of L. 1801 (R. A.), ch. 72, § 2.

L. 1797, ch. 2.—Continues Gerard Bancker in his office as state treasurer and prescribes the oath to be taken and the bond to be given. Temporary and obsolete.

L. 1797, ch. 21, §§ 1 pt., 6-8.—Section 1, pt., provides for the appointment of an officer to be known as comptroller. Superseded by L. 1822, ch. 184, § 1, which was specifically repealed by L. 1828, ch. 21, § 1, ¶ 354, 2d meeting, which repeal is noted in the schedule of the Public Officers Law. L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Section 6 is within operation and purview of L. 1801 (R. A.), ch. 185, § 22. Section 7 was repealed by L. 1800, ch. 11, § 3. Section 8 is temporary and obsolete.

L. 1797, ch. 54, §§ 2-7.—Sections 2, 6 direct the surveyor-general to survey and mark the bounds of all counties not theretofore surveyed and marked; and direct the treasurer to pay the surveyor-general for the expense of such survey. Temporary and obsolete. L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Of statute cited:

Sections 3-5 are within the purview and operation of L. 1801 (R. A.), ch. 72, §§ 6, 7.

Section 7 is within purview and operation of L. 1801 (R. A.), ch. 72, § 3.

L. 1797, ch. 75.—Provides that it may be lawful for the state treasurer to reside and continue his office in the city of New York until May 1, 1798. Temporary and obsolete.

L. 1798, ch. 36, §§ 1, 3, 10.—Appoints Robert McClallen state treasurer and provides for his oath and bond and fixes his compensation. Temporary and obsolete.

L. 1799, ch. 16, §§ 1, 3, 7.—Appoints Robert McClallen state treasurer and provides for his oath and bond, also fixes his compensation and provides for the conducting of the business of treasurer in case of his death during the recess of the legislature. Temporary and obsolete.

L. 1800, ch. 5.—Continues Robert McClallen in his office as state treasurer and fixes his compensation. Temporary and obsolete.

L. 1800, ch. 11.—L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Statute cited comes within purview and operation of L. 1801 (R. A.), ch. 185, §§ 1, 22. Section 3 is a repealing section.

L. 1800, ch. 58.—L. 1801, ch. 193, repeals all acts that come within purview or operation of revised acts. Sections 4, 5 come within the operation and purview

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of L. 1801 (R. A.), ch. 72, §§ 6, 7. Balance of act provides for the loaning by the comptroller of the sum of three thousand dollars to the surveyor-general to aid in the publication of a state map. Act further provides for the payment to the surveyor-general for the work done. Temporary and obsolete.

L. 1800, ch. 85.—Amends an act to continue in office of state treasurer Robert McClallen, and rectifies act as to taking oath and giving sureties for said office. Temporary and obsolete.

L. 1801, ch. 33, §§ 1, 2.—L. 1813, ch. 202, repeals all acts that come within operation or purview of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 6, § 1.

L. 1801, ch. 41.—Continues Robert McClallen in office of state treasurer and provides for his compensation. Temporary and obsolete.

L. 1801, ch. 72.—L. 1813, ch. 202, repeals all acts that come within operation or purview of revised acts. Of statute cited:

Section 1, 2 are within purview and operation of L. 1813 (R. L.), ch. 77, §§ 1, 2.

Sections 6, 7 are within operation and purview of L. 1813 (R. L.), ch. 77, §§ 3, 4.

Section 8-10 are within purview and operation of L. 1813 (R. L.), ch. 77, §§ 5-7. Balance of act directs the surveyor-general to furnish each branch of the legislature with a map of the state and to the secretary of state a map for each town. Act also directs the surveyor-general to survey lands on the Niagara river and other property. Temporary and obsolete.

L. 1801, ch. 173, §§ 1, pt., 5, 6, 7.—L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Of statute cited:

Section 1, pt. is within purview and operation of L. 1813 (R. L.), ch. 2, § 1.

Section 5 is within purview and operation of L. 1813 (R. L.), ch. 2, § 5.

Section 6 is within purview and operation of L. 1813 (R. L.), ch. 2, § 6.

Section 7 is within purview and operation of L. 1813 (R. L.), ch. 2, § 7.

L. 1801, ch. 185, §§ 6, 22.—L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Of statute cited:

Section 6 is within purview and operation of L. 1813 (R. L.), ch. 42, § 10.

Section 22 is within purview and operation of L. 1813 (R. L.), ch. 42, § 24.

L. 1801, ch. 190, §§ 1, pt., 5.—Relates to fees of secretary of state and attorney-general. Fixes the fees of these officers. Section 6 repeals all former acts regulating the fees of the officers and ministers of justice whose fees have been fixed by § 1. Section 5 is a repealing section.

L. 1802, ch. 3.—Continues Robert McClallen in office of state treasurer and provides for his compensation. Temporary and obsolete.

L. 1803, ch. 1, §§ 1, 4.—Section 1 is a repeal. Section 4 appoints Abraham G. Lansing state treasurer. Temporary and obsolete.

L. 1804, ch. 2.—Continues Abraham G. Lansing in office of state treasurer. Temporary and obsolete.

L. 1805, ch. 4.—Continues Abraham G. Lansing in office of state treasurer. Temporary and obsolete.

L. 1805, ch. 96, §§ 5-7.—L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 77, §§ 8-10.

L. 1806, ch. 2.—Continues Abraham G. Lansing in office of state treasurer. Temporary and obsolete.

L. 1806, ch. 181, § 3.—L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 5, § 3; L. 1813 (R. L.), ch. 45, § 7, and L. 1813 (R. L.), ch. 10, § 10.

L. 1806, ch. 187, § 8.—L. 1813, ch. 202, repeals all acts that come within the purview or operation of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 55, § 11.

L. 1807, ch. 2.—Continues Abraham G. Lansing in office of state treasurer. Temporary and obsolete.

L. 1807, ch. 52.—Of statute cited § 1 relates to fees of secretary of state. L. 1813 (R. L.), ch. 83, § 1, fixes fees of secretary of state. Section 6 of same act repeals all former acts regulating the fees of the said several officers and ministers of justice whose fees have been fixed by section 1. L. 1813, ch. 202, repeals all acts that come within purview and operation of revised acts. Of statute cited:

Section 2 is within purview and operation of L. 1813 (R. L.), ch. 77, § 11.

L. 1807, ch. 74, § 2.—L. 1813, ch. 202, repeals all acts that come within purview

or operation of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 32, § 12.

L. 1808, ch. 4.—Appoints David Thomas state treasurer. Temporary and obsolete.

L. 1808, ch. 215, § 3.—L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 96, § 24.

L. 1808, ch. 240, § 27.—L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Statute cited is within purview and operation of L. 1813 (R. L.), ch. 42, § 24.

L. 1809, ch. 18.—Continues David Thomas in office of state treasurer. Temporary and obsolete.

L. 1810, ch. 3.—Appoints Abraham G. Lansing state treasurer. Temporary and obsolete.

L. 1810, ch. 141.—Directs the payment of the amount due the surveyor-general for surveying the public land in Palmer's purchase. Temporary and obsolete.

L. 1810, ch. 193, §§ 4, 16.—L. 1813, ch. 202, repeals all acts that come within purview and operation of revised acts. Section 4 is within purview and operation of L. 1813 (R. L.), ch. 2, § 5. Section 16 directs the payment of the expenses of exploring and surveying the St. Lawrence river on the American side. Temporary and obsolete.

L. 1810, ch. 194, § 1.—L. 1828, ch. 21, § 1, ¶ 549, 2d meeting, repeals all acts consolidated and re-enacted in or repugnant to Revised Statutes. Statute cited was consolidated and re-enacted in R. S., pt. 1, ch. 9, tit. 1, § 14.

L. 1811, ch. 2.—Appoints Abraham G. Lansing state treasurer. Temporary and obsolete.

L. 1811, ch. 78, §§ 1, pt., 2, 9.—L. 1828, ch. 21, § 1, ¶ 549, 2d meeting, repeals all acts consolidated and re-enacted in or repugnant to Revised Statutes. Section 1, pt., was consolidated and re-enacted in R. S., pt. 1, ch. 5, tit. 6, art. 1, § 5. L. 1813, ch. 202, repeals all acts that come within purview or operation of revised acts. Of statute cited:

Sections 1, pt., 2, are within purview and operation of L. 1813 (R. L.), ch. 42, § 23.

Section 9 is within purview and operation of L. 1813 (R. L.), ch. 52, § 32.

L. 1811, ch. 246, §§ 11, 12.—Section 11 relates to fees of secretary of state for registering mortgages. L. 1813 (R. L.), ch. 83, § 1, fixes such fees. Section 6 of latter act repeals all former acts regulating the fees of the officers and ministers of justice whose fees have been fixed by § 1. Section 12 grants to the treasurer a sum for the current year in addition to his regular salary. Temporary and obsolete.

L. 1812, ch. 1.—Appoints David Thomas state treasurer. Temporary and obsolete.

L. 1812, ch. 239, § 50.—L. 1813, ch. 202, repeals all acts which come within the purview or operation of revised acts. Statute cited comes within the purview and operation of L. 1813 (R. L.), ch. 2, § 1.

L. 1813, ch. 24.—Appoints Charles Z. Platt state treasurer. Temporary and obsolete.

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1814, ch. 10.—Continues Charles Z. Platt in the office of state treasurer. Temporary and obsolete.

L. 1814, ch. 120, § 10.—L. 1828, ch. 21, § 1, ¶ 549, 2d meeting, repeals all acts consolidated and re-enacted in or repugnant to Revised Statutes. Statute cited was consolidated and re-enacted in R. S., pt. 1, ch. 8, tit. 2, § 10.

L. 1815, ch. 33.—Continues Charles Z. Platt in the office of state treasurer. Temporary and obsolete.

L. 1816, ch. 236, §§ 51, 52.—Fix salary of surveyor-general and treasurer. These sections are superseded and rendered obsolete by L. 1820, ch. 124, § 1, which fixes a different salary for these officers. Section 6 of the latter act repeals all inconsistent acts or provisions.

L. 1817, ch. 33.—Appoints Gerrit L. Dox state treasurer. Temporary and obsolete.

L. 1820, ch. 34.—Appoints Gerrit L. Dox state treasurer. Temporary and obsolete.

L. 1820, ch. 124, §§ 1, 4, 5, 6.—L. 1828, ch. 21, § 1, ¶ 549, 2d meeting, repeals all acts consolidated and re-enacted in or repugnant to Revised Statutes. Of statute cited:

Section 1 was consolidated and re-enacted in R. S., pt. 1, ch. 9, tit. 1, §§ 3, 5, 6, 12.

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Section 4, part from beginning to and including words "one thousand dollars" first used therein was consolidated and re-enacted in R. S., pt. 1, ch. 9, tit. 1, §§ 10, 11.

Section 5 was consolidated and re-enacted in R. S., pt. 1, ch. 9, tit. 1, § 5, subd. 15.

Section 6 repeals inconsistent acts.

So much of § 4 as was not repealed has been superseded by L. 1839, ch. 388, § 4.

L. 1821, ch. 21.—Appoints Benjamin Knowler state treasurer. Temporary and obsolete.

L. 1822, ch. 19.—Appoints Benjamin Knowler state treasurer. Temporary and obsolete.

L. 1822, ch. 193, § 5.—Provides for the binding and classifying of the transcripts of the minutes of the provincial congress, committees and councils of safety and conventions for the years 1775, 1776 and 1777. Temporary and obsolete.

L. 1822, ch. 260, §§ 3, 8.—L. 1828, ch. 21, § 1, § 549, 2d meeting, repeals all acts consolidated and re-enacted in or repugnant to Revised Statutes.

Section 3 was consolidated and re-enacted in R. S., pt. 1, ch. 9, tit. 1, § 5, subds. 2, 3.

Section 8 was consolidated and re-enacted in R. S., pt. 1, ch. 9, tit. 1, § 14.

L. 1826, ch. 59.—Continues L. 1823, ch. 197, for three years. Temporary and obsolete.

L. 1828, ch. 20, § 20.—Act amends R. S., pt. 1, ch. 5, tit. 1, §§ 2, 7, so that the time specified in those sections should be January 1, 1830, instead of January 1, 1829. This amendment was published as part of chapter 5 in the first edition of the Revised Statutes and was repealed with it by former Public Officers Law (L. 1892, ch. 681) § 43.

L. 1829, ch. 52.—Extends the commissions of notaries public and commissioners of deeds to third Monday in January, 1830, and validates the acts of notaries and commissioners of deeds in office, January 1, 1829, whose commissions may have expired previous to this act. Act also provides for the number of commissioners of deeds and notaries public in the city of New York.

Section 1 is temporary and obsolete.

Section 2, so far as it relates to notaries public, is abrogated by L. 1858, ch. 44, § 2, and as to commissioners of deeds by L. 1848, ch. 75, § 1, which provides that they shall be appointed by the common council.

L. 1829, ch. 378, §§ 1, 2.—Fixes the compensation of state treasurer, and was superseded by L. 1875, ch. 145, § 1, which fixes a different compensation, but contains no repealing clause.

L. 1830, ch. 320, § 53.—Amends R. S., pt. 3, ch. 9, tit. 2, § 39, which latter statute is repealed by L. 1880, ch. 245, § 1. L. 1880, ch. 245, § 2, repeals all laws which amend the Revised Statutes repealed by § 1 of that act.

L. 1831, ch. 323, § 4.—Provides for compensation of door-keeper of the executive chamber during that year. Temporary and obsolete.

L. 1833, ch. 23.—Relates to appointment of commissioners of deeds by judges of the county courts and validates certain official acts of commissioners of deeds. Office of commissioner of deeds "in the several towns of this state" was abolished by L. 1840, ch. 238, § 1, which contained no repealing clause. As to commissioners of deeds in cities, superseded by L. 1848, ch. 75, § 1.

L. 1837, ch. 320.—Section 1 fixes the salary and compensation of surveyor-general. L. 1848, ch. 72, relates to duties of same officer called state engineer and surveyor, and fixes his compensation. In § 12 all laws that conflict with the provisions of this act are repealed. Section 2 increases the salaries for one year of two deputy comptrollers and one deputy secretary of state specified by name. Temporary and obsolete. Section 3 has been superseded by L. 1870, ch. 80, § 9.

L. 1839, ch. 333, § 2.—Provides for an allowance to the treasurer in lieu of allowances theretofore granted to him for clerk hire. Superseded by L. 1892, ch. 683, § 40.

L. 1842, ch. 149.—Section 2 contains an appropriation to pay for services and material rendered and furnished under the act of May 8, 1840, to continue the geological survey of the state. Temporary and obsolete. All other sections have been repealed, except § 6, which repeals, and § 7, which states when act shall take effect.

L. 1842, ch. 207, § 4.—Provides for the appointment of commissioners of deeds in Brooklyn. Superseded by L. 1848, ch. 75, § 1. Rest of act is special.

L. 1847, ch. 499.—Section 1, subd. 1, amended "so as to read as follows" by L. 1854, ch. 288, § 1. Subds. 2, 3 recommended for repeal, as the offices of inspector of state prisons and canal commissioners have been abolished. Section 2 provides when act shall take effect.

L. 1848, ch. 158.—Extends the time for the first appointment of commissioners of deeds in the city of New York, until April 20, 1848. Temporary and obsolete.

L. 1850, ch. 360, § 4.—This section states when act takes effect. Rest of act has been repealed. Obsolete.

L. 1851, ch. 390.—Authorizes the appointment of twenty-five additional notaries for the city of New York. Statute has been abrogated by L. 1858, ch. 44, § 2.

L. 1851, ch. 516.—Provides for the appointment of an additional number of commissioners of deeds in the city of New York. Act was abrogated by L. 1882, ch. 410, § 100.

L. 1854, ch. 92.—Authorizes the appointment of forty additional notaries public for the city of New York. Statute has been abrogated and superseded by L. 1858, ch. 44, § 2.

L. 1854, ch. 288.—Relates to the appointment and salary of deputy attorney-general and messenger. L. 1878, ch. 40, § 1, relates to appointment and salary of deputy attorney-general and messengers. Section 2 repeals all provisions of law inconsistent with this act.

L. 1854, ch. 399.—Fixes the salary of secretary of state. L. 1875, ch. 145, § 1, supersedes and abrogates this law by fixing a different salary, but there is no repealing clause in the latter act.

L. 1855, ch. 335.—Relates to salary of deputy attorney-general. L. 1878, ch. 40, § 1, relates to appointment and salary of deputy attorney-general, and § 2 repeals all provisions of law inconsistent with this act.

L. 1858, ch. 44.—Legalizes the commissions and the acts of the notaries public in the city of New York, and provides for the appointment of four hundred notaries in that city. First part of statute is temporary and obsolete, latter part has been abrogated by L. 1882, ch. 410, § 1712.

L. 1858, ch. 57.—Provides for the appointment of twenty-five additional notaries public in the city of Troy. Abrogated and superseded by L. 1892, ch. 683, § 81.

L. 1858, ch. 64.—Amends R. S., pt. 1, ch. 8, tit. 1, by adding thereto §§ 20-24, which require the governor to keep in proper books a full and complete register of all applications or petitions made to him; also of all applications made to him for the pardon, or commutation of sentence of any prisoner; also the judge's report and testimony in capital cases; he is also directed to keep a book containing his disbursements for the incidental expenses of his department, of rewards offered by him for the apprehension of criminals and the expenses incurred in sending the reports of courts and copies of the laws of the state to other states and all other official expenses and disbursements. Act also fixes the compensation of the private secretary to the governor and makes an allowance for payment of clerks and messengers.

R. S., pt. 1, ch. 8, except titles 3 and 4, was repealed by L. 1892, ch. 683, § 90, but no mention was made in the repealing section of the repeal of sections amending the Revised Statutes. Statute cited has been superseded by L. 1892, ch. 683, §§ 3-5.

L. 1859, ch. 485.—Authorizes the appointment of one hundred additional notaries public for the city of New York. Abrogated and superseded by L. 1882, ch. 410, § 1712.

L. 1861, ch. 229.—Authorizes the appointment of one hundred additional notaries public for the city of New York. Abrogated by L. 1882, ch. 410, § 1712.

L. 1862, ch. 283.—Statute cited amends L. 1850, ch. 270. L. 1875, ch. 136, § 11, repeals L. 1850, ch. 270, and acts amendatory thereof.

L. 1862, ch. 337.—Authorizes the appointment of two hundred additional notaries public for the city of New York. Statute has been abrogated and superseded by L. 1882, ch. 410, § 1712.

L. 1866, ch. 539.—Authorizes the appointment of one hundred additional notaries public for the city of New York. Abrogated and superseded by L. 1882, ch. 410, § 1712.

L. 1868, ch. 6, §§ 3, 4.—L. 1868, ch. 6, authorizes the extension of time for the collection of taxes in the various towns and cities of the state. Section 3 directs the secretary of state to print this act upon slips of paper and distribute them to the treasurers of counties and mayors of cities. Temporary and obsolete.

L. 1869, ch. 10, § 2.—Statute cited extends the time for the collection of taxes in various cities and towns. Section recommended for repeal directs the secretary of state to print the law upon slips of paper and distribute them to treasurers of counties and mayors of cities. Temporary and obsolete.

L. 1875, ch. 105.—Provides that a notary public for Kings, Queens, Richmond, Westchester or Rockland, or for city and county of New York, upon filing a certified copy of his appointment, with his autograph signature, in the clerk's office of

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any other of said counties, may exercise his functions in that county. Section 1 amended so as to read as follows by L. 1875, ch. 458, § 1. Section 2 legalizes acts of notaries public. Section 3 states when act shall take effect.

L. 1875, ch. 145.—Fixes the compensation of comptroller, secretary of state, state treasurer, attorney-general, state engineer and surveyor and auditor of canal department. Abrogated and superseded as follows:

Section 1, part fixing salary of comptroller has been superseded by L. 1892, ch. 683, § 30.

Section 1, part fixing salary of secretary of state, has been abrogated and superseded by L. 1892, ch. 683, § 20.

Section 1, part fixing salary of state treasurer, has been abrogated and superseded by L. 1892, ch. 683, § 40.

Section 1, part fixing salary of attorney-general, has been abrogated and superseded by L. 1892, ch. 683, § 50.

Section 1, as to canal commissioners and inspectors of state prisons. Office of canal commissioners was abolished by Const., art. 5, § 3, and of the inspectors of state prisons by Const., art. 5, § 4, as amended in 1876. Obsolete.

Section 2, part fixing salary of state engineer and surveyor, has been abrogated and superseded by L. 1892, ch. 683, § 60.

Section 2, part fixing salary of auditor of the canal department, was abrogated by L. 1883, ch. 691, § 1, which abolished the office of canal auditor. Section 3 states when act shall take effect.

L. 1877, ch. 27, § 1, part relating to salary of deputy comptroller and abolishing office of second deputy. L. 1880, ch. 316, § 1, fixes the salary of deputy comptroller at a different sum. Section 2 of the same act repeals all laws inconsistent with this act. Part abolishing office of second deputy comptroller obsolete; now provided for in § 31 of Executive Law.

L. 1880, ch. 316.—Fixes the salary of the deputy comptroller at four thousand dollars per annum. Abrogated and superseded by L. 1892, ch. 683, § 31, relating to same subject.

L. 1889, ch. 198.—Consolidated in Executive Law, § 9.

L. 1889, ch. 569, § 1, part authorizing attorney-general to employ deputies, etc. Statute cited authorizes the attorney-general to employ as many deputies, clerks, stenographers and messengers as he may deem necessary and to designate their salaries, the aggregate of all which should not exceed the sum of sixteen thousand dollars. This statute applied only to the attorney-general then in office and for that year or for his term, to enable him to procure a sufficient number of clerks to carry out the provisions of L. 1883, ch. 205. Temporary and obsolete.

L. 1892, ch. 598, § 6, part relating to copyright of Miscellaneous Reports. Consolidated in Executive Law, § 31.

L. 1892, ch. 651, § 8.—Rewritten so as to make reference correct and consolidated in Executive Law, § 43.

L. 1892, ch. 683.—This statute, which is the former Executive Law, is recommended for repeal because its live provisions have been incorporated in the Executive Law.

L. 1893, ch. 248.—Section 1 amended so as to read as follows, as appears in the schedule. Section 2 consolidated in Executive Law, §§ 27, 53, 82, 83. Section 3 is a repealing section. Section 4 states when act takes effect.

L. 1893, ch. 287.—Directs the state engineer and surveyor to make a topographical survey and map of the state and authorizes him to confer and co-operate with the director of the United States geological survey. Act also provides how survey and map are to be done and published, and appropriates money for the expense thereof. Temporary and obsolete.

L. 1894, ch. 88.—Section 1, pt., amended so as to read as follows by L. 1901, ch. 657, § 1, and remainder of section consolidated in §§ 103-106 of Executive Law. Balance of act is special.

L. 1895, ch. 107.—Consolidated in Executive Law, § 1 being made § 28, and § 2 being added to § 21, Executive Law.

L. 1895, ch. 393.—Section 1 consolidated in Executive Law, § 90. Section 2 amended so as to read as follows by L. 1900, ch. 63, § 1. Section 3 repeals inconsistent acts. Section 4, when act takes effect.

L. 1895, ch. 821.—Consolidated in Executive Law, §§ 62, subds. 1, 2; 65.

L. 1896, ch. 466.—Consolidated in Executive Law, § 54.

L. 1897, ch. 208.—Consolidated in Executive Law, § 44.

L. 1897, ch. 411.—Consolidated in Executive Law, § 26, subd. 12.

L. 1898, ch. 583.—Section 1 amended so as to read as follows by L. 1899, ch. 112, § 1. Section 2 fixes the terms of office of all commissioners of deeds who were ap-

Cross-references.

pointed subsequent to January 1, 1896, in cities of not less than three hundred thousand, nor more than five hundred fifty thousand inhabitants, and legalizes and confirms all their official acts. Temporary and obsolete. Section 3 is a saving clause, and § 4 states when act takes effect.

- L. 1899, ch. 112.—Consolidated in Executive Law, § 106.
- L. 1899, ch. 197.—Consolidated in Executive Law, § 26, subd. 15.
- L. 1899, ch. 476.—Consolidated in Executive Law, § 76.
- L. 1900, ch. 63.—Consolidated in Executive Law, § 91.
- L. 1900, ch. 664, § 2.—Consolidated in Executive Law, § 4.
- L. 1900, ch. 737.—Consolidated in Executive Law, § 67.
- L. 1901, ch. 657.—Consolidated in Executive Law, § 102.
- L. 1903, ch. 603.—Consolidated in Executive Law, § 42, subd. 6.
- L. 1904, ch. 26.—Section 1 is amended so as to read as follows by L. 1907, ch. 213, § 1. Section 2 is consolidated in § 26, subd. 16. Section 3 states when act takes effect.
- L. 1904, ch. 179.—Consolidated in Executive Law as § 62, subd. 7.
- L. 1905, ch. 178.—Consolidated in Executive Law, § 101.
- L. 1907, ch. 142.—Consolidated in Executive Law, §§ 107, 108, 109, subd. 1.
- L. 1907, ch. 213.—Consolidated in Executive Law, § 26, subds. 4, 17.
- L. 1907, ch. 359.—Consolidated in Executive Law, § 41.
- L. 1907, ch. 539.—Consolidated in Executive Law, § 8.
- L. 1907, ch. 559, § 1.—Consolidated in Executive Law, § 103.
- L. 1907, ch. 586.—Consolidated in Executive Law, § 71.
- Code Civil Procedure, §§ 54, 57; part relating to duty of secretary of state. Consolidated in Executive Law, §§ 29, 30.
- Code Civil Procedure, § 212 pt., last sentence.—Consolidated in Executive Law, § 31.
- Code Civil Procedure, § 213.—Consolidated in Executive Law, § 32.
- Code Civil Procedure, § 226 pt., second sentence.—Consolidated in Executive Law, § 33.
- Code Civil Procedure, § 233 pt., from words "who must publish" to "in pursuance thereof," inclusive. Consolidated in Executive Law, § 33.
- Code Civil Procedure, § 249 pt., from words "but the copyright" to "people of the state," inclusive. Consolidated in Executive Law, §§ 31, 32.
- Code Civil Procedure, § 2417 pt., last sentence.—Consolidated in Executive Law, § 34.
- Code Civil Procedure, § 3290.—Consolidated in Executive Law, § 84.

EXECUTORS AND ADMINISTRATORS.

Action by or against; Code Civ. Pro. §§ 1814-1836-a. Grant of letters of administration; Code Civ. Pro. §§ 2588-2606. Temporary administration; Code Civ. Pro. §§ 2670-2683. Revocation of letters; Code Civ. Pro. §§ 2596-2601. Ancillary letters; Code Civ. Pro. §§ 2629-2636. Accounting and settlement of estate; Code Civ. Pro. §§ 2719-2742. Disposition of decedent's real property for payment of debts; Code Civ. Pro. §§ 2701-2718. Authority to exchange lands; Real Property Law, § 105. Distribution of personal property; Decedent Estate Law, § 98. Powers and duties generally; Decedent Estate Law, §§ 110-121. See also Decedent Estate Law for validity and construction of wills, descent, distribution, etc. See also Public Administrators.

EXHIBITIONS.

Acrobatic, etc.; Penal Law, §§ 30-34. Injury to works of art deposited in exhibitions; Penal Law, § 1428.

EXPLOSIVES.

Unlawfully keeping or transporting; Penal Law, §§ 1894, 1895. Endangering life by placing; Penal Law, § 1895.

Storage and sale; Labor Law, §§ 230-239-a. These provisions formerly in Insurance Law, but repealed by L. 1915, ch. 4, abolishing state fire marshal's office. Damaging building or vessel, Penal Law, § 1420.

L. 1911, ch. 812.

Farm and industrial colony.

§§ 1, 2.

EXPRESS COMPANIES.

See Transportation Corporations Law; Tax Law; Joint Stock Law; Public Service Commissions Law. Disposition of unclaimed articles; General Business Law, §§ 280-287. Franchise tax; Tax Law, § 184.

EXTORTION.

Definition and punishment; Penal Law, §§ 850-860.

EXTRADITION.

Taking unlawful reward for services in extradition of fugitives; Penal Law, § 1831.

FACTORIES.

Regulations respecting; See Labor Law.

FACTORS.

When deemed true owner of merchandise; Personal Property Law, § 43.

FAIRS.

Appropriations for; Agricultural Law, § 310. State Fair; Agricultural Law, §§ 290-294. Agricultural and Horticultural corporations; Membership Corporations Law, §§ 190-197. Construction of tunnels and bridges by Fair Associations; Membership Corporations Law, §§ 270-273.

FALSE PERSONATION.

See Penal Law, §§ 828-931.

FALSE PRETENSES.

See Penal Law, §§ 932-940.

FARM AND INDUSTRIAL COLONY.

L. 1911, ch. 812.—An act in relation to a farm and industrial colony for tramps and vagrants.

Section 1. **Establishment and purpose.**—A state industrial farm colony is hereby established for the detention, humane discipline, instruction and reformation of male adults committed thereto as tramps or vagrants.

§ 2. **Board of managers; appointments; powers and duties.**—The said colony shall be under the control and management of a board of seven managers to be appointed by the governor by and with the advice and consent of the senate, in accordance with the provisions of section fifty-one of the state charities law. Such managers shall serve without compensation but shall be entitled to their actual and necessary traveling expenses in the performances of their official duties. The governor shall have power to remove any member or members of the said board of managers for cause after an opportunity to be heard. The said board's control of the said colony shall include among other things:

- a. The election of the officers of the said board.
- b. The appointment of a superintendent and such other employees as the said board shall deem proper.
- c. The establishment and alteration of rules and regulations for the

management of the said colony, including the classification, parole, discharge and retaking of inmates, and a system of compensation and credits, by marks or otherwise.

§ 3. **Site; work of inmates.**—The said board of managers shall ascertain whether any lands now owned by the state are suitable for use as a site for the said farm and industrial colony and available therefor. If the said board of managers shall find that any lands now owned by the state are suitable and available for such purpose, the state authorities having charge and control of such lands are hereby authorized, with the approval of the governor, to transfer said lands to the board of managers hereby established, and the said board shall thereupon cause such lands to be made ready for use as a site for such farm and industrial colony. In case no lands now owned by the state are found to be suitable for said farm and industrial colony, the board of managers hereby established shall, with the approval of the governor, select a site therefor of not less than five hundred acres, and may enter into options in behalf of the state for the purchase of such lands at a price not to exceed sixty thousand dollars, and shall make full report thereon to the legislature on or before March first, nineteen hundred and twelve. The said board shall cause to be made by the state engineer and surveyor a map or maps of the lands selected, which shall be certified by a majority of them, and filed in the office of the secretary of state and duplicates thereof in the office of the clerk of the county wherein such lands are located. It shall be the duty of the said board to prepare such site as may be acquired for the use by the said colony, to provide a water supply and a system of drainage therefor, to determine what buildings are necessary to be erected thereon for the proper housing and educational and industrial training of not less than five hundred inmates and to act as a board of managers in the erection of said buildings and in the expenditure of the moneys herein or hereafter appropriated for the purchase and improvement of the said site. In all the work of construction and improvement, the labor of inmates of the said colony shall be employed wherever and so far as practicable.

§ 4. **Commitment; term of detention.**—When the said colony shall be ready to receive any inmates, the said board shall notify the several county clerks of all the counties of the state of that fact. It shall be the duty of the said county clerks immediately on receipt of the said official notification to transmit a copy thereof to each and all of the several courts in their respective counties and to each and all of the several justices of the supreme court and other judges, justices and magistrates, residing or sitting in their respective counties. Thereafter any such court or magistrate may commit to the said colony to be there detained under the provisions of this act any male over the age of twenty-one who shall be adjudged by such court or magistrate to be a vagrant or tramp; but no person shall be so committed who shall satisfy the said court or magistrate that he habit-

ually supports himself through lawful employment. It is the intent and meaning of this act that reputable workmen, temporarily out of work and seeking employment, shall not be deemed tramps or vagrants nor be committed as such to the said colony, nor shall any person be committed to the said colony for any other cause than herein provided. Any person who shall be committed to the said colony shall be detained therein according to this act and not otherwise, anything in the penal law to the contrary notwithstanding. Such commitment shall not be for a definite term, but any such male, at any time after his commitment, may be paroled, or discharged by the said board of managers, and shall not in any case be detained longer than two years and unless he shall since reaching the age of sixteen have been previously committed to a penal institution, he shall not be detained longer than eighteen months. If through oversight or otherwise any male be committed to the said colony for a definite period of time, such commitment shall not for that reason be void, but the person so committed shall be entitled to the benefit and subject to the liabilities of this act, in the same manner and to the same extent as if the commitment had been made according to the terms prescribed by this act.

§ 5. Provisions of code of criminal procedure to be followed.—In the commitment of tramps and vagrants to the state industrial farm colony the provisions of the code of criminal procedure with relation to such classes shall, so far as consistent with the provisions of this act, be observed and followed. Persons committed as vagrants shall be local charges as provided in such code, and those committed as tramps shall be maintained at the expense of the state as at present, but in no event shall any locality be charged a greater amount for the care of vagrants than the actual per capita cost of their maintenance in such state industrial farm colony.

§ 6. Appropriation.—The sum of ten thousand dollars (\$10,000), or so much thereof as may be necessary, is appropriated for the purposes of this act.

FARM BUREAUS.

Organization; See Agriculture; Farms and Markets Law, § 30.

FARM NAMES.

L. 1912, ch. 145.—An act to provide for recording of farm names.

§ 1. Recording.—Any owner of a farm in the state of New York may have the name of his farm, together with a description of the lands to which said name applies recorded in a register kept for that purpose in the office of the county clerk of the county in which said farm is located, and such recorder shall furnish to such landowner a proper certificate setting forth said name and a description of such lands. When any name shall have been recorded as the name of any farm in such county, such name shall not be recorded as the name of any other farm in the same county.

§ 2. Fee.—Any person having the name of his farm recorded as provided in this act shall first pay to the county clerk a fee of one dollar.

§ 3. **Effect of transfer of farm.**—When any owner of a farm, the name of which has been recorded as provided in this act, transfers by deed or otherwise, the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed of conveyance.

§ 4. **Cancellation.**—When any owner of a registered farm desires to cancel the registered name thereof, such owner shall state on the margin of the record of such name in such clerk's office the following, or the same in substance: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person canceling such name and attested by the county clerk. For such latter service the county clerk shall charge a fee of twenty-five cents. Or, such owner may cancel the same by recording in the county clerk's office where such original record is, a paper duly signed and acknowledged as a satisfaction of a mortgage of real property, referring to such original record of name, and directing the clerk to cancel the same; for recording such paper the clerk shall be entitled to the same fee as for recording a satisfaction of mortgage of real property.

FARM PRODUCE.

Sale on commission; **Agricultural Law**, §§ 282-289; **General Business Law**, § 397. Regulation of sale in municipal corporations; **General Municipal Law**, § 81. Repacking regulated, **General Business Law**, § 392. Peddling in villages; **Village Law**, § 91. See **Farms and Markets Law**.

FARMS AND MARKETS LAW.

L. 1917, ch. 802.—An Act in relation to farms and markets, constituting chapter sixty-nine of the consolidated laws. (In effect June 9, 1917.)

[In effect June 9, 1917.]

CHAPTER 69 OF THE CONSOLIDATED LAWS.**THE FARMS AND MARKETS LAW.**

- Article 1. Short title; definitions (§§ 1-3).
2. Department of farms and markets; jurisdiction; general powers and duties (§§ 10-39).
 3. Investigation; practice and procedure; violations; penalties (§§ 50-63).
 4. Departments of markets in cities (§§ 70-88).
 5. Miscellaneous provisions (§§ 100-104).

ARTICLE I.**SHORT TITLE; DEFINITIONS.**

- Section 1. Short title.
2. Definitions.
 3. Matters of public interest.

§ 1. **Short title.**—This chapter shall be known as the farms and markets law.

§ 2. **Definitions.**—When used in this chapter, unless otherwise expressly stated, or unless the context or subject matter otherwise requires:

1. "Department" means the state department of farms and markets;
2. "Council" means the council of farms and markets;
3. "Commissioner" means either the commissioner of agriculture, or the commissioner of foods and markets, or both of them.

4. The terms "food," "foods," and "food products," shall include all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed or compound.

5. The production of foods means the producing of food upon the farm or elsewhere by the tillage of the soil, or other agricultural, horticultural or dairying processes and shall also include the manufacture of foods.

6. "Farm product" means any agricultural, dairy or horticultural product, or any product designed for food manufactured or prepared principally from an agricultural, dairy or horticultural product.

§ 3. **Matters of public interest.**—The production, manufacturing, marketing, storing and distribution of food, and of all the instrumentalities used in the production thereof, including fertilizers, feeding stuffs, materials, apparatus and machinery used or needed in connection therewith, are matters of public interest and proper subjects for investigation, encouragement, development and regulation by the state to secure an abundant supply of pure and wholesome food and to protect the health of the citizens of the state, to secure the exchange of such food and instrumentalities upon a fair basis and at market prices uncontrolled by speculation, and to prevent frauds or other violations of law in the traffic therein, and so far as may be to eliminate waste and loss in distribution.

ARTICLE II.

DEPARTMENT OF FARMS AND MARKETS; JURISDICTION; GENERAL POWERS AND DUTIES.

- Section 10. Department of farms and markets.
11. Council of farms and markets; appointment.
 12. Removal of members of council.
 13. Organization of council; committees.
 14. Meetings of council.
 15. Delegation of powers.
 16. Special duties of president.
 17. Expenses of members of council.
 18. Offices of department.
 19. Seal of department.
 20. Transfer of property, records and appropriations.
 21. Transfer of officers and employees of existing departments.
 22. Commissioner of agriculture; commissioner of foods and markets.
 23. Counsel and secretary.
 24. Oaths of office.
 25. Existing departments of agriculture and of foods and markets.
 26. Bureaus in division.
 27. Officers and employees.
 28. Salaries of commissioners and officers; expenses.
 29. Powers and duties of commissioners.
 30. General powers and duties of department.
 31. Rules of council.
 32. Enactment and publication of rules.
 33. Duties of secretary.
 34. Powers and duties of counsel.
 35. Records, documents and papers of department.
 36. Publication of department bulletins, publications and reports.
 37. Annual reports; reports of investigations and proceedings.
 38. Access to place of business.
 39. Power to administer oaths and compel testimony.

§ 10. **Department of farms and markets.**—There shall be a department of farms and markets, which shall consist of two divisions: the division of

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agriculture and the division of foods and markets. The head of such department shall be the council of farms and markets.

§ 11. **Council of farms and markets; appointment.**—The council of farms and markets shall consist of one member from the state at large, the commissioner of public markets of the city of New York, if any, and one member from each of the judicial districts of the state. All vacancies in the council, either for full or for unexpired terms, shall be so filled that there shall always be in the membership of the council at least one resident of each of the judicial districts.

The governor shall appoint the members of such council to be first appointed hereunder, by and with the advice and consent of the senate, who shall serve for terms of one, two, three, four, five, six, seven, eight, nine and ten years, beginning April first, nineteen hundred and seventeen, to be designated by the governor when such appointments are made. Their successors shall be elected by the legislature in joint session in the second week in February, on or before the fourteenth day of such month, for terms of ten years beginning on April first following their election. Such election shall be in the manner provided by law for the election of regents of the university.

A vacancy in the office of member of such council for a cause other than the expiration of term shall be filled for the unexpired term by an election at the session of the legislature immediately following such vacancy, unless the legislature is in session when such vacancy occurs, in which case the vacancy shall be filled by the legislature during such session.

Reference.—Election of successors of those first appointed by legislature in joint session in the manner provided for the election of Regents of the University, see Education Law, § 41.

§ 12. **Removal of members of council.**—The members of the council may be removed by the senate, on the recommendation of the governor, for misconduct or malversation in office, if a majority of all the members elected to the senate shall concur therein. The proceedings for such removal shall be the same as those prescribed by law for the removal of elective state officers, and the provisions of the public officers law relative thereto shall apply to the removal of members of the council.

Reference.—Removal of state officers by senate, see Public Officers Law, § 32.

§ 13. **Organization of council; committees.**—The council shall elect one of its members as president, and one of its members as vice-president. The president, and in his absence the vice-president, shall preside at all meetings of the council. The council may provide for standing and other committees, to consist of such number of members and to perform such duties as may be prescribed by its rules.

§ 14. **Meetings of council.**—The council shall hold regular meetings

at such times and places as the council may direct, and special meetings when authorized and called as prescribed in the rules of the council.

§ 15. **Delegation of powers.**—The council may, by rule or resolution duly adopted, delegate its powers to, or direct its duties to be performed by, a committee of members of the council, or to or by one or both commissioners, or to or by one or more members of the council acting with either one or both commissioners, or with one or more directors of bureaus.

§ 16. **Special duties of president.**—The president of the council may, when authorized by the council, co-operate with the market authorities of other states, of the federal government, or of foreign countries, for the more ready and beneficial disposition of surplus food products of this state, or the distribution within this state of necessary food products from such other states or countries, when not in contravention of the laws of this state or of the United States. He may also, when authorized by the council, co-operate with such authorities or other agencies in other states in securing uniform and appropriate legislation as to transportation, standardization, grading and marketing of food products.

§ 17. **Expenses of members of council.** Each member of the council shall be paid his necessary traveling and other expenses incurred while in attendance at meetings of the council at Albany or elsewhere, or while otherwise engaged in the performance of his official duties.

§ 18. **Offices of department.**—The principal office of the department shall be in the city of Albany in rooms to be designated by the trustees of public buildings as provided by law. Branch offices shall be established and maintained by the council in such places as the council may determine. The offices shall be supplied with all necessary books, stationery, office equipment and furniture, to be furnished and paid for in the manner provided by law.

§ 19. **Seal of department.**—The department shall have an official seal, to be prepared and furnished by the secretary of state, as provided by law. Such seal shall be used for the authentication of the orders and proceedings of the council and the commissioners and for such other purposes as the council may prescribe.

§ 20. **Transfer of property, records and appropriations.**—The property, records, books, papers and documents of the department of agriculture, of the department of foods and markets, and of the office of the state superintendent of weights and measures, and such of the property, records, books, papers or documents of the department of health as pertain to the powers and duties of such department which are to be exercised and performed by the department of farms and markets under this chapter, shall be delivered and belong to the department of farms and markets. All unexpended balances of appropriations made for the department of agri-

culture, the department of foods and markets and for the state superintendent of weights and measures, for the performance of the duties and the exercise of the powers transferred by this chapter to the department of farms and markets, shall be available for and expended by such department in carrying out the objects and purpose of such appropriations.

References.—As to department of agriculture and powers and duties, see Agricultural Law. Powers and duties of department of foods and markets, see General Business Law, art. 2-a; of superintendent of weights and measures, Id., art. 1. Powers and duties of state department of health as to adulterations, Public Health Law, §§ 40-43, 46-50; as to cold storage, Id., art. 16-a.

§ 21. Transfer of officers and employees of existing departments.—The officers and employees of the department of agriculture and of the department of foods and markets, and the state superintendent of weights and measures and the officers and employees appointed by him, shall, without change of salary, be transferred to the department of farms and markets and continue in office subject to the power of removal or the appointment of their successors as provided in this act. Where existing powers or duties of an officer or employee of the department of health are by this chapter conferred or imposed upon the department of farms and markets, such officers and employees shall, without change of salary, be transferred to the department of farms and markets. The civil service commission may, on request of the council, determine which officers and employees of the department of health shall be so transferred. Services in the departments from which such transfers are made shall be counted as services in the department of farms and markets. The council shall assign the officers and employees so transferred to duties in the department.

§ 22. Commissioner of agriculture; commissioner of foods and markets.—The council of farms and markets shall have the power of appointment of a commissioner of agriculture and a commissioner of foods and markets, who shall be persons qualified by experience and training for the duties of their offices. Each of such commissioners shall hold office during the pleasure of the council.

§ 23. Counsel and secretary.—There shall be a counsel and a secretary of the department to be appointed by the council, each of whom shall serve during the pleasure of the council. The counsel shall be an attorney and counselor at law and shall have been actually engaged in the practice of his profession for a period of at least ten years.

§ 24. Oaths of office.—Each member of the council, the commissioner of agriculture, the commissioner of foods and markets, the counsel and the secretary shall, before entering upon the duties of their offices, take and subscribe the constitutional oath of office. Such oaths shall be filed in the office of the secretary of state.

§ 25. Existing departments of agriculture and of foods and markets.—

The department of agriculture and the department of foods and markets, in existence when this chapter takes effect, are hereby continued as the division of agriculture and the division of foods and markets, respectively, in the department of farms and markets, and the powers and duties of the commissioner of agriculture and of the commissioner of foods and markets and the jurisdiction of the department of agriculture and of the department of foods and markets, under laws in existence when this chapter takes effect, are hereby transferred to and imposed upon the department of farms and markets and shall be assigned to the division of agriculture and division of foods and markets, respectively, as herein provided. The office of the superintendent of weights and measures, in existence when this chapter takes effect, is hereby continued as a bureau in one of the divisions of the department, and the powers, duties and jurisdiction of the superintendent of weights and measures under laws in existence when this chapter takes effect are hereby transferred to and imposed upon the department, to be assigned by the council to the appropriate division.

References.—Department of agriculture created, Agricultural Law, art. 1. Powers and duties of commissioner of agriculture under Agricultural Law, of commissioner of foods and markets under General Business Law, art. 2-a, of superintendent of weights and measures under General Business Law, art. 1, and of department of health as to adulterations of foods and cold storage, under §§ 40-43, 46-50 and art. 16 of the Public Health Law, are to be exercised and the provisions of such laws are to be carried into effect by the department of farms and markets, see § 100, post.

§ 26. Bureaus in divisions.—The council may establish such bureaus in each division as may be necessary for the administration and operation of the department and the proper exercise of its powers and the performance of its duties, under this chapter, and may consolidate or abolish such bureaus, and assign existing bureaus to the appropriate divisions. The council may determine the official functions of the bureaus in each division.

§ 27. Officers and employees.—There shall be in each division such inspectors, chemists, experts, statisticians, accountants and other assistants and employees, as the council shall deem necessary for the exercise of the powers and the performance of the duties of such divisions, under this chapter. There shall be a director of each bureau, who shall be deemed to occupy a confidential position to the council and the commissioner in charge of the division in which such bureau is included, and may therefore be appointed without competitive examination.

The director of each bureau and the officers and employees in each division shall be appointed by the council on the recommendation or nomination of the commissioner in charge of such division.

The council may transfer officers or employees from their positions to other positions in the department, or abolish or consolidate such positions. Each commissioner may, with the approval of the council, remove from office any officer or employee in his division.

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§ 28. **Salaries of commissioners and officers; expenses.**—The annual salaries of the commissioner of agriculture, the commissioner of foods and markets, the counsel and secretary, first appointed under this chapter, shall be fixed by the council, subject to the approval of the governor. The annual salaries of such officers thereafter appointed shall be fixed by the council, within the limits of appropriations made therefor. The salaries and compensation of all other officers and employees of the department shall be fixed by the council, subject to such limitation.

The reasonable and necessary traveling and other expenses of the commissioners, secretary, counsel and other officers and employees of the department, while actually engaged in the performance of their duties, outside of the city of Albany, or if any such officer or employee be in charge of or regularly employed at a branch office of the department, the reasonable and necessary traveling and other expenses outside of the place in which such branch office is located, shall be paid by the state treasurer upon the audit of the comptroller, upon vouchers approved by the president of the council, or by a commissioner when authorized by the council.

§ 29. **Powers and duties of commissioners.**—The commissioner of agriculture shall be the chief executive officer of the division of agriculture and the commissioner of foods and markets shall be the chief executive officer of the division of foods and markets, and subject to the provisions of this chapter and the rules of the council shall be responsible, primarily, for the enforcement and carrying into effect of the laws, rules and orders pertaining to the powers and duties assigned, respectively, to such divisions. They shall within their respective divisions (1) execute and carry into effect the recommendations, orders and directions of the council, (2) formulate, inaugurate and carry out the policies determined upon by the council, and (3) conduct such investigations or inquiries as may be directed by the council, or as may be required under the provisions of this chapter and the rules of the council.

The council shall assign the work of the department to such divisions and determine the powers to be exercised and the duties to be performed by each division.

§ 30. **General powers and duties of department.**—The department through the council and the appropriate divisions shall have power to:

1. Execute and carry into effect the laws of the state and the rules of the council, relative to agriculture, horticulture, farm and dairy products, and the production, transportation, storage, marketing and distribution of food; enforce and carry into effect the provisions of the laws of the state relative to weights and measures.

2. Aid in the promotion and development of the agricultural resources of the state and the improvement of the conditions of rural life; the improvement of the fertility and productiveness of farm lands and the restoration to fertility and productiveness of unoccupied and unproductive

land; the settlement of farms and the supply of farm labor; the stocking of farms with meat-producing and dairy animals and promoting the production of cereals, fruits and vegetables, and co-operate with county farm bureaus, and with the agricultural, dairying and horticultural associations or corporations and other agencies of the state, organized for any or all of such purposes.

3. Investigate the cost of food production and marketing in all its phases.

4. Investigate the sources of food supply for the state, the production, transportation, storage, marketing and distribution of food sold, offered for sale, stored or held within the state, the cost of transportation to the leading centers of population and of distribution to consumers.

5. Collect and disseminate accurate data and statistics as to the food produced, stored or held within the state, the quantities available from time to time and the location thereof, and so far as practicable and available collect such like statistics from without the state, as are of value to producers and consumers within the state.

6. Investigate and recommend useful methods of co-operative production, marketing and distribution of foods within the state and recommend to the legislature such remedial legislation as in the judgment of the council is required by the public interests for the control and supervision thereof.

7. Aid in the organization and operation of co-operative associations and corporations among producers and consumers for the purpose of securing more direct business relations and of facilitating exchange between them, and also aid in and, on terms prescribed by the council, sanction the organization and operation of co-operative associations, corporations or other agencies for the purpose of increasing the production, improving the quality, grading and bringing together of farm products for wholesale marketing.

8. Co-operate with and aid farmers and other producers of food, and distributors and consumers thereof, in improving and maintaining economic and efficient systems of production, storage, distribution and marketing, and in reaching advantageous markets.

9. Acquire and disseminate accurate information as to market prices of food products in the markets of the state and any other markets, when in the judgment of the council such information will be valuable to the producers or consumers of the state.

10. Acquire and publish useful information to facilitate transportation, to avoid delays therein and upon request advise shippers or purchasers as to the most direct and expeditious route of shipment to market.

11. Co-operate with the public service commissions with the view of obtaining suitable, expeditious and economical facilities for the shipment of food, and recommend as to the action to be taken by such commissions to avoid and prevent unfair discrimination in such shipment and unreason-

able delay in the transportation thereof, and to obtain fair and reasonable rates for such transportation.

12. Investigate delays in transportation, and in case food is likely to spoil for lack of a ready market, take such action as seems advisable for facilitating the sale thereof.

13. Investigate and report to the legislature what, if any, further remedial legislation is necessary to prevent restraint of trade or unlawful combinations to fix prices or modification of existing laws as to such restraint of trade or combinations.

14. Investigate as to the needs of terminal, dock and other distributing facilities for the delivery and distribution of foods at the centers of population, and the establishment and operation of co-operative or public abattoirs for the slaughter of animals and poultry for food purposes; and advise and co-operate with corporations and municipalities or other agencies to promote their establishment, construction or acquisition for the public use and make recommendations as to the conduct thereof, and when necessary recommend to the legislature the enactment of remedial or enabling legislation therefor.

15. Advise and co-operate in establishing local markets, and warehouses for assembling, grading, packing and storing food or farm products, whenever in the judgment of the council the public interests require such establishment.

16. Co-operate with producers in the conduct of experiments and disseminate information as to producing, assembling, grading, packing, distributing and selling farm products, so as to demonstrate economic and efficient methods, and to standardize the grades of such products and determine the cost of such production, assembling, grading, packing, distribution and sale.

17. Investigate and report to the legislature what plan in the judgment of the council should be established by law for the purpose of securing an ample supply of pure milk in centers of population upon an economic basis of distribution and to aid in the accomplishment of such purpose within the provisions of existing law.

18. Ascertain the names and addresses of producers, manufacturers, importers and distributors of food, the kind of food produced, manufactured, imported or distributed by such persons, and to publish the same whenever in the judgment of the council public interests require or, upon request, when in the public interest, supply lists of such persons.

19. Make such recommendations as in the judgment of the council will stimulate and increase the production of food and co-operate with public or private agencies for that purpose.

20. Act as mediator or arbitrator, when jointly invited, in any controversy or issue that may arise between producers and distributors of food.

21. Investigate, when deemed advisable, the conduct and methods of

exchanges and boards of trade within the state for the purchase and sale of food, and make recommendations to the legislature in relation thereto.

22. Collect and publish data concerning the purity, wholesomeness, economic value and the nutritious and hygienic properties of food produced, sold or available for sale within the state, and for such purpose to take, examine and analyze samples of such food.

23. Investigate, when deemed advisable, as to deceptions in the quality, quantity or character of foods produced, stored, sold or offered for sale within the state, including the use of dyes and coloring matter; and if any such deceptions constitute criminal violations, cause the necessary prosecutions to be instituted.

24. Co-operate with local health departments and departments of markets in preventing the production, manufacture, sale or offering for sale of fraudulent, deleterious or unwholesome food.

25. Investigate and take action to prevent illegal acts or practice in the sale or distribution of food or of fertilizers, feeding stuffs, materials, apparatus and machinery or other instrumentalities used or needed for the production, marketing or distribution of food, and when necessary recommend the enactment of remedial legislation to prevent unfair acts or practices.

§ 31. **Rules of council.** Subject and in conformity to the constitution and laws of the state, the council may enact, amend and repeal necessary rules which shall

1. Regulate and control the transaction of business by the council and the department, provide for the exercise of the powers and the performance of the duties of the department, the council and the commissioners, and prescribe the powers and duties of the divisions of the department, the bureaus of such divisions and of the directors and other officers and employees thereof;

2. Provide for carrying into effect the provisions of this chapter and of the laws of the state in respect of food and food traffic;

3. Regulate the conduct of investigations, inquiries and hearings authorized by this chapter and prescribe necessary forms and notices;

4. Provide generally for the exercise of the powers and performance of the duties of the department as prescribed in this chapter and the laws of the state and for the enforcement of its provisions and the provisions of the rules enacted as herein provided.

§ 32. **Enactment and publication of rules.**—At least six affirmative votes shall be necessary for the adoption, amendment or repeal of a rule, and every rule or amendment or repeal of a rule shall be promptly published in the bulletins of the department and in the state paper. Every such rule, amendment or repeal shall, unless otherwise prescribed by the council, take effect twenty days after publication in the state paper, and shall be certified by the secretary of the department and filed with the secretary of state.

§ 33. **Duties of secretary.**—The secretary of the department shall perform such duties in connection with the meetings of the council and the investigations and hearings conducted by it or under its authority, and the preparation of rules under the provisions of this chapter, as the council may prescribe. Under the direction of the president of the council he shall have general charge of the offices of the department, superintend its clerical business and perform such other duties as the council may prescribe.

§ 34. **Powers and duties of counsel.**—The counsel of the department shall represent and appear for the department, the council or a committee thereof, and a commissioner, in all actions and proceedings involving any question under this chapter or within the jurisdiction of the department under any general or special law or under or in reference to any act, order or proceeding of or before the council, a committee thereof, or a commissioner, and shall, when directed, intervene, if possible, in behalf of the department, the council, a committee thereof or a commissioner, in any action or proceeding involving or relating to any matter within the jurisdiction of powers of the department as herein prescribed. He shall act as counsel for the council, a committee thereof or any officer of the department in the conduct of a hearing, investigation or inquiry instituted under authority of the council or as provided in this chapter. He shall advise the council, a committee thereof, or a commissioner or any officer of the department, when so requested, in regard to all matters in connection with their powers and duties, and perform generally all duties and services as counsel of the department which may reasonably be required of him.

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§ 35. **Records, documents and papers of department.**—All proceedings, documents, papers and records filed or deposited with the department relating to matters within its jurisdiction and powers shall be public records; except such portions thereof as are received and accepted by the council, a committee thereof or a commissioner, as being of a confidential nature which when so received and accepted shall not be subject to subpoena. Copies of all official documents and orders so filed or deposited, certified by the secretary under the seal of the department to be true copies of the originals, shall be evidence in like manner as the originals.

§ 36. **Publication of department bulletins, publications and reports.**—There may be published by the department from time to time bulletins or other publications and reports containing accurate data, statistics and information.

1. As to agriculture, agricultural production, agricultural labor and the agricultural conditions of the state, and the development and improvement thereof, with a view of increasing farm production and values;

2. As to the sources, supply and prices of food, their storage and ac-

cumulation at different places, and the quantities and location of the available supply thereof;

3. As to the market prices of foods;

4. As to facilities afforded for transportation, marketing and distribution of foods within the state;

5. As to matters pertaining generally to the production of foods, the actual food value of articles used as foods, and the sale and distribution thereof to the consumers, which in the opinion of the council will prove valuable or of interest to the public;

6. As to investigations, hearings and inquiries conducted as provided in this chapter, the conclusions reached as to the matters involved therein, and the orders and recommendations made as a result thereof.

7. As to any other matter which the council deems proper.

Such bulletins, publications and reports and the information contained therein shall be published and distributed in the manner deemed best by the council for the dissemination of knowledge as to the agricultural and dairy interests of the state and the production, sale, purchase, storage, marketing and distribution of foods, and the economic and food value of articles used as food. The cost of publishing such bulletins, publications and reports shall be paid in the same manner as other expenses of the department out of appropriations made therefor, copies of the bulletins, publication and reports of the department may be sold to the public at the estimated cost thereof, in accordance with a schedule of charges which the council is hereby authorized to adopt.

§ 37. **Annual reports; reports of investigations and proceedings.**—The council shall cause to be prepared and submitted to the legislature each year, a report of the transactions of the department, including such part of the acts and proceedings of the council as it deems advisable to include therein, together with such information, data and statistics in the possession of the department, as the council shall deem of value to the legislature and the people of the state. Such report shall contain a general review of the work of the department and of the divisions thereof, and abstracts of investigations and hearings and copies of decisions and orders rendered or issued by the council, a committee thereof, or a commissioner. Each commissioner shall report to the council annually, and at such other times as the council may prescribe, as to the proceedings and work of his division, and all of such reports, or such portions thereof as the council may designate, shall be included in the report of the department to the legislature.

Such report to the legislature shall also contain a statement in detail of the expenditures of moneys appropriated for the state fair commission, the New York State Agricultural Society, agricultural societies for the promotion of agriculture under article twenty-five of this chapter and the New York state agricultural experiment station and other agricultural purposes.

L. 1917, ch. 802. Department of farms and markets; powers. §§ 38, 39.

The council may require the State Agricultural Society and all other agricultural societies receiving money from the state to make reports to it, and may prescribe the form of such reports.

References.—Publication of reports as legislative documents, State Printing Law, § 5. Report of commissioner of agriculture, Agricultural Law, § 5; of commissioner of foods and markets, General Business Law, § 20-a, subd. 6. The last paragraph is substantially the same as the last part of Agricultural Law, § 5.

§ 38. **Access to place of business.**—The members of the council, the commissioners, and the directors, counsel, experts, chemists, agents and other officers and employees of the department shall have full access to all places of business, factories, farms, buildings, carriages, cars and vessels used in the production, manufacture, storage, sale or transportation within the state of any dairy products or any imitation thereof, or of any article or produce with respect of which any authority is conferred by this chapter on the department. They may examine and open any package or container of any kind containing or believed to contain any article or product, which may be manufactured, sold or exposed for sale in violation of the provisions of this chapter, or of the rules of the council, and may inspect the contents therein, and take therefrom samples for analysis.

Reference.—For similar provision as to commissioner of agriculture and officers of department of agriculture, see Agricultural Law, § 3.

§ 39. **Power to administer oaths and compel testimony.**—A member of the council, a commissioner, the secretary or counsel of the department, or any other officer or employee duly authorized by the council, may administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the commission under this chapter. The council or a committee, or a commissioner, may subpoena and require the attendance of witnesses and the production of books, papers and documents pertaining to the investigations and inquiries which such council, committee or commissioner is authorized to conduct, and examine them in relation to any matter to be investigated by them and issue commissions for the examination of witnesses who are out of the state or unable to attend before the commission or excused from attendance.

Any person who shall testify falsely as to any material matter pending in an investigation or proceeding under this chapter shall be guilty of and punishable for perjury. An officer who serves the subpoenas issued as above provided and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil actions in courts of record.

Reference.—For similar provision as to commissioner of agriculture and officers of department of agriculture, see Agricultural Law, § 3.

ARTICLE 3.

INVESTIGATIONS; PRACTICE AND PROCEDURE; VIOLATIONS; PENALTIES.**Section 50. Investigations and proceedings.**

51. Immunity of witnesses.
52. Practice on hearings; attendance and examination of witnesses.
53. Proceedings in court.
54. Orders and service thereof.
55. Review of rules or orders by commission.
56. Review by court.
57. When injunction may be obtained.
58. Penalties for violation of chapter.
59. Penalty for violation of rules or orders.
60. Violation of chapter or rule a misdemeanor.
61. Act of officer or agent deemed act of principal.
62. Prosecution for penalties.
63. Disposal of fines and moneys recovered.

§ 50. **Investigations and proceedings.**—1. The council, a committee thereof, a commissioner, or any officer of the department when authorized by the council, may investigate and report as to all matters within or pertaining to the powers and jurisdiction of the department, and for the purposes of carrying into effect the provisions of this chapter or of any other law relative to matters within its jurisdiction and the rules of the council.

2. Proceedings may be instituted before the council against a corporation, association or person upon the written complaint of any person or corporation aggrieved complaining of practices in the production, sale, transportation, purchase, storage, marketing and distribution of foods, in violation of any provision of law or the rules of the council or of the terms of an order issued pursuant to law by the council, a committee thereof or a commissioner, under the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, or the rules of the council, made in conformity therewith.

3. Upon the presentation of such complaint the council may cause inquiries to be made as to the matters alleged therein and if such complaint appears to present a sufficient cause for investigation a copy of such complaint shall be forwarded to the person, association or corporation complained of and answer may be made thereto in accordance with the rules of the council.

4. The council shall thereupon cause the charges presented by such complaint to be investigated as herein provided, and such action shall be taken as the facts justify and as may be authorized by law.

§ 51. **Immunity of witnesses.**—No person shall be excused from testifying or from producing any books or papers in any investigation, hearing or inquiry, conducted pursuant to this chapter or the rules of the council, when directed to do so by the officer presiding at such investigation, hearing

or inquiry, upon the ground that the testimony or evidence, books or documents, required of him may tend to incriminate him or subject him to penalty or forfeiture; but no person shall be prosecuted, punished or subjected to penalty or forfeiture, for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence and no testimony so given or produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony.

§ 52. Practice on hearings; attendance and examination of witnesses.—

1. The practice on all investigations and hearings conducted or instituted as provided in this chapter shall be governed by the rules of the council, and in all such hearings or investigations where testimony is taken, the council, a committee thereof, commissioner, or other officer conducting the same, shall not be bound by the technical rules of evidence.

2. All subpoenas shall be signed and issued by the secretary of the department and may be served by any person of full age. The fees of witnesses shall be audited and paid in the same manner as other expenses of the department. Whenever a subpoena is issued at the instance of a complainant, respondent or other party to the proceeding, the cost of the service thereof and the fees of the witnesses shall be borne by the party at whose instance the witness is subpoenaed. A subpoena issued as herein provided shall be served in the same manner as a subpoena issued out of a court of record.

3. If a person subpoenaed to attend before the council, a committee thereof, a commissioner or other officer of the department, fails to obey the command of such subpoena, without reasonable cause, or if a person in attendance upon an investigation or hearing shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer or officers conducting such investigation or hearing, or to subscribe and swear to his deposition after it has been correctly reduced to writing, if required so to do, he shall be guilty of a misdemeanor and may be prosecuted therefor in any court of competent criminal jurisdiction.

4. If a person in attendance upon an investigation or hearing refuses without reasonable cause to be examined or to answer a legal and pertinent question or produce a book or paper, when ordered so to do by the officer or officers conducting such investigation or hearing, the council, a committee thereof or a commissioner may apply to any justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail; upon the return of such

order the justice before whom the matter shall come on for hearing shall examine under oath such person whose testimony may be relevant, and such person shall be given an opportunity to be heard; and if the justice determine that such person has refused without reasonable cause or legal excuse to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

§ 53. **Proceedings in court.**—If it appear after an investigation or hearing conducted as herein provided that any person, association or corporation is guilty of a violation of the provisions of this chapter or of any other act the enforcement of which is within the jurisdiction of the department, an action or proceeding may be instituted in a court of competent jurisdiction by the council, or a commissioner when authorized by the council, to recover a penalty for such violation or to compel a compliance with such provisions, or prevent a continuance of such violations.

§ 54. **Orders and service thereof.**—1. If it be ascertained after an investigation or hearing conducted as herein provided, that any person, association or corporation has failed to comply with or is guilty of a violation of the provisions of this chapter or of a rule of the council, or of any other general or special law relative to any matter within the jurisdiction of the department, an order may be executed by the council, a committee thereof, or a commissioner if authorized by the council, under the seal of the department, compelling a compliance with such law or rule.

2. Every such order shall be served upon every person, association or corporation affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof with postage prepaid to the person affected thereby, or in case of a corporation or association, to an officer or agent thereof, upon whom a summons may be served in accordance with the provisions of the code of civil procedure.

3. It shall be the duty of the person, association or corporation upon whom such order is so served to notify the commission forthwith, in writing, of the receipt of such order, and in the case of an association or corporation such notification must be signed and acknowledged by a person or officer duly authorized by such association or corporation to admit service. Within a time specified in the order, every person, association or corporation upon whom it is served must, if so required in the order, notify the department in like manner whether the terms of the order are accepted and will be obeyed.

4. Every such order shall take effect at a time therein specified, and shall continue in force either for a period to be designated therein or until changed or abrogated by the council.

* 4. If such hearing is held before a committee of the council or a commissioner, a report shall be made upon the termination of the hearing to the council, with recommendation as to the determination which should be made as to issues raised on such hearing. If the council find upon such report or upon a hearing conducted by it, that the rule or order complained of is reasonable and valid it shall render its decision ratifying or confirming such rule or order; if it find that such rule or order is unreasonable or invalid, it shall revoke or modify it, or substitute a new rule or order in its place. If such modified or new rule or order is substantially different from the rule or order complained of, the parties affected thereby may bring before the council, by a new petition, in the manner above provided, objections to its reasonableness or validity.

5. The decision of the council shall be final, unless within thirty days after its issuance one of the parties shall institute a proceeding for the review thereof, as provided in the next section.

§ 55. Review of rules or orders by commission.—1. Any person, association or corporation claiming to be adversely affected by a rule or order of the council, a committee thereof or a commissioner enacted or executed under this chapter may, at any time, apply to the department by verified petition for a review of the reasonableness or validity of such rule or order.

2. Such petition shall be filed with the department and shall set forth in detail: (a) the rule or order upon which the hearing is desired and in what respects it is claimed to be unreasonable or invalid, and (b) the issues to be considered on the hearing.

3. The council shall, if necessary to determine the issues raised, direct that a hearing be had before the council, a committee thereof or a commissioner. If in the opinion of the council the issues have been considered adequately in a prior proceeding under this chapter, the council may confirm the previous determination, without a hearing. The council may direct that all petitioners alleging the unreasonableness or invalidity of the same or substantially similar rules or orders be joined in one proceeding. Notice of the time and place of hearing shall be given to the petitioners and to such other persons as are found to be interested directly in the issues to be determined upon the hearing.

§ 56. Review by court.—Any person affected by a decision of the council rendered as provided in the preceding section may institute a proceeding for the review thereof in the supreme court of the county of Albany or any county in which the council shall have established a branch office. Such proceeding shall be instituted against the council as respondent by petition and one such notice as the court may prescribe. If reasonable grounds are shown for a review of such decision, the court shall direct that within a specified time a return be filed with the clerk of the court, containing a certified copy of the testimony taken upon the hearing before

* So in original.

the council, together with copies of all papers, documents and records used therein. If the decision sought to be reviewed is one refusing a hearing on the ground that the issues have been determined in a prior proceeding, such return shall include a certified copy of the records of such prior proceeding. The court may of its own motion or upon motion of a party suspend the rule or order sought to be reviewed during the pendency of the review, and unless so suspended the rule or order shall remain in full force and effect.

The court shall thereupon determine the issues raised from the return so made and it may, where questions of fact arise which were not raised or disposed of upon the hearing, take additional evidence as to the matters involved in the proceeding. The court may refer any issue arising in such proceeding to the council for further consideration. At any time during such proceeding the party applying for a review of the council's decision may apply to the court, without notice, for an order directing all questions of fact arising upon one or more specified issues, to be tried and determined by a jury, and the court shall thereupon cause such questions to be plainly stated for trial, and the findings of the jury upon such questions shall be conclusive in the proceeding.

A proceeding instituted as provided in this section shall have precedence over other actions and proceedings in the same court in accordance with the provisions of subdivision one of section seven hundred and ninety-one of the code of civil procedure.

Appeals from the supreme court to the appellate division of the supreme court and to the court of appeals may be taken in such cases and subject to the same limitations as in other cases.

§ 57. When injunction may be obtained.—In an action in the supreme court for the recovery of a penalty or forfeiture incurred for the violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the council, an application may be made on the part of the people to the court or any justice thereof for an injunction to restrain the defendant, his agents and employees from the further violation of such provisions. The court or justice to whom such application is made, shall grant such injunction on proof, by affidavit, that the defendant has been guilty of the violations alleged in the complaint, or of a violation of any such provision subsequent to the commencement of the action, and in the same manner as injunctions are usually granted under the rules and practice of the court. No security on the part of the plaintiff shall be required, and costs of the application may be granted or refused in the discretion of the court or justice. If the plaintiff shall recover judgment in the action for any penalty or forfeiture demanded in the complaint, the judgment shall contain a permanent injunction, restraining the defendant, his agents and employees from any further violation of such provision of this chapter or of any other law the

enforcement of which is within the jurisdiction of the department or of the rules of the council. Any injunction, order or judgment obtained under this section may be served on the defendant by posting the same upon the outer door of the defendant's usual place of business, or where such violation was or is committed, or in the manner required by the code of civil procedure, and the rules and practice of the court. Personal service of the injunction shall not be necessary when such service cannot be secured with reasonable diligence, but the service herein provided shall be deemed sufficient in any proceeding for the violation of such injunction.

Reference.—This section supersedes Agricultural Law, § 10, and extends the powers granted to the enforcement of any of the laws which are within the jurisdiction of the department of farms and markets.

§ 58. Penalties for violation of chapter or other laws.—Every person violating any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department shall, except where other penalties are herein prescribed, be subject to a penalty, to be recovered as provided herein, in the sum of not less than twenty-five dollars nor more than one hundred dollars for the first violation, nor more than two hundred dollars for the second and each subsequent violation. When such violation consists of the manufacture or production of any prohibited article, each day during which or any part of which such manufacture or production is carried on or continued, shall be deemed a separate violation. When the violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation, and each day on which any such article or substance is offered or exposed for sale or exchange shall constitute a separate violation. If the sale be of milk and it be in cans, bottles or containers of any kind and if the milk in any one of such containers be adulterated, it shall be deemed a violation whether such vendor be selling all the milk in all of his containers to one person or not. When the use of any such article or substance is prohibited, each day during which or any part of which such article or substance is so used or furnished for use, shall constitute a separate violation, and the furnishing of the same for use to each person to whom the same may be furnished shall constitute a separate violation. A right of action for the recovery of, or a liability for, penalties incurred as provided in this chapter, or in any other law, the enforcement of which is within the jurisdiction of the department, may be settled or compromised under rules prescribed by the council, either before or after proceedings are brought to recover such penalties, and prior to the entry of judgment therefor.

Reference.—This section supersedes in effect Agricultural Law, § 52. The penalties prescribed apply to violations of Agricultural Law and of all laws the enforcement of which is within the jurisdiction of the department of farms and markets. The last sentence of this section is new.

§ 59. **Penalty for violation of rule or order.**—Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, so long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order, of the council, a committee thereof, or a commissioner, or who shall violate any rule of the council shall be subject to a penalty not exceeding the sum of two hundred dollars for each and every offense. Every violation of such order, or of the rules of the council, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

Reference.—This section only applies to violations of rules and orders of the council and was adapted from the first part of Agricultural Law, § 52.

§ 60. **Violation of chapter or rule a misdemeanor.**—A person who by himself or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, or of any lawful rule of the council is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense.

Reference.—This section supersedes that part of Agricultural Law, § 52 as applies to punishments of violations of the Agricultural Law, and is extended to cover all violations of laws, the enforcement of which is within the jurisdiction of the department of farms and markets.

§ 61. **Act of officer or agent deemed act of principal.**—In construing and enforcing the provisions of this chapter relating to penalties, the act of a director, officer, agent or other person acting for or employed by a person, association or corporation subject to the provisions of this chapter and acting within the scope of his employment, shall be deemed the act of such person, association or corporation.

§ 62. **Prosecution for penalties.**—1. Whenever the council or a commissioner shall know or have reason to believe that any penalty has been incurred by any person for a violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the commission, or that any sum has been forfeited by reason of any such violation, the council may cause an action or proceeding to be brought in the name of the people for the recovery of the same. Such action may be brought in the county where the violation, or any part thereof, occurred.

2. In an action for a penalty or forfeiture incurred by reason of the violation of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules

of the council, when the complaint charges a violation of any two or more of such provisions, the plaintiff shall not be compelled to elect between the counts under such different provisions but shall be entitled to recover if it is found that a violation of any of such provisions has been committed for which a penalty or forfeiture is imposed.

3. If the defendant in such an action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of a rule or order of the council, the defendant was actually and in good faith prosecuting a suit, action or proceeding before the department or in the courts to set aside such rule or order, the court shall remit the penalties or forfeitures incurred during the pendency of such action or proceeding.

References.—Subdivision 1 supersedes Agricultural Law, § 8; subdivision 2 supersedes Agricultural Law, § 11. Subdivision 3 is new. The section relates to penalties incurred under the Agricultural Law and of every other law "the enforcement of which is within the jurisdiction of the department."

§ 63. Disposal of fines and moneys recovered.—All moneys recovered, either as penalties, forfeitures or otherwise, for the violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the council, and from fines imposed as a punishment for any criminal offense committed in violation of the provisions of this chapter or of such law or rules, or of the penal law relating to the punishment of criminal offenses committed in violation of the provisions of law for the prevention of frauds in the manufacture or sale of any of the articles or products to which this chapter relates, shall be paid into the treasury of the state. The same disposal shall be made of all moneys recovered upon any bond given by any officer by virtue of the provisions of this chapter.

Reference.—Supersedes in effect the provisions of Agricultural Law, § 9.

ARTICLE 4.

DEPARTMENTS OF MARKETS IN CITIES.

Section 70. Definitions.

71. Establishment of department of markets.

72. Jurisdiction.

73. Seal.

74. Transfer of functions, powers and duties.

75. Transfer of officers and employees.

76. Transfer of property, records and appropriations.

77. Transfer of markets.

78. Dedication or acquisition of land for public markets.

79. Rules.

80. When rules to take effect; punishment for violation.

81. Renting of stalls and stands.

82. Inspection of food.

83. Acting as auctioneer without license prohibited; penalty.

- 84. License of auctioneers.
- 85. Suspension or revocation of license of auctioneer.
- 86. Disposition of consignment of food.
- 87. Bureau of information.
- 88. Limitation of article.

§ 70. Definitions.—As used in this article,

1. The term “market” means any building, structure or place, the property of a city or under lease to or in the possession of a city, used or intended to be used as a public market for the buying, selling or keeping for sale of food products, flowers or ornamental plants, or any part of a street, avenue, parkway, plaza, square or other public place assigned to or set apart by law or ordinance or other competent authority to be used for such purpose;

2. The term “market produce,” includes food, flowers and ornamental plants.

§ 71. Establishment of department of markets.—A department of markets may be established in a city under the provisions of this article, by resolution of the board of estimate and apportionment of the city, if there be such board, approved by the common council, board of aldermen or corresponding legislative body, or in a city having no such board of estimate and apportionment, by resolution of the common council, board of aldermen or corresponding legislative body of such city. Such department shall be under the control and management of a commissioner of public markets. He shall be appointed by and may be removed at the pleasure of the mayor of such city, and his compensation shall be fixed by the local authorities, if any, of such city, vested by law with the general power of fixing salaries therein, or if there be no such authorities, by the common council, board of aldermen or corresponding legislative body of the city.

§ 72. Jurisdiction.—Upon the appointment of a commissioner of public markets in any city, the department of public markets therein shall have power, charge and control

1. Of the construction, repair, maintenance and management of all public markets, market places and market lands of such city, and of all buildings, structures and facilities thereon;

2. Of fixing fees for services, licenses and privileges and of renting space therein and entering into leases therefor, except as herein otherwise provided;

3. Of making rules for the government of the department and of the public markets, market places and market lands not in conflict with the rules of the council of farms and markets, and subject to the approval of the board of estimate of the city, or if there be no such board, of the common council, board of aldermen or other corresponding legislative body of such city;

4. Of granting or revoking licenses to auctioneers of food in such

markets and fixing a schedule of commissions to be charged by auctioneers;

5. Of granting, transferring or revoking permits to buy or sell in such market or upon such market places or lands;

6. Of investigating any complaint in relation to the shipment of food to any public market of the city.

§ 73. **Seal.**—A department of public markets established in a city, pursuant to this article, may adopt a seal of which the courts of the state shall take judicial notice.

§ 74. **Transfer of functions, powers and duties.**—All the functions, powers and duties in respect of the management and control of public markets in a city which shall establish a department of markets, pursuant to this article, now vested in and imposed on other departments, boards, commissions or officers of such city by any general law, city charter, or other law or ordinance, shall be transferred to, vested in and be performed by the department of public markets of such city.

§ 75. **Transfer of officers and employees.**—Where existing powers and duties of a department, office, division, bureau, position or employment, or officer or employee of a city, are by this article conferred or imposed upon the department of public markets, the board of estimate and apportionment of such city, or if there be no such board, the common council, board of aldermen or corresponding legislative body, shall, upon the establishment of the department of public markets designate from among the officers and employees exercising such powers and duties at the time of the appointment of the commissioner of public markets, the officers and employees to be transferred to the department of public markets. Such officers and employees shall be transferred, without change of salary, and shall be assigned to duty by the commissioner of public markets. Service in the department, office, division, bureau, position or employment from which transferred shall for all purposes be counted as services in the department of public markets.

§ 76. **Transfer of property, records and appropriations.**—Where existing powers or duties of a department, office, division, bureau, position or employment, or officer or employee of a city are, by this article, conferred or imposed upon the department of public markets, or transferred to the department of public markets, all property, and such records, books, papers and documents relating to markets as the board of estimate and apportionment, or if there be no such board, as the common council, board of aldermen or other corresponding legislative body, shall from time to time determine, within the jurisdiction or control of the department, office, division, bureau, position or employment, or officer or employee now exercising such powers and duties, shall after the establishment of the department of public markets be transferred and delivered to and belong to the department of public markets. Upon the establishment of a department of public markets in a city, the board of estimate and apportionment, or if there be no such

board, the common council, board of aldermen or other corresponding legislative body, may, in its discretion, transfer all or part of existing funds and unexpended appropriations made by the city to enable the department, office, division, bureau, officer or employee to exercise the powers and duties so transferred.

§ 77. **Transfers of markets.**—All public markets, market places and market lands, existing and maintained as such by any city at the time of the creation therein of a department of public markets under this article, shall continue to be public markets and shall be transferred to the jurisdiction, charge and control of the department of public markets.

§ 78. **Dedication or acquisition of land for public markets.**—The local authorities of a city in which a department of public markets shall be created under the provisions of this article, in whom is vested the power to assign lands of such city for public uses, may designate for use as public markets any lands owned by the city and not dedicated or devoted to another inconsistent use; or any space over the waters of a navigable stream adjoining any dock or wharf of such city, provided such markets shall not interfere with the flow of water of such stream or extend beyond the pier or bulk head line established by law. Any such city may, with the approval of such local authorities and in such manner as may be authorized or provided by law for the acquisition of land for public purposes in such city, acquire land in such city for public market purposes, or if there be no law authorizing such acquisition, the board of estimate and apportionment of such city, or if there be no such board, the common council, board of aldermen or corresponding legislative body, may acquire land for such purpose by private purchase or by condemnation.

§ 78-a. **State aid for public markets.** (1) The commissioner of public markets of a city, in which a department of markets shall have been heretofore or shall hereafter be established as provided in this article, may when authorized by the city submit to the council of farms and markets a proposal for the location and construction, repair or improvement of one or more public markets in such city with storage facilities for such market or markets and request that state aid be given for such purpose as provided in this section.

(2) The commissioner of public markets of such city shall submit such proposal by petition, in the form and manner prescribed by the council of farms and markets. Such petition shall (a) give the location and describe in detail the lands owned by the city and dedicated or assigned for use as public markets, or lands to be acquired for such use, as provided by section seventy-eight of this article, upon which it is proposed to construct new public markets or to repair or improve existing public markets in such city; (b) describe the character of the proposed construction, repair or improvement; (c) state the estimated value of the lands dedicated or assigned, or to be acquired for use as public markets, and the estimated cost

of the proposed construction, repair or improvement; (d) specify generally the public necessity for the acquisition of the lands described for public market purposes and for the construction of new public markets on such lands, and for the construction, repair or improvement of public markets on lands already owned by the city and dedicated or assigned for use as public markets, and (e) set forth such other matters as may be required by the council of farms and markets. The commissioner of public markets of such city shall submit with such petition detailed plans and specifications for the construction of the proposed new public market or markets, or for the repair or improvement of one or more existing public markets in such city.

(3) Upon the submission of such petition and plans and specifications, the council of farms and markets shall cause an investigation to be made of the matters submitted in such petition, and shall determine as to whether or not a public necessity exists for the acquisition of lands and the construction, repair or improvement of public markets in such city. The council shall visit and inspect the locations of the lands proposed to be acquired or already acquired and dedicated or assigned for use as public markets, and shall determine as to the suitability of such lands for public market purposes and as to the propriety of constructing, repairing or improving public markets thereon. The council shall also examine the plans and specifications for the proposed construction, repair or improvement of such public markets, and determine whether such public markets should be constructed, repaired or improved in accordance with such plans and specifications. The council may recommend such modifications or alterations of such plans and specifications as it may deem advisable and return the same to the commissioner of public markets of such city.

(4) If the council approve the location of the proposed new public markets and the plans and specifications of the public markets to be erected thereon, or in the case of existing public markets, if the council approve of the proposed repair or improvement and of the plans and specifications therefor, it shall issue a certificate of such fact to the commissioner of public markets of such city and shall state therein the maximum amount which in its opinion should be expended for the acquisition of the lands for the proposed new public markets and for the construction of public markets thereon, or in case of the repair or improvement of existing public markets, the maximum amount which should be expended for such repair or improvement.

(5) If it is proposed to erect new public markets on land owned by the city and dedicated or assigned for use as public markets, or to repair or improve existing public markets, the council shall appraise the value of such lands or of such existing public markets and shall issue a certificate of the value as so appraised to the commissioner of public markets of such city.

(6) If the lands described in such petition, the location of which shall

have been approved by the council, are acquired by the city as provided in this article and dedicated or assigned for use as public markets, and new public markets are constructed upon such lands in accordance with plans and specifications which have been approved by the council, or if new public markets are constructed upon lands already owned by the city and dedicated or assigned for use as public markets, in accordance with plans and specifications so approved by the council, or if existing public markets are repaired or improved in accordance with plans and specifications so approved by the council, one-half of the maximum amount certified by the council as above provided, shall be paid by the state out of moneys appropriated or made available therefor as provided by law. The remainder of the cost of the acquisition of such lands and of the construction, repair or improvement of public markets thereon, shall be paid by the city.

(7) If the council of farms and markets shall approve of the proposed locations of lands dedicated or assigned, or to be dedicated or assigned, for public markets in such city, and shall have approved as herein provided of the plans and specifications for the construction, repair or improvement of such public markets, all conveyances or transfers of such lands to the city shall be approved as to their form and sufficiency by the council of farms and markets, and all contracts for the construction, repair or improvement of public markets in accordance with the plans and specifications approved by the council as herein provided, shall before they become effectual be submitted to and approved by such council. No payments shall be made by the state as provided herein unless the council of farms and markets shall have approved such conveyances, transfers and contracts as above provided.

(8) The portion of the expenditures for the acquisition of lands for public markets and for the construction, repair and improvement of public markets, which is to be paid by the state shall be paid to the city by the state treasurer out of moneys appropriated or available therefor, upon the certificate of the council of farms and markets on the warrant of the comptroller. The moneys so paid shall be applied by the city exclusively for the payment of the cost of the acquisition of the lands acquired by the city and dedicated for public markets, and for the construction, repair and improvement of public markets thereon in accordance with the provisions of this section.

(9) Upon the acquisition of lands by the city and the dedication or assignment thereof for use as public markets, and the completion of the construction of new public markets thereon or of the repair and improvement of existing public markets as provided herein, such public markets shall be under the supervision and control of the department of public markets of the city, subject to the provisions of this article. The commissioner of public markets shall submit to the council of farms and markets a report at least once in each period of three months, or oftener if required

by the council, containing a statement of the fees and other receipts collected for the use of the public markets, for the construction, repair or improvement of which the state has contributed as provided herein. The council shall prescribe the form of such reports and may inspect through its officers, employees or agents the books and accounts of the commissioner of markets of such city, for the purpose of determining the amount received for the use of such public markets. The commissioner of public markets in such city shall pay to the council of farms and markets such proportion of the net receipts collected for the use of such public markets, including services, licenses and privileges and of renting space therein, as the payments by the state under the provisions of this section, for the acquisition of lands for public markets and the construction, repair or improvement of public markets, bear to the total amount expended for the acquisition of such lands and the construction, repair or improvement of public markets, including the appraised value of lands owned by the city and of existing public markets so repaired or improved. The net receipts shall be ascertained by deducting from the gross receipts the expenses of operating such markets according to rules made by the council of farms and markets. The amount so paid to the council shall be turned into the state treasury to the credit of the general fund.

(10) It shall be the duty of the council of farms and markets to prepare and submit to the legislature at the next session a plan of apportionment of all moneys to be appropriated by the state to the several cities so that expenditures under this act shall be available to such cities on an equitable basis.

(11) The governing board of a town or village of ten thousand inhabitants or over may establish a department of markets for such municipality, with the powers, duties and jurisdiction of a department of markets in a city, as prescribed in this article, and may appoint a commissioner of public markets to be head of such department, and fix his compensation, or may provide for the supervision of the department by such governing board or by a designated official or officials of the town or village. When a department of markets shall have been so established in such a town or village the provisions of this section shall apply to such municipality in the same manner and to the same effect that they apply to cities; and references in this section to a city and to the commissioner of public markets thereof shall be deemed to include, respectively, a town or village in which a department of markets shall have been established and the commissioner of public markets thereof, the governing board of the town or village or the designated official or officials in charge of such department, as the case may be. (*Section added by L. 1917, ch. 813, § 24, in effect Aug. 29, 1917.*)

§ 79. **Rules.**—The commissioner of public markets of a city may make, amend or repeal rules for the government, regulation, control, discipline and conduct of

1. The business of the department;
2. The repair, care and use of markets, and concerning fees, the hours during which business shall be conducted, and the general management of the markets;
3. All vehicles, including push carts, from which market produce shall be sold;
4. All auctions conducted in such markets, and all auctioneers doing business therein;
5. The establishment of standards or grades for different classes of market produce, not inconsistent with law or with the rules of the state department of agriculture, foods and markets;
6. The receipt, handling, storage and sale at public auction of market produce consigned to auctioneers in the markets; the deduction of commissions and other authorized charges by such auctioneers, and the transmission by such auctioneers of the balance to consignors.

§ 80. **When rules to take effect; punishment for violation.**—Such rules shall be in force and effect upon the approval thereof by the board of estimate and apportionment of such city, or if there be no such board, by the common council, board of aldermen or other corresponding legislative body, and upon their publication for at least ten days subsequent to such approval in such newspaper as may be designated by or pursuant to law for the publication of municipal notices of such city, or if there be no such newspaper, in a newspaper designated by the mayor. Such rules shall not be in conflict or inconsistent with the rules of the council of farms and markets adopted as provided in this chapter. A violation of such rules or the orders of the commissioner of public markets, which he is hereby authorized to issue in pursuance thereof, shall be punishable by a fine of not more than fifty dollars or by imprisonment for not more than thirty days, or by both, or by the revocation or suspension by the commissioner of the license or permit to do business in any market heretofore issued by any other officer or hereafter issued by the department of public markets.

§ 81. **Renting of stalls and stands.**—All stalls and stands in such markets or upon such market places or lands shall be rented on permits issued by the commissioner of public markets or by an officer or employee designated by him for that purpose.

§ 82. **Inspection of food.**—The consignor or consignee of any food consigned to a tenant, occupant or licensee of space in any such public market shall be entitled to have the same examined by a market inspector when it shall have been received at any such market. The inspector shall immediately report a detailed description, in writing, of the consignment and the condition thereof at the time of his examination to the officer in charge of the market at which the same was received, who shall issue a certificate as to the condition of the consignment, when received, and send copies without

delay to the consignor and consignee. Such certificate shall be presumptive evidence of the facts stated therein in any court of the state.

§ 83. **Acting as auctioneer without license prohibited; penalty.**—No person shall carry on hereafter the business of auctioneer of any food in the public markets of any city in which a department of public markets shall have been established under this article without having first obtained a license from such department. Any person who shall sell or offer for sale at public auction any food in the markets established under this article, without having first obtained from the department of public markets of the city a license authorizing such person to carry on the business of auctioneer, shall be guilty of a misdemeanor, punishable by imprisonment for not more than six months or by a fine of not more than five hundred dollars, or by both.

§ 84. **License of auctioneers.**—The department of public markets shall grant licenses to any person of good character and engaged in the business of auctioneer of one or more kinds of food, on the payment by such person of a license fee of one hundred dollars per annum in cities of the first class, fifty dollars per annum in cities of the second class, and twenty-five dollars per annum in cities of the third class; and the filing of a bond to be approved by the department, with sufficient surety or sureties, in the penal sum of five thousand dollars in cities of the first class, twenty-five hundred dollars, in cities of the second class, and one thousand dollars, in cities of the third class, conditioned to save harmless any person with whom such auctioneer shall have official relations in connection with his duties as auctioneer of public markets. An auctioneer licensed under this section shall not be personally interested, directly or indirectly, in the sale of food, except as auctioneer and to the extent of his legal fees and charges as such.

§ 85. **Suspension or revocation of license of auctioneer.**—The department of public markets, on complaint of any person of misconduct on the part of any such auctioneer or his agent or employee, may grant a hearing thereon and, if the charge be sustained, suspend or revoke the license granted to such auctioneer.

§ 86. **Disposition of consignment of food.**—Food may be consigned to such farmer's agents as may be authorized to occupy space in any public market, or may be consigned directly to auctioneers licensed by the department of public markets for sale at auction, and such consignment to auctioneers shall be sold as soon as possible after receipt thereof. The city shall not be liable for loss of or injury to any such consignment or part thereof because of any act or omission on the part of any such agents or auctioneers. The department of public markets may provide space and accommodation for the care of all such consignments, and entries of the receipt and sale thereof shall be made by the auctioneer showing the name of the consignor, the name and address of each purchaser of any part thereof, and the amount or amounts

§§ 87, 88, 100.

Miscellaneous provisions.

L. 1917, ch. 802.

received therefor. The auctioneer shall deduct all proper charges against such consignment and his commission as fixed by the schedule established by the rules of the department of public markets, and he shall thereupon transfer the balance of the proceeds of such sale or sales to the consignor.

§ 87. **Bureau of information.**—The department of public markets of a city may organize and maintain a bureau of information for the use and convenience of purchasers and consumers, and for general information as to the supply and prices of food, and such information tending to facilitate and cheapen food distribution as the department may deem expedient.

§ 88. **Limitation of article.**—Nothing in this article shall abridge the powers of local boards or departments of health.

ARTICLE 5.

MISCELLANEOUS PROVISIONS.

Section 100. **Effect on existing provisions of law.**

101. Construction of terms.
102. Existing rules and regulations continued.
103. Pending actions or proceedings.
104. Time of taking effect.

§ 100. **Effect on existing provisions of law.**—The provisions of the agricultural law, except so far as the same are in conflict or inconsistent with the provisions of this chapter, are contained in full force and effect, and the powers and duties of the agricultural department and the commissioner of agriculture under such law shall be exercised and performed by the department of farms and markets, through the council and the appropriate divisions of such department, under and pursuant to the provisions of this chapter. The provisions of article two-a of the general business law, as added by chapter two hundred and forty-five of the laws of nineteen hundred and fourteen and the acts amendatory thereof, pertaining to foods and markets, are continued in full force and effect except so far as they are in conflict or inconsistent with the provisions of this chapter. The powers and duties of the department of foods and markets and of the commissioner of foods and markets, as conferred or imposed by such article of the general business law, shall be exercised and performed by the department of farms and markets, through the council and the appropriate divisions of such department, under and pursuant to the provisions of this chapter. The provisions of the general business law relative to weights and measures, and all other provisions thereof relative to food and farm products are continued in full force and effect, except so far as they are in conflict or inconsistent with the provisions of this chapter, and such provisions shall be enforced and carried into effect by the department of farms and markets through the council and the appropriate divisions of such department, under and

pursuant to the provisions of this chapter. The provisions of article sixteen-a of the public health law and the acts amendatory thereof, relative to cold storage, and the provisions of sections forty, forty-one, forty-two, forty-three, forty-six, forty-seven, forty-eight, forty-nine and fifty of the public health law, and the acts amendatory thereof, are continued in full force and effect, except as in conflict or inconsistent with this chapter, and such provisions shall be enforced and carried into effect by the department of farms and markets, through the council and the appropriate divisions of such department, under and pursuant to the provisions of this chapter.

§ 101. **Construction of terms.**—Wherever the terms department of agriculture, commissioner of agriculture, department of foods and markets, commissioner of foods and markets, state superintendent of weights and measures, or state commissioner of health, shall occur in any law, contract or document, such terms shall be deemed to mean and refer to the department of farms and markets or council of farms and markets as established by this chapter, so far as such law, contract or document pertains to matters which are within the jurisdiction of such department or council under the provisions of this chapter.

§ 102. **Existing rules and regulations continued.**—The rules and regulations of the commissioner of agriculture, the commissioner of foods and markets, the state commissioner of health or the state superintendent of weights and measures, pertaining to any matter within the jurisdiction of the department of farms and markets under this chapter, adopted in pursuance of any law, the duty of enforcing which is imposed upon the department of farms and markets as provided herein, shall continue in full force and effect until they are modified, amended or repealed by the council as provided by this chapter.

§ 103. **Pending actions or proceedings.**—This chapter shall not affect pending actions or proceedings brought by or against the department of agriculture, the commissioner of agriculture, the department of foods and markets, the commissioner of foods and markets, the state superintendent of weights and measures, the state commissioner of health, or any other officer, person or corporation, or by or in behalf of the people of the state, under or in pursuance of any of the provisions of the laws which are to be enforced or carried into effect under the provisions of this chapter by the department of farms and markets, but the same may be prosecuted or defended in the same manner and for the same purpose by the department of farms and markets, or by the proper officer or party, under the provisions of this chapter. Any investigation, examination or proceeding undertaken, commenced or instituted by the department of agriculture, the commissioner of agriculture, the department of foods and markets, the commissioner of foods and markets, the state superintendent of weights and measures, the state commissioner of health, or any other officer, under the

Cross-references.

provisions of the laws which are to be enforced or carried into effect as provided in this chapter by the department of farms and markets, may be conducted or continued to a final determination by the department of farms and markets or council of farms and markets, or a commissioner or other proper officer of such department, in the same manner and under the same terms and conditions as though this chapter had not been passed.

FARM SCHOOLS.

Establishment and control; Education Law, §§ 610-619-b.

FARM SETTLEMENT.

Bureau established; Agricultural Law, §§ 266-267.

FEEBLE MINDED.

Syracuse Institution; State Charities Law, §§ 60-71. State Custodial Asylum at Newark; State Charities Law, §§ 80-83. Rome Custodial Asylum; State Charities Law, §§ 90-95.

FEEDING STUFFS.

Sale and analysis; Agricultural Law, §§ 160-165.

FEES.

Public officer taking unlawful fees; Public Officers Law, § 67. When additional fees authorized; Public Officers Law, § 68. Fees for administering certain official oaths prohibited; Public Officers Law, § 69. Accounting for fees; Public Officers Law, § 7. Accounting by County Clerk or Register; County Law, § 161. Accounting by clerk of the court of appeals; Judiciary Law, § 256. Of certain officers to be taxed upon demand; Code Civ. Pro. § 3287. When party or attorney not entitled to witness fees; Code Civ. Pro. § 3288. Fees to be paid before papers are transmitted; Code Civ. Pro. § 3292. Publication where newspaper refuses to accept legal fee; Code Civ. Pro. §§ 3293-3294. Sums allowed as legal fees generally; Code Civ. Pro. §§ 3296-3332. Criminal liability for taking unlawful fees; Penal Law, §§ 131, 1826, 1830.

FELONY.

Defined; Penal Law, § 2. Accessory to; Penal Law, § 1934. Punishment when not fixed by statute; Penal Law, § 1935. Punishment under certain conditions; Penal Law, §§ 1940-1942.

FERRIES.

Licenses to operate; Highway Law, §§ 270-274. Regulation by board of supervisors, County Law, § 77. Unlawfully maintaining; Penal Law, § 870. Penalty for neglecting to post rates; Penal Law, § 871.

FERRY CORPORATIONS.

Incorporation and powers; Transportation Corporations Law, §§ 2-6. Franchise tax; Tax Law, § 184.

FERTILIZERS.

Sale and analysis of commercial; Agricultural Law, §§ 220-224.

FINANCE.

See State Finance Law.

FINES, PENALTIES AND FORFEITURES.

Proceedings to collect fine; Judiciary Law, §§ 790-797. Limit of; Penal Law, § 36. Action by private person for penalty or forfeiture; Code Civ. Pro. §§ 1893-1898. Action for a fine, penalty or forfeiture, or upon a forfeited recognizance; Code Civ. Pro. §§ 1961-1966. Disposition by district-attorney of money recovered as penalty or forfeiture; County Law, § 201.

FIREARMS.

Unlawfully discharging; Penal Law, § 1906. Carrying and use regulated; Penal Law, § 1896, *et seq.* Discharge near magazine or factory; Insurance Law, § 367. Sale of silencers; Penal Law, §§ 1897-a, 1898.

FIRE CORPORATIONS.

Incorporation and powers; Membership Corporations Law, §§ 100-105.

FIRE DISTRICTS.

Outside of incorporated villages, County Law, § 38.

FIRE ESCAPES.

Hotel keepers to maintain; General Business Law, § 205. Hospitals and Asylums to be equipped with; Public Health Law, § 334. Factories to be provided with; Labor Law, §§ 82, 83, 94. On school buildings over two stories in height, Education Law, § 453. Failure of hotel to maintain; Penal Law, § 1905.

FIRE ISLAND PARK.

L. 1908, ch. 474.—An act to authorize the location, establishment, maintenance and use of certain lands in the towns of Islip and Babylon, county of Suffolk, for a state reservation to be called Fire Island state park.

§ 1. Established as state reservation.—A state reservation to be known as Fire Island state park is hereby created and established from and out of certain lands now owned in fee by the people of the state of New York, situate, lying and being in the towns of Islip and Babylon, county of Suffolk, which said lands hereinafter more particularly described shall forever be reserved and maintained for the free use of all the people.

§ 2. Boundary.—The said Fire Island state park shall contain and include the lands and premises heretofore conveyed by David S. S. Sammis and Antoinette Sammis, his wife, to the people of the state of New York as appears by deed dated May fourth, eighteen hundred and ninety-three (1893), and recorded in the office of the clerk of the county of Suffolk in liber three hundred and ninety-six of conveyances, page four hundred and seventeen, on the eighth day of May, eighteen hundred and ninety-three (1893), and which said lands and premises are more particularly bounded and described therein as follows, namely:

All that certain tract of land and beach situate on the south side of Long Island in the county of Suffolk and state of New York opposite to and southerly of the east part of the town of Babylon and opposite to and southerly of the town of Islip known and commonly called the Great South beach, the part thereof hereby conveyed being bounded and described as follows, namely: Beginning at the northwest corner of said

tract hereby conveyed and at the northeast corner of the lands held by the United States and known as the Fire Island lighthouse property on the Great South bay and running thence south six degrees west twenty-three hundred and thirty-four and one-tenth ($2334 \frac{1}{10}$) feet along the line of the aforesaid lands of the United States known as the Fire Island lighthouse property to the Atlantic ocean, thence north seventy-eight degrees and thirty-two minutes east along the said Atlantic ocean twenty-nine hundred and thirty-five and six-tenths ($2935 \frac{6}{10}$) feet, thence north fourteen degrees and twenty-six minutes west two thousand and fifty-five and eight-tenths ($2055 \frac{8}{10}$) feet to the Great South bay, thence south eighty-three degrees and five minutes west along the said Great South bay twenty-one hundred and thirty-six (2136) feet to the point or place of beginning, containing within said bounds one hundred and twenty-five (125) acres of land be the same more or less; being the same premises described on map made November, eighteen hundred and ninety-two, by J. P. Jervis, civil engineer, and examined and approved March twenty, eighteen hundred and ninety-three, by Hon. Martin Schenck, engineer and surveyor, and filed in the office of state engineer and surveyor, together with all the rights, easements, claims or demands, land under water and natural or artificial or additions, wharves, piers, tenements and hereditaments thereunto belonging, subject, however, to a lease to the Western Union Telegraph Company of seventy-five (75) feet square and to a lease of the plot of land forty (40) feet front occupied by the so-called Coudert cottage. Also all that other tract, piece or parcel of land lying under the water of Sampawams creek near the Great South bay in the town of Babylon (formerly Huntington), Suffolk county, New York, bounded and described as follows, namely: Beginning at the northeast corner of the land formerly belonging to James H. Carll and Martin Willetts adjoining the south side of a road or highway and running thence south seventy-three and one-half degrees east two hundred (200) feet, thence north sixteen and one-half degrees east fifty (50) feet, thence south seventy-three and one-half degrees east fifty (50) feet, thence south sixteen and one-half degrees west one hundred and thirty (130) feet, thence north seventy-three and one-half degrees west fifty (50) feet, thence north sixteen and one-half degrees east fifty (50) feet, thence north seventy-three and one-half degrees west three hundred and twenty (320) feet to the above shore, thence southward thirty (30) feet to the south side of the road or highway aforesaid, containing within said bounds about sixteen thousand one hundred (16,100) square feet, being the same premises granted by the people of the state of New York October seventeenth, eighteen hundred and sixty-five, by letters patent to James H. Carll and Martin Willetts; all of which aforesaid lands and premises are the same referred to and described in chapter one hundred and eleven of the laws of the state of New York passed March ninth, eighteen hundred and ninety-three (1893).

§ 3. Within thirty (30) days after the passage of this act there shall be appointed by the governor by and with the consent and approval of the senate five (5) commissioners, all of whom shall be residents of the state of New York, and at least three of whom shall be residents of the county of Suffolk, who are hereby appointed and constituted a board of commissioners by the name and style of "The Commissioners of Fire Island State Park." Said commissioners shall hold office for the term of five (5) years from and after the date of the passage of this act, and until others are appointed in their places. No member of said board shall receive any compensation for his services as commissioner, but each commissioner shall be entitled to receive his actual disbursements for his expenses in performing the duties of his office. In case any of the persons so appointed as above neglect or fail to accept such appointment and to undertake the office and duties of such commissioners by written acceptance, addressed and mailed to the governor within twenty (20) days after receipt of due notification thereof, or in case of a vacancy on said board, such vacancy shall be filled forthwith by the governor and the person so appointed shall hold his office for the term of five (5) years from the date of his appointment, and until another shall be appointed in his place. The governor shall at all times have the power to remove for good and sufficient cause shown, any or all of the above commissioners.

§ 4. **Organization of board.**—The said board of commissioners shall hold their first meeting at twelve o'clock noon at the office of the clerk of the town of Islip, county of Suffolk, on the fourth Monday of the month subsequent to that on which this act shall take effect, and within sixty (60) days after due notice given of their appointment. The said commissioners shall at said meeting choose a president of said board who shall be a member thereof, and shall appoint some person to act as the secretary and treasurer of said board, who shall thereupon give a bond to the people of the state of New York, with two or more sufficient sureties to be approved by any judge or justice of a court of record in such sum as the commissioners shall determine, to the effect that he will faithfully perform the duties of his office and account for all moneys coming into his hands by virtue of his office as treasurer. Said bond shall be forthwith filed in the office of the secretary of state. The compensation to be allowed and paid said secretary and treasurer shall be fixed by said commissioners but such compensation shall not be in excess of the sum of five hundred dollars (\$500) in any one calendar year. Said commissioners shall hold at least two meetings during each calendar year, and such other meetings as may be called by the president or by any two members of the said board of commissioners, and at such time and place within the county of Suffolk as may be designated in and by such notice in writing of said meeting.

§ 5. **Powers of board.**—Said reservation or park shall be under the control and management of the aforesaid commissioners and their succes-

sors in office. A majority of said commissioners shall constitute a quorum for the transaction of business. Said commissioners shall have power to lay out, manage, and maintain said reservation and to make and enforce ordinances, by-laws, rules and regulations necessary to effect the purpose thereof, and for the orderly transaction of business not inconsistent with the laws of this state; to fix the prices to be charged for carrying or transporting persons, for the use of bathing, boat and other privileges, within the limits of said reservation, to appoint and employ a superintendent and such other persons as may be needed, one or more of whom, to be designated by the said commissioners, shall have the powers, and may perform the duties of a police constable in criminal cases. Said commissioners shall also have the power to fix the compensation of the persons who may be appointed or employed by them, but no debt or obligation shall be created by said commissioners exceeding the amount of the moneys at the time at their disposal. None of said commissioners, or any other person, shall have power to create any debt, obligation, claim or liability for or on account of said commissioners, except by the express authority of said commissioners conferred at a regularly called and held meeting thereof.

§ 6. *Idem.*—The said board of commissioners may sell and cause to be removed from said reservation all structures and materials thereon belonging to the state which in their judgment are not necessary or desirable for park purposes, and may apply the proceeds of such sales toward the payment of the expenses of maintaining such reservation; they shall have the power to repair and lease, for a term not, however, exceeding one (1) year any or all buildings or structures on said reservation; they shall have the power also to lay out, construct and maintain roads and pathways upon, across and over the said reservation, to build, construct, purchase and maintain bath and boat houses, boats, docks, wharves and any other necessary and proper structures or appurtenances, and to operate, manage and control any ferry or ferries running from said reservation or park to various points on the Great South bay in the said county of Suffolk. They shall also have the power to make and dredge waterways or channels in front of and appurtenant to said reservation.

§ 7. *By-laws and rules; violation.*—The said by-laws, ordinances, rules and regulations adopted by said commissioners shall within thirty (30) days after adoption be published at least twice in some newspaper published weekly in said county of Suffolk. Any person offending against any of said ordinances, by-laws, rules and regulations shall be deemed guilty of a misdemeanor, and, on conviction, may be punished by a fine not exceeding one hundred dollars (\$100) or by imprisonment not exceeding thirty (30) days, or by both such fine and imprisonment.

§ 8. *Report to legislature.*—In the month of January of each and every year the said commissioners shall make to the legislature a report of their

L. 1903, ch. 427.

Effect of conviction of fireman.

§§ 1, 2.

proceedings, and a statement in detail of all their receipts and expenditures for the preceding calendar year. They shall also submit therewith an estimate of the work necessary to be done, and of the expenses of maintaining the said reservation for the ensuing year, and shall make such recommendations and suggestions as they shall see fit.

§ 9. **Requisitions.**—Upon the requisition of said commissioners and upon a proper voucher or vouchers, certified by said commissioners or by such officer or officers as they may duly designate for that purpose in form to be approved by the comptroller of the state of New York, the said comptroller shall pay over the sum or sums authorized or appropriated by this act and by any subsequent acts affecting said Fire Island state park, and also the amount of any and all expenditures made or incurred by said commission so certified as above provided.

§ 10. Appropriates \$5,000.

§ 11. **Repeal.**—Section five (5) of chapter one hundred and eleven (111) of the laws of eighteen hundred and ninety-three (1893) providing for the sale of said lands and premises hereinabove described and hereby constituted the said Fire Island state park, is hereby repealed.

FIRE MARSHAL.

Office abolished by L. 1915, ch. 4. See Insurance Law, §§ 350-375.

FIREMEN.

Qualifications of exempt; General Municipal Law, § 200. Rights and privileges of exempt; General Municipal Law, § 201. Certificate to be issued to exempt; General Municipal Law, § 202. List of exempt; General Municipal Law, § 203. Payments to representatives of deceased volunteer firemen; General Municipal Law, § 205. Use of transportation lines by; General Municipal Law, § 206. Penalty for improper use of certificate; General Municipal Law, § 207. False personation of; Penal Law, § 931. Incorporation in unincorporated villages; Membership Corporations Law, §§ 100-105.

L. 1903, ch. 427.—An act permitting membership in a fire department of persons who have been convicted of felony, et cetera.

§ 1. **Effect of conviction of felony when under eighteen.**—If any person has ever been convicted of felony while under the age of eighteen years and had been pardoned by the governor of the state of New York before the expiration of his term of imprisonment, shall subsequently be appointed to membership in a fire department and continue to hold membership therein for a period of five years and upwards, and during such time has not been convicted of any dereliction of duty, it shall be lawful for any such person to continue to hold membership therein, and the provisions of any existing law shall not apply to or be enforceable against any such person nor shall he be liable to charges or removal because of the provisions of any existing act.

§ 2. **Construction.**—So far as the provisions of this act are inconsistent
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with the provisions of any existing act, this act shall be a modification of such act and shall be so construed.

FIRES.

Investigation as to origin in certain cases; Code Crim. Pro. §§ 952-h, 952-o. Giving false alarms of; Penal Law, § 1424. Negligently managing and refusing to extinguish; Penal Law, § 1900. Obstructing attempts to extinguish; Penal Law, § 1901. Prevention of fires in forests; Conservation Law, §§ 50-56.

FISCAL YEAR.

Change of; State Finance Law, § 2.

FISH

See Conservation Law.

FISH HATCHERIES.

See Conservation Law.

FLAGS.

Unlawful use of for advertising and other purposes; Penal Law, § 1425, subd. 16. On school buildings; Education Law, § 710. Display at polling places; Election Law, § 300-a. Display in legislative chambers, Public Buildings Law, § 4, subd. 5.

FLAXSEED OIL.

Standard required; Agricultural Law, §§ 240-243.

FLOUR AND MEAL.

How packed, size of casks, etc.; General Business Law, §§ 220-229.

FOLIO.

Defined; General Construction Law, § 21.

FOOD.

Adulterations; Public Health Law, §§ 40-50; Agricultural Law, §§ 200, 201. Adulteration of vinegar; Agricultural Law, §§ 70-73. Penal liability for adulterating; Penal Law, §§ 1748, 1749. Sale of tainted food; Penal Law, § 1750. Sale of imitations without brand; Penal Law, § 1753. Wilfully poisoning food; Penal Law, § 1760. Cleanliness in preparation and service; Public Health Law, §§ 343-a-343-c. See Labor Law; Farms and Markets Law.

FOOD COMMISSION.

L. 1917, ch. 813.—An Act to define the policy of the state of New York in relation to the production, supply and control of the distribution of the necessities of life, to insure an adequate supply thereof at a reasonable price, to prevent unreasonable profits by reason of speculation, to extend such policy in aid of the national government in providing for the national security and defense, to amend the farms and markets law in relation to markets in cities, and to transfer the powers and duties conferred on a commission by chapters two hundred and five and five hundred and six of the laws of nineteen hundred and seventeen to the commission created by this act. (In effect Aug. 29, 1917.)

Section 1. State food commission.—There is hereby created a state food commission, hereinafter referred to as the commission, which shall consist

of three commissioners, who shall be appointed by the governor, by and with the advice and consent of the Senate. Such commissioners shall have the powers and perform the duties hereinafter prescribed. The governor shall also designate, at the time of making such appointments, a member of the commission to be president thereof who shall, when present, preside at all of its meetings and be its executive officer. In case of a vacancy from any cause, the commissioner or commissioners remaining in office shall continue to perform the duties of such commission until the vacancy or vacancies be filled. The members of such commission shall hold office during the pleasure of the governor, and in case of a vacancy or vacancies, the appointments to fill the same shall be made by the governor, by and with the advice and consent of the senate. The members of the commission as such shall not receive any compensation but shall be paid their necessary traveling expenses and other expenses incurred in the performance of their duties under this act in any part of the state. Members of the commission shall not be disqualified from holding any other office, either state or municipal, nor forfeit the same by reason of their appointment under this act, notwithstanding the provisions of any city charter to the contrary.

§ 2. **Secretary and employees.**—The commission may appoint a secretary who shall receive a salary to be fixed by the commission with the approval of the governor. The commission may appoint and employ such inspectors, experts, assistants and employees as may be necessary for the exercise of the powers and performance of the duties conferred or imposed upon the commission. The compensation of such officers and employees shall be fixed by the commission within the appropriations made therefor, subject to the approval of the governor. But the commission may accept the voluntary service of any person for the performance of any duties prescribed by this act without compensation other than expenses, in which case the expenses of such person so appointed shall be paid out of the moneys hereby appropriated.

§ 3. **Definitions.**—The word “necessaries” as used in this act shall be deemed to include foods, feeds, seeds, fuel including fuel oil, fertilizers and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds and fuel except gas, natural or artificial. The word “person” wherever used in this act, shall include individuals, partnerships, associations and corporations. When construing and enforcing the provisions of this act, the act, omission or failure of any official, agent, or other person acting for or employed by any partnership, association or corporation within the scope of his employment or office shall, in every case, also be deemed the act, omission or failure of such partnership, association or corporation as well as that of the person.

§ 4. **Matters of public interest during a state of war.**—During the exist-

ence of a state of war, the production, manufacture, marketing, storage, accumulation, distribution, supply, waste, hoarding, destruction, cost to producers and distributors, price to consumers, and the expense of handling necessities, are matters of public interest and proper subjects for investigation, encouragement, development, regulation and control by the state to the end that while such state of war exists, the people of the state may, in common with the people of other states, have an adequate supply of pure and wholesome food, their health be protected, their energies conserved, and that they may not suffer from the excessive cost, unreasonable prices or speculation in the necessities of life.

§ 5. **Certain acts prohibited.**—It is hereby made unlawful for any person willfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture or distribution; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful, practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessities; to conspire, combine, agree or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent, limit or lessen the manufacture or production of any necessities in order to enhance the price thereof, or (e) to exact excessive prices for any necessities; or (f) to aid or abet the doing of any act made unlawful by this section; the acts prohibited in this section having been prohibited by act of congress as well. Any such act shall be deemed to be a practice detrimental to the public interest within the meaning of this act.

§ 6. **Hoarding.**—It shall be unlawful for any person to hoard necessities. Necessaries shall be deemed to be hoarded within the meaning of this act when either (a) held, contracted for or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time; (b) held, contracted for or arranged for by any manufacturer, wholesaler, retailer or other person in a quantity in excess of the reasonable requirements of his business for use or sale by him for a reasonable time, or reasonably required to furnish necessities produced in surplus quantities seasonally throughout the period of scant or no production; or (c) withheld whether by possession or under any contract or arrangement from the market by any person for the purpose of unreasonably increasing or diminishing the price: Provided, however, that this section shall not include or relate to transactions on any exchange, board of trade or similar institution or place of business that may be permitted by the president of the United States

pursuant to authority conferred upon him: and provided, further, that any accumulating or withholding by any farmer or gardener, co-operative association, corporate or otherwise, of farmers or gardeners, including livestock farmers and fruit growers, or any other person, of the products of any farm, garden or other land owned, leased or cultivated by him or by the members of any such association shall not be deemed to be hoarding within the meaning of this act. Whenever any necessities shall be hoarded as defined in this section, it shall be the duty of the food commission of this state to report the same immediately to the food administrator of the federal government at Washington, with all the facts and evidence relating to the case, and to aid and assist in any manner desired by the federal government or its representative in the prosecution thereof.

§ 7. **Proceedings against necessities hoarded.**—Whenever any necessities shall be hoarded as defined in section six, and jurisdiction thereof shall not have been assumed by the federal government within three days after receiving notice from the commission as provided in the preceding section,

(1) Such necessities shall be liable to be proceeded against in the supreme court of the state under a summary process on application by the commission, and if such necessities shall be adjudged to be hoarded, they shall be disposed of by sale in such manner as to provide the most equitable distribution thereof as the court may direct, and the proceeds thereof less the legal costs and charges shall be paid to the party entitled thereto. The proceedings in such cases shall conform as near as may be to the proceedings in admiralty in the United States courts and shall include the right to seize, appoint a receiver, sell at public sale and any other authority necessary to make the provisions of this act effective, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit and in the name of the state of New York, and shall be brought by the attorney-general. If a jury trial be demanded the jury shall be empaneled as directed by the court.

(2) The commission may order the discontinuance of such hoarding and if such hoarding by a corporation be not discontinued, the supreme court may, on application of the commission in a suit brought by the attorney-general in the name of the people of the state, annul the charter of such corporation if it be a domestic corporation, or revoke its certificate of authority to transact business within the state if it be a foreign corporation.

(3) The commission may in its discretion if an emergency exists requiring the sale and distribution of necessities so hoarded for the purpose of relieving public necessity, cause the fair value thereof to be ascertained by a board of appraisers, consisting of one member to be appointed by the commission, one by the owner of the property and one by the appraisers so appointed. If the appraisers appointed by the commission and the owner of the property shall fail for three days to agree upon the third member of said board of appraisers, then on request of the commission, or such

§§ 8, 9.

Ice; information to be obtained.

L. 1917, ch. 813.

owner, such third member shall be selected within five days by a judge of a court of record in the judicial district in which such property is located. If such owner fail or refuse to appoint a member of such board of appraisers, such value shall be ascertained by the commission. The members of such board of appraisers, for the purpose of making such appraisal, shall have access to any place in which such necessities are kept or stored. Such board of appraisers shall file its report in the office of the commission within five days after the appointment of the third member of such board. If such report shall not be filed within such five days the commission shall appraise such necessities. Upon the determination by such appraisers or by the commission, as the case may be, the commission, if funds be available to the amount of such appraised value, may seize such necessities and shall pay such appraised value thereof to the person entitled thereto. If the compensation so paid be unsatisfactory to the owner of such necessities, he shall be entitled to file his claim in the court of claims for such further sum as added to the amount so paid shall amount to just compensation for such necessities. The court may make such award upon any such claim as it deems just and proper and render judgment therefor as against the state, provided that such claim be filed within three months from the time it accrued. Claims filed under this section shall have preference in the hearing thereof over all other claims pending in such court. Necessaries seized by the commission pursuant to this section shall be sold at public auction in such manner as to provide the most equitable distribution thereof.

(4) The commission shall have power to settle and adjust any controversy arising under this section.

§ 8. Ice.—The commission may, whenever in its judgment the public interest requires, make and promulgate an order declaring ice to be one of the necessities as defined in section three, in which case ice, the storage, sale and distribution of the same shall be subject to the powers of the commission in the same manner and to the same extent as food.

§ 9. Information gathered for the use of the state and in aid of the federal government.—The commission whenever the public interest requires may compel the submission to it of reports by persons in this state in regard to the sources, accumulation, storage and distribution of necessities, and for this purpose may make such investigation and inspections as it may deem necessary. It shall be the duty of the commission to ascertain the food requirements of the people of this state, and the seed requirements of the producers of this state. The commission and its representatives for the purpose of acquiring such information shall be deemed to be possessed of all the powers of investigations conferred under the farms and markets law on the council of farms and markets relative to inspections and investigations by such council. The commission may avail itself of the facilities of the department of farms and markets under the farms and markets

law, and such department and the officers and employees thereof shall perform such duties in addition to the duties now imposed upon the department as may be required to furnish the commission with accurate information as to food conditions and sources of food supply and necessities. The commission shall transmit such information as it deems will be useful to the public interest to the federal authorities, and make such use thereof by publication or otherwise as the public interest requires within this state.

§ 10. **Licenses as to necessities; farmers exempt.**—Whenever the commission shall find it in the public interest to license the manufacture, storage or distribution of any necessary in order to carry into effect any of the purposes of this act and shall publicly so announce, no person shall after the date fixed in the announcement engage in or carry on any business specified in such announcement unless he shall secure and hold a license issued pursuant to this section. The commission is authorized to issue such licenses and to prescribe regulations for the issuance of licenses and requirements for systems of accounts and the auditing of accounts to be kept by licensees, as well as the submission of reports by them, with or without oath or affirmation, and the entry and inspection by the commission's duly authorized agents of the places of business of licensees and the inspection of their books. Whenever the commission shall find that any storage charge, commission, profit or practice of any licensee is unjust or unreasonable, or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall state the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory or unfair storage charge, commission, profit or practice. The commission may, in lieu of such unjust or unreasonable or discriminatory and unfair storage charge, commission, profit or practice find what is a just or reasonable or non-discriminatory and fair storage charge, commission, profit or practice, and in any proceeding brought in any court such finding of the commission shall be prima facie evidence. Any person who, without a license issued pursuant to this section or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section or who wilfully fails or refuses to discontinue any unjust or unreasonable or discriminatory and unfair storage charge, commission, profit or practice, in accordance with the requirement of an order issued under this section or any regulation prescribed under this section, shall be deemed guilty of a violation of this act. Provided that this section shall not apply to any farmer, gardener, co-operative association, corporate or otherwise, of farmers or gardeners, including livestock farmers and fruit growers, or other persons with respect to the products of any farm, garden or other land owned, leased or cultivated by them, nor to any retailer with respect to the retail business actually conducted by him,

nor to any common carrier; provided further that for the purposes of this act a retailer shall be deemed to be a person, partnership, corporation or association not engaged in the wholesale business whose gross sales do not exceed one hundred thousand dollars per annum. No such license shall be required as to any person until the plan of such license system shall have been submitted by the commission to the federal food administrator and a period of ten days shall have elapsed without action by the federal government as to licensing the persons to be affected by licenses issued under the plan proposed. No license shall be required of any person licensed by the federal government and any license issued under this act shall be superseded by any similar license issued to such person under the authority of the United States.

§ 11. **Correction of practices in dealing in necessities.**—If the commission becomes satisfied that there is any practice or practices of trade, including speculation or gambling, detrimental to the public interest in dealing by wholesalers, retailers or any other person in the necessities of life which interfere with the distribution or sale of such necessities or any of them at a reasonable price, the commission may enact and publish such rule or rules as in its judgment will provide for the correction or discontinuance of such practices. The commission may in its discretion appoint an advisory committee or committees to aid it in the formation of such rules, in which case one or more members of such committee shall be from the line of trade in which such practice prevails. Such rule or rules shall be published in at least two newspapers in the county in which such practice or practices prevail, so as to give reasonable notice thereof and any person who thereafter violates any such rule shall be deemed guilty of a violation of this act.

§ 12. **Injunction to restrain practice detrimental to the public interest.**—If any person or corporation shall engage in a practice detrimental to the public interest, as defined by this act or by the rules of the commission, the commission may present a verified petition to a justice of the supreme court or a special term of the supreme court of the judicial district in which the offense is committed for an order as herein provided.

Such petition shall state the facts upon which such application is based and upon presentation of the petition the justice or court shall grant an order requiring such person or corporation to appear before such justice or court, or before any special term of the supreme court of the judicial district, on the day specified therein, not more than ten days after the granting thereof, to show cause why such person or corporation should not be permanently enjoined from continuing such practice or from continuing in the trade to which such practice relates. A copy of such petition and order shall be served upon the person or corporation, in the manner directed by such order, not less than five days before the return day thereof. On the day specified in such order the justice or court before whom the

same is returnable shall hear the proofs of the parties and, if deemed necessary or proper, may take testimony in relation to the allegation of the petition.

If the justice or court be satisfied that such person or corporation has engaged in such practice in violation of this act or of the rules of the commission, an order shall be granted either restraining the continuance of such practice or restraining such person from continuing in the business to which the practice relates. If, after the entry of such order in the county clerk's office of the county in which the principal place of business within the state of such corporation is located, or in which the person so enjoined resides, and the service of a copy thereof upon such person or corporation, or such substituted service as the court may direct, such person or corporation shall continue such practice or continue in such business, as the case may be, in violation of such order, such act shall be deemed a contempt of court and punishable in the manner provided by the judiciary law, and in addition thereto be liable to the punishment provided for by section twenty-two. Costs upon the application for such injunction may be awarded in favor of or against the parties thereto of such sum as in the discretion of the justice or court before whom the petition is heard may seem proper; provided that if any such person be enjoined from continuing in business he shall be permitted to sell his stock on hand at public auction, to be commenced and continued until he has disposed of the whole thereof, including any contracts for the delivery to him of merchandise in such trade.

§ 13. **Hotels and restaurants.**—Whenever it shall have been certified to the state commission by the president of the United States or his duly authorized administrators that the public interest requires the regulation of the service of meals in hotels, restaurants and public places where meals are served, the state commission may make and promulgate rules therefor by such publication as in their judgment will give proper notice thereof, and any violation of rules so promulgated shall be deemed a violation of this act.

§ 14. **Purchase and sale of food and fuel by municipalities.**—Any municipality in this state may, in case of an actual or anticipated emergency on account of a deprivation of necessities, by reason of excessive charges or otherwise, purchase food and fuel with municipal funds or on municipal credit, and provide storage for and sell the same to its inhabitants in such manner and through such agencies as it may determine, but before the exercise of any such power or authority by any municipality, it shall have the consent in writing from the state food commission to exercise such power. The mayor, if any, and the governing body or bodies of any such municipality shall file with the state food commission a resolution and certificate stating that such a necessity has arisen in said municipality, and otherwise satisfy the state food commission that such a necessity exists.

The state food commission shall act upon the application as in its judgment the public interest requires, and may prescribe such regulations and restrictions as it deems wise.

Special revenue bonds may be issued by the city comptroller for the purposes of this section in any city which issues such bonds and the same shall be issued in the manner provided by the city charter or other act applicable thereto.

§ 15. **Other powers of the commission.**—The food commission shall also have the following powers: (a) To compel common carriers to give preference to the transportation of necessities not inconsistent with directions by federal authority. In case it becomes necessary to enforce such preference, the commission shall certify to the public service commission of either district of the state the necessity of such preference, whereupon the said public service commission shall forthwith issue an order to the common carriers to be affected by such preference, and such order shall not be subject to review and shall be binding and enforced in like manner as other orders of the state food commission;

(b) To direct and authorize such method of distribution of necessities through distributors in any part of the state as will prevent waste or discrimination or conserve the public health.

(c) To make and promulgate such rules relating to governing the destruction of food on the order of any public health officer as may be necessary to prevent waste and destruction of sound and marketable food;

(d) With the consent of the conservation commission to permit the sale under such rules and regulations as the commission may prescribe of fish and game which may be lawfully taken, but may not, prior to the enactment of this act, be lawfully sold. Such rules and regulations shall be so made as, in the judgment of the commission and the conservation commission, will be consistent with the general policy of this state of conserving fish and game.

(e) To make any other order or rule in the premises necessary to prevent the waste of and insure the conservation of necessities, to carry into effect the powers conferred by this act, and enforce the provisions thereof.

(f) To accept the delegation of any authority from the president of the United States or any person designated by him under authority of the congress of the United States under an act passed by the congress of the United States to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel for the purpose of carrying out that act within the state of New York.

§ 16. **Weekly reports.**—The said food commission shall, by itself or through the department of farms and markets, cause to be prepared and published weekly reports showing the cost of food products from the producer, and wholesale and retail prices in all of such cities of the state as

in its opinion will serve the public interest, and give wide circulation to the same, with a view to informing all consumers as to the true state of the market, and the reasonable price or value of food commodities.

§ 17. Oaths and affidavits; inspections; procuring affidavits; reports to the governor.—Each member of the commission, its secretary and any other person designated by the commission for that purpose shall have power to administer oaths and take affidavits, and they, and, when duly authorized by the commission, any officer, employee or person designated by the commission, shall have the power to make personal inspection of all books, papers, records or places within the state for the purpose of ascertaining facts to enable the commission to administer this act. The commission may subpoena witnesses, may require their attendance before the commission, or a person designated by the commission for that purpose, and require the production of books and papers pertinent to investigations hereby authorized, and may examine such witnesses by themselves or through a person designated therefor in relation to any matter within the jurisdiction of the commission, and may issue commissions for the examination of witnesses who may be unable to attend or who may be absent from the state. The commission shall, when requested by the governor, report to him as to their proceedings under this act.

§ 18. Co-operation with federal authorities.—Nothing in this act shall be construed to empower the commission to do any act in conflict with existing acts of congress or acts of congress hereafter enacted relating to the encouragement of agriculture and the regulation, control and distribution of necessities, or any matters and things referred to in this act. Such commission shall so far as possible co-ordinate its work with that of any officer, board or department of the United States for the purpose of putting into effective operation in this state any law of the United States during the existence of a state of war to conserve the national supply of necessities and to regulate the distribution thereof, and likewise so far as practicable co-ordinate its work by like efforts with other states. The said commission may also accept any designation or authority conferred upon it to carry out any policy of the United States relating to subjects as to which authority is conferred upon said commission by this act within this state. The said commission shall also act as far as may be in co-operation with any municipal officer or department having duties to perform in respect to foods and food materials in this state.

§ 19. Co-operation of other departments.—The council of farms and markets, and all other officers of the department of farms and markets, and all other commissions, boards and officers of the state are hereby directed to co-operate with the state food commission in carrying into effect the purposes of this act.

§ 20. War production committees.—The commission may on their own account or through appropriate officers of the state, or voluntary commit-

§§ 21-25.

Violation of act; appropriations.

L. 1917, ch. 813.

tees in the different counties, organize a war production committee in each of the counties of this state for the purpose of procuring, organizing and placing on farms all available farm labor to aid in planting, harvesting and conserving food products.

§ 21. **Partial invalidity.**—If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

§ 22. **Violations of this act.**—Rules made by the commission under the terms of this act shall have the force and effect of law. A violation of any of the provisions of this act, or of any rule or order duly made by the commission shall be a misdemeanor, and shall be punishable by a fine of not less than one hundred dollars, or more than one thousand dollars, or by imprisonment of not more than one year, or by both said fine and imprisonment; if the violation be by a corporation or association, it shall be subject to the said fine, and any officer of said corporation participating in such violation shall be subject to punishment as an individual by said fine and imprisonment.

§ 23. **Appropriations.**—For the purpose of carrying out the provisions of this act there is hereby appropriated from any money in the state treasury not otherwise appropriated, the sum of one million dollars (\$1,000,000), or so much thereof as may be necessary. All receipts of the commission on account of necessities seized and sold under subdivision three of section seven of this act shall be paid over to the state treasurer and shall constitute a special revolving fund for the discharge of any liability which the commission is authorized to incur under such subdivision. No obligation shall be incurred by the commission, under subdivision three of section seven of this act, in excess of the amount available therefor, either from money appropriated by this act or from the balance to the credit of such special revolving fund. For the purpose of paying for necessities seized by the commission under subdivision three of section seven of this act, the treasurer, on the warrant of the comptroller, shall advance moneys to the commission, from time to time, on its requisition, either from moneys appropriated by this act or from the special revolving fund established by this act. On or before the fifth day of each and every month the commission shall make a verified and detailed report to the comptroller and the governor of its receipts and disbursements during the preceding month. The report to the comptroller shall be accompanied by proper vouchers.

§ 24. Amends the Farms and Markets Law, adding § 78-a, relating to state aid for public markets. See Farms and Markets Law, § 78-a.

§ 25. The commission appointed by chapter two hundred and five, laws of nineteen hundred and seventeen, is hereby abolished, and all its powers

L. 1917, ch. 813.

Time of taking effect; continuance.

§ 26.

and duties hereby conferred upon the commission created by this act. The said commission shall transfer to the commission created by this act all books, records and papers of its proceedings, and all employees of such commission so abolished shall be transferred to and be under the charge of the commission created by this act. All appropriations made under said chapter are hereby transferred to the commission created by this act. This section shall not take effect until the commission shall pass a resolution stating that it is organized and ready to assume the duties under this act and file the same in the office of the secretary of state.

§ 26. **Time of taking effect; continuance of act.**—This act shall take effect immediately, and shall continue in force during the time that the United States is at war with the German empire, and thereafter until the governor by a proclamation shall declare that the emergency causing the enactment thereof no longer exists either in whole or in part, in which event the powers herein conferred upon the commission shall terminate either wholly or partially as of the date of such proclamation. The governor may in such proclamation state that an emergency no longer exists as to certain powers conferred upon the commission specified therein and the exercise of such powers shall thereupon cease. In case of a partial suspension by proclamation of the powers of the commission, powers not specified in such proclamation shall continue until a further proclamation terminating the same. At the termination of the powers of the commission, the books, papers and records thereof, or any unexpended balance of appropriations available, and now properly under its control, shall be turned over to or transferred forthwith to the department of farms and markets, which under the direction of the governor shall close up the affairs of the commission. Provided that the powers conferred by this act upon the commission shall in any case terminate within one year after the publication of a treaty of peace between the United States and the German empire; and provided further that the provisions of section twenty-four of this act shall take effect immediately and continue in full force and effect until amended or repealed.

FOOD PRODUCTS.

False labels, Penal Law, § 435.

FOODS AND MARKETS.

State department established; General Business Law, §§ 20-20-1. See Farms and Markets Law.

FOOD SUPPLY.

See also Farms and Markets Law.

L. 1917, ch. 205.—An act to provide for assuring an adequate food supply and for promoting the production thereof, and making an appropriation therefor. (*In effect Apr. 17, 1917.*)

Section 1. Commission established; powers.—A commission is hereby created, for the purposes of this act, to consist of the commissioner of agri-

§§ 2, 3. Commission established; distribution of seeds. L. 1917, ch. 205.

culture, the commissioner of education, the dean of the New York State College of Agriculture, the state director of farm bureaus, the commissioner of foods and markets, and four other members, who shall be appointed by the governor. The commissioner of agriculture shall be chairman of the commission. The members of such commission shall receive no compensation for the performance of their duties under this act, but shall be paid their actual and necessary expenses incurred in connection therewith.

The commission shall have the power, and it shall be the object and purpose of the commission, to adopt all necessary measures to assure an adequate food supply in the state and to promote the production of such supply, by co-operating with the state department of agriculture, the state department of education, other state departments and commissioners, the State College of Agriculture and other state institutions, and the various farm bureaus and official and unofficial organizations. Moneys used in aiding the functions of a state department, commission or institution, shall be applied in accordance with laws governing the exercise of such functions. Within the amount of moneys appropriated, the commission may employ such assistants as may be necessary, and, if so directed by the commission with the approval of the governor, additional assistants may be employed by any state department, commission or institution for carrying out the provisions of this act. By reason of the emergency which occasions the enactment of this statute all assistants employed under this act shall be exempt from civil service examinations, rules and regulations.

§ 2. **Distribution of seeds.**—The commission may, if in its judgment the public interest requires, buy and distribute at cost seed for staple productions in any section of the state and may accept loans from private corporations or individuals for the same purpose. It may also act as the agent for any voluntary organization to distribute seed or otherwise stimulate agricultural production or co-operate with such organization or organizations for that purpose.

§ 3. **Appropriation; advances; report to comptroller.**—The sum of five thousand dollars (\$500,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, to carry out the provisions of this act. Such money shall be paid to the commission or to its order by the state treasurer from time to time on the warrant of the comptroller, upon requisition signed by the chairman of such commission and the governor.

The comptroller is hereby authorized and directed to advance to said commission for use in making purchases for sale and distribution, as provided in section two hereof, such sum of money as said commission may require and request, not to exceed one-fifth of the amount appropriated herein. The said commission is hereby authorized to use such money in making such purchases and to use the money received from sales of goods so purchased in making further purchases of the kind provided in section

L. 1911, ch. 851. State college of forestry; Syracuse University. §§ 1, 2.

two for resale, but such purchases shall be approved by the comptroller. The provisions of section thirty-seven of the finance law requiring the payment of moneys into the state treasury on or before the fifth day of each month shall not apply to money received by the commission from the sales of goods purchased as provided herein.

On or before September first and December thirty-first, each year, until the close of the present war, the commission shall make a verified report to the comptroller of the disbursements made by it to such date. The commission shall expire at the close of such war or at such earlier time as the legislature shall determine. (*Amended by L. 1917, ch. 506, in effect May 16, 1917.*)

FORCIBLE ENTRY AND DETAINER.

See Penal Law, §§ 2034-2036.

FORECLOSURE OF MORTGAGE.

By action; Code Civ. Pro. §§ 1626-1637. By advertisement; Code Civ. Pro. §§ 2387-2409.

FOREIGN.

Importing foreign convict; Penal Law, §§ 641, 642. Code Crim. Pro. § 674.

FOREST, FISH AND GAME LAW.

(L. 1909, ch. 24.)

Note.—All of this chapter, repealed by Conservation Law or by L. 1912, ch. 318, 344, and revised, amended and reenacted as articles of the Conservation Law, which see.

FOREST LANDS.

Acquisition and development by municipalities; General Municipal Law, § 72-a. See Conservation Law.

FORESTRY.

L. 1911, ch. 851.—An act to establish a state college of forestry at Syracuse University, and making an appropriation therefor.

STATE COLLEGE OF FORESTRY AT SYRACUSE UNIVERSITY.

- Section 1. Establishment; corporate name.
2. Objects and purposes of college.
 3. Management and control of college.
 4. Powers and duties of boards of trustees.
 5. Property acquired to belong to the state.
 6. Admission to college; disposition of fees and income.
 7. Time of taking effect.

§ 1. Establishment; corporate name.—There is hereby established at Syracuse University a state college of forestry, which shall be known as The New York State College of Forestry at Syracuse University.

§ 2. Objects and purposes of college.—Such college shall have for its objects and purposes:

1. The conduct upon land acquired by purchase, gift or lease for such purpose of such experiments in forestry and forestation as the board of trustees deem most advantageous to the interests of the state and the ad-

§§ 3-5. State college of forestry; Syracuse University. L. 1911, ch. 851.

vancement of the science of forestry. (*Subd. amended by L. 1913, ch. 161.*)

2. The planting, raising, cutting and selling of trees and timber at such times, of such specie and quantities and in such manner as the board of trustees deems best, with a view of obtaining and imparting knowledge concerning the scientific management and use of forests, their regulation and administration, and the production, harvesting and reproduction of wood crops and the earning of revenue therefrom.

§ 3. **Management and control of college.**—The care, management and control of such college and the property and premises required therefor shall be exercised by a board of twelve trustees. The chairman of the state conservation commission, the lieutenant governor, the state commissioner of education and the chancellor of Syracuse university, shall be ex-officio members of the board of trustees. The remaining nine members of the board of trustees shall be appointed by the governor, by and with the advice and consent of the senate, immediately after this act takes effect and shall be divided into three classes, so that the terms of one-third thereof shall expire on June thirtieth, nineteen hundred and fifteen, and one-third thereof on the thirtieth day of June of each second year thereafter. Successors to such trustees shall be appointed for full terms of six years. In case of any vacancy in the office of any appointive trustee his successor shall be appointed for the unexpired term for which he was appointed. The members of the board of trustees shall serve without compensation, but shall be entitled to their actual necessary expenses incurred in the performance of their duties. (*Amended by L. 1912, ch. 15, L. 1913, ch. 339 and L. 1915, ch. 587.*)

§ 4. **Powers and duties of board of trustees.**—The board of trustees of such college of forestry shall have the general care, supervision and control of such college and of its officers, and to carry out its objects and purposes shall:

1. Employ and at pleasure remove teachers, experts and all necessary clerks and assistants.

2. Adopt rules, not inconsistent with law, controlling the affairs of such college.

3. Prescribe the course of instruction and the methods of investigation and experiments to be followed in such college, and the degree to be conferred on graduation therefrom.

4. Report to the legislature on or before the first day of February a detailed statement of the general operation of such college for the year ending on the thirtieth day of June then next preceding. (*Amended by L. 1916, ch. 118, § 30.*)

§ 5. **Property acquired to belong to the state.**—All lands purchased and other property acquired with moneys appropriated by the state for such college of forestry shall be and remain the property of the state. If real

L. 1913, ch. 677. State college of forestry; Syracuse University.

§ 1.

property is purchased, the title thereto shall be conveyed to the people of the state of New York, and the sufficiency of such title and the form of conveyance shall be approved by the attorney-general.

§ 6. Admission to college; disposition of fees and income.—Students who are bona fide residents of the state of New York for one year preceding the date of admission shall be entitled to free tuition in such college. Any moneys received from tuition paid by students not residents of the state of New York and from the sale of products shall be reported and forwarded monthly to the state treasurer, as required by the state finance law, and may be appropriated toward the maintenance of such college of forestry. (*Amended by L. 1912, ch. 15.*)

* 2. Appropriation.—\$40,000 appropriated.

L. 1913, ch. 677.—An act providing for the erection of buildings for the New York State College of Forestry at Syracuse University, and the acquisition of land on which to erect the same, and making an appropriation therefor.

Section 1. Appropriated \$250,000.

§ 2. None of the moneys hereby appropriated for the New York State College of Forestry at Syracuse University shall, however, be or become available until the land on which the buildings provided for herein are to stand, shall be conveyed to the people of the state of New York by Syracuse University, and the conveyance approved as to form and manner of execution by the attorney-general. The conveyance shall include, besides the land on which said buildings may be erected, a strip ten feet wide around the same, with the necessary rights of way to the same. Syracuse University shall, during the pleasure of the state, have complete control over the land conveyed and the buildings erected thereon, for the educational purposes of said New York State College of Forestry at Syracuse University, the same as though no conveyance had been made. If at any time any building or buildings so erected on said lands shall cease to be available to said Syracuse University for the use for which it is hereby authorized to be constructed, by reason of an act of the legislature abolishing the New York State College of Forestry at Syracuse University, or the discontinuance of said college, the land and buildings aforesaid shall revert to Syracuse University; but in that case such reversion to said Syracuse University shall be conditioned upon the payment by it to the state of the then duly appraised value of such building or buildings. In case said buildings shall be destroyed, and the state shall fail within a reasonable time *thereafter to reconstruct the same, the title to said lands shall likewise revert to Syracuse University.

§ 3. Temporary.

FORESTS, FISH AND GAME.

See Conservation Law.

* So in original.

Cross-references.

FORFEITURES.

See Fines.

FORGERY.

Definition and punishment; Penal Law, §§ 880-895.

FORT BREWERTON.

See Historical Places.

FOUL BROOD.

Among bees; prevention of; Agricultural Law, § 300.

FOUNDRIES.

Regulation; Labor Law, § 97.

FRANCHISE TAX.

See Tax Law, § 2, sub. 3, and §§ 44-49.

FRATERNAL SOCIETIES

Obtaining aid by fraud in use of badge; Penal Law, § 935. Fraudulent use of name or title; Penal Law, § 936. Unlawful dues; Penal Law, § 936-a. Incorporation and powers; Insurance Law, §§ 230-249. See also Benevolent Orders Law.

FRAUDS.

Penal provisions generally as to frauds and cheats; Penal Law, §§ 920-949. Obtaining property; Penal Law, § 1293-c.

FRAUDS, STATUTE OF.

See Personal Property Law, §§ 30-44. Real Property Law, § 224-f.

FRAUDULENT CONVEYANCES.

Penal Law, §§ 1170-1173.

FREE AND ACCEPTED MASONS.

See Benevolent Orders Law.

FREIGHT AND BAGGAGE.

Disposition of unclaimed; General Business Law, §§ 280-287. Railroad Law, § 69.

FREIGHT TERMINAL CORPORATIONS.

Incorporation; Transportation Corporations Law, §§ 153-159.

FRIENDS.

Trusts for; Religious Corporations Law, §§ 202, 203.

FRUIT PACKAGES.

Apples, pears, peaches and quinces; Agricultural Law, §§ 260-263. Marketing small fruit packages; General Business Law, § 391. Use of for repacking regulated; General Business Law, § 392.

FRUIT TREES.

Sale; Agricultural Law, §§ 263-265. Prevention of diseases; Agricultural Law, §§ 304, 305. Unlawfully spraying with poisons; Penal Law, § 1757.

FUGITIVES FROM JUSTICE.

See Code Crim. Pro. §§ 827-834.

Cross-references.

FULL LIABILITY COMPANIES.

See Business Corporations Law.

GAMBLING.

Penal provisions generally; Penal Law, §§ 970-997. Betting on prize fight; Penal Law, § 1712. Immunity of gambling witness; Penal Law, § 996.

GAME FARMS.

See Conservation.

GAME REFUGES.

Reservation for; Conservation Law, § 366-a.

GARBAGE.

Operation of crematories; General City Law, § 17.

GAS.

Municipal contracts for supplies in cities of the first class; General City Law, §§ 130-132. Standard of purity in cities of the second class; General Business Law, §§ 320-323. Injuring mains; Penal Law, § 1423. Interference with meters; Penal Law, § 1431. See Public Service Law.

GAS CORPORATIONS.

Incorporation and powers; Transportation Corporations Law, §§ 60-67. See also Natural Gas Corporations. See Public Service Law for regulation and control.

GAS TAR.

Throwing into potable waters; Penal Law, § 1759.

GENERAL BUSINESS LAW.

L. 1909, ch. 25.—An act relating to general business, constituting chapter twenty of the consolidated laws.

In effect February 17, 1909.

CHAPTER XX. OF THE CONSOLIDATED LAWS.

GENERAL BUSINESS LAW.

- Article 1. Short title (§ 1).
2. Weights and measures (§§ 2-18-a).
- 2-A. Department of foods and markets (§§ 20, 20-a-20-i).
3. Auctions and auctioneers (§§ 20-28).
- 3-A. Private banking (§§ 25-29, 29-a-29-g). [*Repealed by L. 1914, ch. 369.*]
4. Peddlers (§§ 30-36).
5. Pawnbrokers (§§ 40-52).
- 5-A. Supervisor of small loans; business of small loan brokers regulated (§§ 55-59, 59-a-59-k). [*Repealed by L. 1914, ch. 369, and ch. 518, § 38.*]
6. Junk dealers (§§ 60-64).
7. Private detectives (§§ 70-76).
- 7-a. Registered architects (§§ 77-79, 79-a, 79-b).
8. Public accountants (§§ 80-82).
- 8-A. Certified shorthand reporters (§§ 85-89, 89-a).
9. Warehousemen (§§ 90-143).
10. Ticket agents (§§ 150-154).
11. Employment agencies (§§ 170-192).
12. Hotels and boarding houses (§§ 200-209).
- 12-A. Public entertainments or exhibitions by cinematograph or any other apparatus for projecting moving pictures (§§ 209-216).
13. Flour and meal (§§ 220-229).
14. Beef and pork (§§ 240-242).
15. Hops, hay and straw (§§ 250-255).
16. Ice (§§ 260-263).
17. Milk cans (§§ 270-274).
18. Freight and baggage (§§ 280-287).
19. Oil and distilled spirits (§§ 300-310).
20. Gas (§§ 320-323).
21. Newspapers and periodicals (§§ 330-333).
22. Monopolies (§§ 340-346).

L. 1909, ch. 25.	Short title.	§ 1.
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- 23. Conspiracies to control transportation (§§ 350, 351).
- 24. Trade marks (§§ 360-367).
- 25. Interest and usury (§§ 370-382).
- 25-A. Sale of coal, coke and charcoal (§§ 383-389, 389-a).
- 26. Miscellaneous (§§ 390-398).
- 27. Laws repealed; when to take effect (§§ 400, 401).

ARTICLE I.

SHORT TITLE.

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the “General Business Law.”

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 1.

Consolidators' note.—When the statutes which had been classified to the Domestic Commerce Law, during the preliminary examination, were taken up for consolidation, a large number of independent statutes were found relating to such subjects as peddlers, pawnbrokers, private detectives, public accountants, employment agencies and warehousemen. Other provisions were found of a miscellaneous nature such as regulating the cutting of ice in the Hudson river; preventing monopolies; providing for the disposition of unclaimed freight and baggage; regulating the plugging of abandoned oil wells; regulating the publishing of periodicals; providing for the purity, power and pressure of gas, and a number which can best be grouped under the general head, “interest and money.” Many of the foregoing provisions could not be regarded as coming under the head of “commerce,” and the prefix “domestic” is not applicable as in some of the provisions matters relating to exportation and foreign commerce are made subject to the statute. Therefore it became necessary either to broaden the scope and change the name of the Domestic Commerce Law or to recommend additional general laws. The former course was deemed best and the name “General Business Law” was adopted as more descriptive than the old name, “Domestic Commerce Law.”

This chapter as presented contains all provisions of the Domestic Commerce Law as amended to date, and various statutes relating to business generally.

ARTICLE II.

WEIGHTS AND MEASURES.

Section 2. Description of weights and measures.

- 3. The unit of length and surface.
- 4. Units of weight.
- 5. Units of capacity.
- 5-a. Bottles or jars for milk and cream.
- 5-b. Penalty.
- 6. Heap measure. (Repealed by L. 1917, ch. 530.)
- 7. Measure for bran. (Repealed by L. 1917, ch. 530.)
- 8. Number of pounds to the bushel.
- 9. Barrels of apples, quinces, pears and potatoes. (Repealed by L. 1912, ch. 531.)

§ 2.	Weights and measures.	L. 1909, ch. 25.
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10. Construction of contracts.
11. Duties of state superintendent of weights and measures.
12. Copies of standard weights and measures.
13. County sealer; duties of county sealer; duty of supervisors.
14. City sealer.
15. Weights and measures to be sealed; fees.
16. Method of sale of certain commodities.
- 16-a. Certain sizes of containers when used for vegetables, produce and fruit prescribed. (Repealed by L. 1917, ch. 530.)
- 16-b. Standard grape basket. (Repealed by L. 1917, ch. 530.)
17. Net contents of containers to be indicated on the outside thereof.
- 17-a. When sections sixteen, sixteen-a and seventeen shall not apply.
- 17-b. Guaranty furnished by wholesaler, jobber or manufacturer.
- 17-c. Definition of terms "container" and "person."
18. Examination and prosecution.
- 18-a. Penalties.

Note.—The provisions of this article are to be enforced and carried into effect by the Department of Farms and Markets, and the office of the state superintendent of weights and measures is made a bureau in that department. See Farms and Markets Law, §§ 25, 30, 100.

§ 2. Description of weights and measures.—The standard weights and measures that were furnished to this state by the government of the United States, in accordance with a joint resolution of congress, approved June fourteenth, eighteen hundred and thirty-six, and consisting of one standard yard measure and one set of standard weights, comprising one Troy pound, and nine avoirdupois weights of one, two, three, four, five, ten, twenty, twenty-five and fifty pounds respectively; one set of standard Troy ounce weights, divided decimally from ten ounces to the one ten-thousandth of an ounce; one set of standard liquid capacity measures, consisting of one wine gallon of two hundred and thirty-one cubic inches, one half gallon, one quart, one pint and one-half pint measure; and one standard half bushel, containing one thousand and seventy-five cubic inches and twenty-one hundredths of a cubic inch, according to the inch hereby adopted as standard, and such new weights, measures, balances and other apparatus as may be received from the United States as standard weights, measures, balances and apparatus in addition thereto or in renewal thereof as well as such weights, measures, balances and apparatus as may be added by the state department of weights and measures and verified by the national bureau of standards shall be the standards of weights and * measure throughout this state. (*Amended by L. 1910, ch. 187.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 2; originally revised from L. 1851, ch. 134, § 1.

Consolidators' note.—In connection with the subject of weights and measures see U. S., R. S., tit. 37, § 3569, and also Constitution of the United States, art. 1, § 8, which reserves to congress the right to "coin money * * * and fix the standards of weights and measures."

* So in original.

L. 1909, ch. 25.

Weights and measures.

§§ 3, 4.

References.—Criminal liability for using or keeping false weights and measures. Penal Law, §§ 2410–2417.

History of various revisions of law relating to weights and measures. Ford v. N. Y. C. & H. R. R. R. (1898), 33 App. Div. 474, 480, 53 N. Y. Supp. 764.

Metric system markings.—Bottles and barrels of brandies and wines imported with contents marked under the metric system may be sold without re-marking in units of the gallon. Rept. of Atty. Genl. (1914), Vol. 2, p. 307.

§ 3. **The unit of length and surface.**—The unit or standard measure of length and surface, from which all other measures of extension, whether lineal, superficial or solid, shall be derived and ascertained, are the standards of length designated in this article. For measures of cloth and other commodities commonly sold by the yard, it may be divided into halves, quarters, eighths and sixteenths.

The rod, pole or perch, contains five and one-half yards; the mile, one thousand seven hundred and sixty yards. The chain for measuring land is twenty-two yards long and is divided into one hundred equal parts called links.

The acre for land measure shall be measured horizontally and contain ten square chains, equivalent in area to a rectangle sixteen rods in length and ten in breadth; six hundred and forty acres being contained in a square mile. (*Amended by L. 1910, ch. 187.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 3; originally revised from L. 1851, ch. 134, §§ 2–5.

§ 4. **Units of weight.**—The units or standards of weight from which all other weights shall be derived and ascertained, shall be the standard weights designated in this article. The hundred-weight consists of one hundred avoirdupois pounds and twenty hundred-weight are a ton. In all transactions relating to the sale or delivery of coal two thousand avoirdupois pounds in weight shall constitute a legal ton. (*Amended by L. 1910, ch. 187.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 4; originally revised from L. 1851, ch. 134, §§ 6, 7. Last sentence from General City L. (L. 1900, ch. 327) § 150, in part.

Consolidators' note.—The new matter incorporated in § 4 comes from General City Law, § 150, first sentence. The provision is of general application and should not be in the General City Law. Although possibly covered by § 4, it has been inserted to avoid question.

Municipal ordinance on same subject.—The provision of this section which inhibits the sale of coal "at less than 2,000 pounds by weight to a ton" does not prevent the passage of a similar ordinance. City of N. Y. v. Marco (1908), 58 Misc. 225, 109 N. Y. Supp. 58.

Evidence of short weight coal.—Where coal dealers are sued for a penalty imposed by L. 1900, ch. 327, § 150, for selling less than 2,000 pounds by weight to a ton of coal, and the plaintiff proves that the coal in question weighed only 1,870 pounds at a public scale, they can only meet such proof by showing that the coal when it left their yard weighed 2,000 pounds. City of New York v. Henderson (1902), 39 Misc. 351, 79 N. Y. Supp. 877.

§§ 5, 5-a, 5-b.

Weights and measures.

L. 1909, ch. 25.

§ 5. **Units of capacity.**—The units or standards of measure of capacity for liquids from which all other measures shall be derived and ascertained shall be the standards designated in this article. The barrel is equal to thirty-one and one-half gallons and two barrels are a hogshead. The parts of the liquid gallon shall be derived from the gallon by continual division by the number two, so as to make half gallons, quarts, pints, half pints and gills. The peck, half peck, quarter peck, quart, pint and half pint measures for measuring commodities which are not liquids shall be derived from the half bushel by successively dividing that measure by two. (*Amended by L. 1909, ch. 414 and L. 1917, ch. 530, in effect Sept. 1, 1917.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 5; originally revised from L. 1829, ch. 297, §§ 1, 2, 6, 7 and L. 1851, ch. 134, §§ 8-11. The amendment of 1917 conforms the section to the federal law.

§ 5-a. **Bottles or jars for milk and cream.**—Bottles used for the sale of milk and cream shall be of the capacity of half gallon, three pints, one quart, one pint, half pint and one gill, filled full to the bottom of the cap ring or stopple. The following variations on individual bottles or jars may be allowed; six drams above and six drams below on the half gallon; five drams above and five drams below on the three pint; four drams above and four drams below on the quart; two drams above and two drams below on the half pint, and two drams above and two drams below on the gill. Bottles or jars used for the sale of milk shall have clearly blown, or otherwise permanently marked, in the sides or bottom of the bottle the name, initials or trade-mark of the manufacturer and a designating number, which designating number shall be different for each manufacturer and may be used in identifying the bottles. The designating number shall be furnished by the state superintendent of weights and measures upon application by the manufacturer, and a record of the designating numbers and to whom furnished shall be kept in the office of the superintendent of weights and measures. (Added by L. 1910, ch. 470.)

Source.—New.

References.—Trade-marks on bottles; description to be published, General Business Law, § 360. Unlawful use of trade-marked bottles, Id. §§ 362, 363. Branded cans, jars or bottles not to be sold, re-marked or used without consent of owner, Agricultural Law, § 36. Unsanitary cans and receptacles condemned, Id. §§ 46, 47. Shipping cream in bottles from milk stations; bottles to be marked, Id. § 45.

§ 5-b. *** Penalty.**—Any manufacturers who sell milk and cream bottles to be used in this state that do not comply as to size and marking with the provisions of section five-a shall suffer a penalty of five hundred dollars, to be recovered by the attorney-general in an action to be brought in the name of the people of the state of New York. Any dealer who knowingly uses for the purpose of selling milk or cream jars or bottles purchased after this law takes effect that do not comply with section five-a as to

* Editor's title.

marking and capacity shall be deemed guilty of giving false or insufficient measure. (*Added by L. 1910, ch. 470.*)

Source.—New.

§ 7. Measure for bran.—(*Repealed by L. 1917, ch. 530, in effect Sept. 1, 1917.*)

§ 8. Number of pounds to the bushel.—Whenever any commodity specified in this section is sold by the bushel, and no special agreement is made by the parties as to the mode of measuring, the bushel shall consist of seventy pounds of lime or coarse salt; sixty pounds of wheat, peas, potatoes, clover-seed or beans; fifty-seven pounds of onions; fifty-six pounds of Indian corn, rye or fine salt; fifty-five pounds of flax-seed; fifty-four pounds of sweet potatoes; fifty pounds of corn meal, rye meal or carrots; forty-eight pounds of barley or buckwheat; forty-five pounds of herds-grass, timothy seed or rough rice; forty-four pounds of Sea island cotton seed; thirty-three pounds of dried peaches; thirty-two pounds of oats; thirty pounds of upland cotton seed; twenty-five pounds of dried apples; twenty pounds of bran or shorts. For a fractional part of the bushel a like fractional part of the above weights shall be required. (*Amended by L. 1910, ch. 187 and L. 1917, ch. 360, in effect May 4, 1917.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 8; originally revised from L. 1851, ch. 134, § 15 and L. 1857, ch. 560; modified to accord with the recommendation of the commissioners for the promotion of uniformity of legislation, except as to the number of pounds in a bushel of fine salt.

§ 9. Barrels of apples, quinces, pears and potatoes.—(*Repealed by L. 1912, ch. 81.*)

§ 10. Construction of contracts.—All contracts made within the state for work to be done, or for the sale or delivery of personal property, by weight or measure, shall be taken and construed according to the standards of weights and measures adopted in this article.

Source.—Domestic Commerce L. (L. 1896, ch. 376), § 10; originally revised from L. 1851, ch. 134, § 14.

§ 11. Duties of state superintendent of weights and measures.—The state superintendent of weights and measures shall take charge of the standards adopted by this article as the standards of the state; cause them to be kept in a fireproof building belonging to the state, from which they shall not be removed, except for repairs or for certification, and take all other necessary precautions for their safe-keeping. He shall maintain the state standards in good order and shall submit them once in ten years to the national bureau of standards for certification. He shall correct the standards of the several cities and counties, and, as often as once in five years, compare the same with those in his possession, and shall keep a record of the same, and where not otherwise provided by law he shall have a general supervision of the weights, measures and measuring and

weighing devices of the state, and offered for sale, hire, award, or sold or in use in the state. He shall upon the written request of any citizen, firm, corporation or educational institution of the state, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the state. He, or his deputies or inspectors by his direction, shall at least once annually test all weights and measures, and weighing and measuring devices used in checking the receipt or disbursement of supplies in every state institution and he shall report in writing his findings to the executive officer of the institution concerned; and at the request of said officers the superintendent of weights and measures shall appoint in writing one or more employees, then in actual service, of each institution, who shall act as special deputies for the purpose of checking the receipt or disbursement of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the state and take receipt for the same from his successor in office. He shall annually during the first two weeks of January make to the legislature a report of the work done by his office. The state superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He, or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the state in order to inspect the work of the local sealers and in the performance of his duties he, or his deputies or inspectors, may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation. He shall establish amounts of tolerance, or reasonable variations allowable for weights, measures, and weighing and measuring devices, and shall issue instructions to the county and city sealers, and these shall be binding upon and govern said sealers in the discharge of their duties. (*Amended by L. 1910, ch. 187 and L. 1917, ch. 531, in effect May 17, 1917.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376), § 11; originally revised from L. 1851, ch. 134, § 17.

References.—Appointment and salary of state superintendent, Executive Law, § 100. Office of superintendent transferred to department of farms and markets, Farms and Markets Law, § 25.

Authority of State Superintendent to enforce performance of duty by county and city sealers.—The scheme of the statute is that the county and city sealers shall enforce the observation by individuals of the standards of weights and measures, and that the State Superintendent shall enforce the performance of this duty by the county sealers and city sealers. While there is no express provision of law as to the manner in which the State Superintendent shall enforce the performance of their statutory duty by the county and city sealers, yet his general powers of supervision over them and over the standards of the State are sufficient to support his authority to direct them in the performance of their duties and to insist that the mandates of the statute be observed. Rept. of Atty. Genl. (1911), Vol. 2, p. 661.

Deputy State Superintendent of Weights and Measures is in the exempt class. Rept. of Atty. Genl. (1911), vol. 2, p. 3.

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§ 12, 13.

§ 12. Copies of standard weights and measures.—The state shall have a complete set of copies of the original standards of weights and measures adopted by this article, which shall be used for adjusting county standards, and the original standards shall not be used except for the adjustment of this set of copies and for scientific purposes.

The state superintendent of weights and measures shall see that the foregoing provisions of this section are complied with and procure such apparatus and fixtures, if the same have not already been procured, as are necessary in the comparison and adjustment of the county standards.

He shall cause all the city and county standards to be impressed with the emblem of the United States, the letters "N. Y.," and such other device as he shall direct for the particular county.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 12; originally revised from L. 1851, ch. 134, §§ 19, 25.

§ 13. County sealer; duties of county sealer; duty of supervisors.—There shall be a county sealer of weights and measures in each county, except where such county is wholly embraced within a city, who shall be appointed by the board of supervisors and hold office during the pleasure of such board. He shall be paid a salary determined by the board of supervisors and shall be provided by them with the necessary working equipment of standard weights and measures. He shall take charge of and safely keep the county standards, and at least once in every five years shall submit such standards to the state superintendent of weights and measures, at the place where the standards of the state are kept, for calibration and certification. Where not otherwise provided by law, the county sealer shall have the power within his county to inspect, test, try and ascertain if they are correct, all weights, scales, beams, measures of every kind, instruments or mechanical devices for measurement and the tools, appliances or accessories connected with any or all such instruments or measurements used or employed within the county by any proprietor, agent, lessee or employee in determining the size, quantity, extent, area or measurement of quantities, things, produce, articles for distribution or consumption offered or submitted by such person or persons for sale, for hire or award. He shall at least twice in each year and as much oftener as he may deem necessary see that the weights, measures and all apparatus used in the county are correct. He may for the purposes above mentioned, and in the general performance of his official duties, enter or go into or upon and without formal warrant, any stand, place, building or premises or may stop any vendor, peddler, junk dealer, coal wagon, ice wagon or any dealer whatsoever, for the purposes of making the proper tests. Whenever the county sealer finds a violation of the statutes relating to weights and measures he shall cause the violator to be prosecuted. The county sealer shall keep a complete record of the work done by him and shall make an annual report to his board of supervisors, and an annual report, duly

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Weights and measures.

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sworn to, not later than the first of December to the state superintendent of weights and measures. The county sealer of weights and measures shall forthwith on his appointment give a bond, with sureties to be approved by the appointing power, for the faithful performance of the duties of his office and for the safety of the local standards and such appliances for verification as are committed to his charge and for the surrender thereof immediately to his successor in office or to the person appointed by the proper authority to receive them. (*Amended by L. 1910, ch. 187 and L. 1917, ch. 529, in effect May 17, 1917.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 13; originally revised from L. 1851, ch. 134, §§ 20, 21, as amended by L. 1865, ch. 666, and §§ 24, 25.

Section mandatory.—The provisions of this section and of section 14, *post*, as to the appointment of sealers of weights and measures in each county and town are mandatory. Rept. of Atty. Genl. (1908), 479; Rept. of Atty. Genl. (1909) 837.

Appointment of county sealer; special meeting.—A special meeting may be called by the board of supervisors for the appointment of a county sealer of weights and measures, if in their discretion it be advisable. Rept. of Atty. Genl. (1910) 928.

Mandamus may be brought by the Attorney-General to compel the board of supervisors to perform the duties imposed by this section. Rept. of Atty. Genl. (1909) 837.

Jurisdiction of a county sealer of weights and measures does not extend to the cities within his county. Rept. of Atty. Genl. (1910) 929.

Computing scales.—The county sealer may test the correctness of indicated money values on computing scales. Rept. of Atty. Genl. (1910) 927.

§ 14. Town sealer.—(*Repealed by L. 1910, ch. 187.*)

§ 14. City sealer.—There shall be a city sealer of weights and measures, or an officer having similar duties, to be appointed by the mayor with the approval of the common council of each city, or in such other way as the city charter shall designate. He shall be paid a salary to be fixed and determined by the board or body authorized to determine salaries of city officials, and no fees shall be charged or received by him or by the city for the inspection or testing of weights, measures or weighing or measuring devices. He shall perform in his city the duties of and have like powers as a county sealer in a county. (*Formerly § 15; renumbered § 14, and amended by L. 1910, ch. 187 and L. 1917, ch. 523, in effect May 16, 1917.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376), § 15.

§ 15. Weights and measures to be sealed.—Whenever the sealer of a city or county compares weights and measures and finds that they correspond or causes them to correspond with the standards in his possession, he shall seal and mark such weights and measures with the appropriate devices. (*Formerly § 16; renumbered § 15, and amended by L. 1910, ch. 187.*)

Source.—Domestic Commerce L. (L. 1896, ch. 516), § 16; originally revised from L. 1851, ch. 134, §§ 26, 27. The amendment of 1910 eliminated provisions as to fees.

Fees not authorized for unsolicited service. Ford v. N. Y. Central & H. R. R. R. Co. (1898), 33 App. Div. 474, 481, 53 N. Y. Supp. 764.

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§§ 16, 16-a.

The statute entitles the sealer of weights and measures to collect a fee from the owner of the weight or measure which is brought to him or which he examines at the instance of the owner; but such fee cannot be collected from the owner of weights and measures where the examination is made at the request of some superior public officer and without the owner's consent *Fausnaugh v. Rogers* (1901), 62 App. Div. 535, 71 N. Y. Supp. 125. See also Rept. of Atty. Genl. (1903) 290.

§ 16. Method of sale of certain commodities.—All meat, meat products and butter, shall be sold or offered for sale by weight. All other commodities not in container shall be sold or offered for sale by standard weight, standard measure or * offered for sale by standard weight, standard measure or numerical count; and such weight, measure or count shall be marked on a label or a tag attached thereto; provided, however, that vegetables may be sold by the head or bunch. (*Added by L. 1912, ch. 81.*)

Source.—New.

Sale by weight or measure.—This section means that articles of food may be sold either by weight, measure or count according to the usual customs of the people, and there is nothing contained therein which makes it obligatory to sell a loaf of bread by weight, that not being the common custom. *People v. Gaab* (1917), 177 App. Div. 192.

The first sentence of this section, as added by Laws of 1912, chap. 81, that "all meat, meat products and butter, shall be sold or offered for sale by weight," is declaratory of an exclusive and unconditional method for selling such articles. *People v. Armour & Co.* (1916), 176 App. Div. 161, 162 N. Y. Supp. 621.

It is not a violation of this section to sell an informed and willing customer bacon upon the basis of gross weight, although nothing denoting weight appeared on the wrapper. As said section does not denounce false weights the vendor may not be punished because he included the wrapper. *People v. Armour & Co.* (1916), 176 App. Div. 161, 162 N. Y. Supp. 621.

Sale by weight or measure in city of New York.—The code of ordinances of the city of New York provides (§ 388): "And all ice, coal, coke, meats, poultry and provisions (except vegetables sold by the head or bunch) of every kind, sold in the streets or elsewhere in the city of New York, shall be weighed or measured by scales, measures or balances, or in measures duly tested and stamped by the inspector or deputy inspector of weights and measures." It was held, that this is to be regarded merely as a requirement that where the provisions and other commodities mentioned are sold by weight or measure, the balances or measures used shall be such as have been stamped by the municipal authorities as correct and true; that it was not intended to apply to canned goods or to such articles as are customarily sealed up in jars, but relates solely to such articles as are customarily sold by weight or measure. *City of New York v. Fredericks* (1912), 206 N. Y. 618, 100 N. E. 419.

Sale of bread.—This section when taken in connection with section 17-a which provides that section 16 shall not apply when the numerical count of the individual units is six or less, does not impose upon the seller of a loaf of bread a penalty for selling a loaf not placed in a container, or not marked with the the weight thereof by a label or tag. *People v. Gaab* (1917), 177 App. Div. 192.

Section cited.—Rept. of Atty. Genl. (1913), Vol. 2, p. 398.

§ 16-a. Certain sizes of containers when used for vegetables, produce and fruit prescribed.—(*Added by L. 1912, ch. 81 and repealed by L. 1917, ch. 528, in effect Nov. 1, 1917.*)

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Containers, not of the standard sizes, for vegetables, fruit and produce may be manufactured and sold within the State of New York, providing they are properly marked as to their true size or contents. Rept. of Atty. Genl. (1913), Vol. 2, p. 660.

Section cited.—Rept. of Atty. Genl. (1913), Vol. 2, p. 398.

§ 16-b. Standard grape basket.—(*Added by L. 1913, ch. 426 and repealed by L. 1917, ch. 528, in effect Nov. 1, 1917.*)

§ 17. Delivery of standards to successor in office.—(*Repealed by L. 1910, ch. 187.*)

§ 17. Net contents of containers to be indicated on the outside thereof.—When commodities are sold or offered for sale in containers of other sizes than those specified in section sixteen-a or which sizes are not otherwise provided by statute, the net quantity of the contents of each container, or a statement that the specified weight includes the container, the weight of which shall be marked, shall be plainly and conspicuously marked, branded or otherwise indicated on the outside or top thereof or on a label or a tag attached thereto, in terms of weight, measure or numerical count; provided, however, that reasonable variations shall be permitted. (*Added by L. 1912, ch. 81.*)

Source.—New.

Marketing of contents under metric system.—Bottles and barrels of brandies and wines imported with contents marked under the metric system may be sold without re-marking in units of the gallon. Rept. of Atty. Genl. (1914), Vol. 2, p. 307.

Wrapped hams and bacons.—Producers of wrapped hams and bacons for sale to the retail customer without unwrapping must mark thereon the net and gross weights. Rept. of Atty. Genl. (1914), Vol. 2, p. 310.

Goods from other states.—Any person selling goods in this State in containers after chapter 81 of the Laws of 1912 became effective must mark the same or make a representation of the quantity delivered, irrespective of whether such goods came from other States or not. Rept. of Atty. Genl. (1913), Vol. 2, p. 398.

Use of word "average."—It is not lawful for a dealer to place on his package, in connection with the statement of the weight of its contents, the word "Average" with or without other qualifying clause. Rept. of Atty. Genl. (1912), Vol. 2, p. 571.

Contents to be indicated.—The absence of data on the wrapper around bacon showing the weight constitutes a violation of this section providing that the net contents of "containers" shall be indicated on the outside thereof. *People v. Armour & Co.* (1916), 176 App. Div. 161, 162 N. Y. Supp. 621.

The intent of this section is to provide a record of the wrapper that shall be the only means of establishing the weight of the "container," so that the vendor may not say that the purchaser was informed in some other way or that he waived information. *People v. Armour & Co.* (1916), 176 App. Div. 161, 162 N. Y. Supp. 621.

§ 17-a. When sections sixteen, sixteen-a and seventeen shall not apply.—Sections sixteen, sixteen-a and seventeen shall not apply to containers or commodities in containers with ornamentations or decorations exclusively for gifts or social favors, or to commodities dispensed for consumption on the premises, or to commodities or containers put in receptacles used merely for

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the purpose of carrying or delivering of commodities or containers complying with the provisions of such sections, or when the numerical count of the individual units is six or less, or in the case of liquids when the contents is two fluid ounces or less, or when the weight of the contents is three avoirdupois ounces or less, or to commodities packed, put up or filled prior to eight months after this section takes effect, or to barrels, half barrels, quarter barrels, casks, kegs and packages used for the purpose of containing maltous beverages; or to bottles used for the purpose of the bottling of spirituous, maltous, vinous, or carbonated beverages until two years after this section takes effect. (*Added by L. 1912, ch. 81, and amended by L. 1913, ch. 514.*)

Source.—New.

When provision relative to selling from bulk takes effect.—Chapter 81 of the Laws of 1912, amending the General Business Law, so far as it provides that where a retailer sells from bulk such sales, except of vegetables, should be by standard weight, standard measure or numerical count and so marked on a label or a tag attached thereto, is now in force and effect. Rept. of Atty. Genl. (1913), Vol. 2, p. 396.

§ 17-b. Guaranty furnished by wholesaler, jobber or manufacturer.—No person shall be prosecuted under the provisions of this article, following section fifteen thereof, when he can show a guaranty signed by a wholesaler, jobber or manufacturer, residing in the state of New York from whom he purchased the commodity in containers to the effect that they were not incorrectly marked within the meaning of such sections of this article. The person making the sale and guaranty shall then be amenable to the prosecution, fines, and other penalties which would in due course attach to the dealer under the provisions of such sections. The name appearing on the container and the marking as provided by section seventeen shall be deemed to constitute a guaranty. (*Added by L. 1912, ch. 81.*)

Source.—New.

§ 17-c. Definition of terms "container" and "person."—"A container" as used in this article, following section fifteen thereof, shall include any carton, box, crate, barrel, half-barrel, hamper, keg, drum, jug, jar, crock, bottle, bag, basket, pail, can, wrapper, parcel or package. "A person" as used in such sections shall be considered to import both the singular and the plural and shall include corporations, companies, societies and associations, and whether acting through an agent or servant. (*Added by L. 1912, ch. 81.*)

Source.—New.

§ 18. Examination and prosecution.—The examination of the weight, measure or numerical count of the contents of containers as provided by section seventeen shall be made by the state superintendent of weights and measures or under his supervision or direction by any of the weights and measures officials of the state; except that in the city of New York

such examination shall be made by the commissioner of the mayor's bureau of weights and measures of the city of New York. When after such examination there is cause to believe that a provision of section seventeen has been intentionally violated the state superintendent of weights and measures shall, after notifying in writing the person so accused of such accusation, certify the results to the attorney-general with a copy of the results of the examination duly authenticated under oath by the official making examination. The attorney-general shall cause appropriate proceedings in the name of the people of the state of New York to be commenced and prosecuted in the proper courts of the state without delay for the enforcement of the penalties therefor; except that in the city of New York the commissioner of the mayor's bureau of weights and measures shall in cases where he acts, after notifying in writing the person so accused of such accusation certify the result to the attorney-general, with a copy of the result of the examination duly authenticated under oath by the official making such accusation. Such attorney-general shall cause appropriate proceedings in the name of the people of the state of New York to be commenced and prosecuted in the courts of the state of New York without delay for the enforcement of the penalties therefor. The state superintendent of weights and measures with the co-operation of the chief or principal weights and measures officials of the cities of the first class shall establish uniform tolerances or amounts of reasonable variation and shall make uniform rules and regulations for carrying out the provisions of sections sixteen, sixteen-a, seventeen, seventeen-a and seventeen-b. (*Added by L. 1912, ch. 81.*)

Source.—New.

Regulation of superintendent.—Although this section empowers the State Superintendent of Weights and Measures with the cooperation of similar officials in cities of the first class, to establish uniform rules and regulations for carrying out the provisions of certain sections, the statute does not authorize the Superintendent of Weights and Measures of the city of New York to make a regulation requiring unwrapped bread to be sold by net weight to be marked on the bread, or on a label attached thereto, or on a sales slip, and to make a failure to comply with said regulation a criminal offense. Although, *it seems*, that the Legislature may delegate its power to regulate the sale of commodities to certain officials, it has not, by this statute, empowered municipal authorities to make a sale of bread otherwise than by weight a penal offense. *People v. Gaab* (1917), 177 App. Div. 192.

§ 18-a. Penalties.—A person violating any of the provisions of sections sixteen, sixteen-a, sixteen-b, seventeen, seventeen-b, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for the first and second violations, and by a fine of not less than one hundred dollars nor more than five hundred dollars for subsequent violations. (*Added by L. 1912, ch. 81, and amended by L. 1913, ch. 426.*)

Source.—New.

ARTICLE II-A.

(Article added by L. 1914, ch. 245.)

DEPARTMENT OF FOODS AND MARKETS.

Section 20. Establishment of department of foods and markets; commissioner.

- 20-a. General powers and duties of commissioner.
- 20-b. Auction markets.
- 20-c. Licensed auctioneers.
- 20-d. Commissions.
- 20-e. Inspection of produce.
- 20-f. Consignment to auction market.
- 20-g. Bulletins; lists of producers and consumers.
- 20-h. Additional duties of department.
- 20-i. Offenses.

§ 20. Establishment of department of foods and markets; commissioner.—There is hereby established a department of foods and markets. The head of such department shall be known as the commissioner of foods and markets. He shall be appointed by the governor for a term of six years, and shall be entitled to receive an annual salary of six thousand dollars. The commissioner may employ such clerks and other employees as may be needed, and fix their compensation. The term "commissioner" as used in this article, means the commissioner of foods and markets. (*Added by L. 1914, ch. 245.*)

Source.—New.

References.—Commissioner of foods and markets to be appointed by council of farms and markets, Farms and Markets Law, § 22. Property, records and appropriations of department of foods and markets transferred to department of farms and markets, Id. § 20; officers and employees transferred to department of farms and markets, Id. § 21. Department of foods and markets continued as division in department of farms and markets, Id. § 25. Salaries fixed by council of farms and markets, Id. § 28.

§ 20-a. General powers and duties of commissioner.—The commissioner of foods and markets shall:

1. Investigate the cost of food production and marketing in all its phases;
2. Aid and assist in the organization of cooperative societies among producers and consumers for the purpose of securing more direct business relations between them, of promoting and conserving the interests of producers, and reduce the cost of living to consumers;
3. Hear complaints and suggestions; take testimony of witnesses and obtain evidence, and, for the exercise of such powers may issue subpoenas and compel the attendance of witnesses and the production of evidence;
4. Advise and assist in the location and establishment of local markets whenever he determines that public necessity or the welfare of the com-

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munity requires such markets provided he shall be satisfied that such markets will be successfully operated by a cooperative company;

5. Have power to make rules and regulations for the grading, packing, handling, storage and sale of all food stuffs within the state, not contrary to law, and to enforce such rules and regulations by actions or proceedings in any court of competent jurisdiction;

6. Make an annual report to the legislature on or before the first day of February in each year, in which he shall summarize the work done by the department during the preceding calendar year, together with a statement of the plans for the development of the work of the department for the current year, and a detailed budget of the financial requirements of the department;

7. Have such other powers and perform such other duties as are prescribed in this article. (*Added by L. 1914, ch. 245.*)

Source.—New.

References.—Powers and duties transferred to department of farms and markets, Farms and Markets Law, §§ 25, 30. Rules of council of farms and markets to provide for carrying article into effect, Id. § 31. Powers and duties of department of foods and markets to be exercised and performed by department of farms and markets, and the provisions of this article to be enforced by such department, Id. § 100.

§ 20-b. **Auction markets.**—The commissioner shall cause to be established at such points in the state as he deems advisable, auction markets, and for such purpose may lease premises therefor or acquire such premises by purchase, or by condemnation, if unable to agree with the owner upon a price therefor. Upon the establishment of such a market the commissioner shall cause a notice to be published in such manner as he deems proper, stating that such market has been established and that farm produce, as defined in section two hundred and eighty-two of the agricultural law, may be consigned to a licensed auctioneer at such market for sale at public auction by such licensed auctioneers of the department of foods and markets at such market, as hereinafter provided. The commissioner shall have power to make regulations, not inconsistent with law, for operating the facilities in such auction markets, leasing space therein and otherwise regulating the management thereof. (*Added by L. 1914, ch. 245.*)

Source.—New.

Reference.—As to public markets in cities, see Farms and Markets Law, Art. 4.

§ 20-c. **Licensed auctioneers.**—Upon the establishment of an auction market, the commissioner shall issue a license to such persons as qualify, as hereinafter provided, in the city, town or village in which such market is located, authorizing them to act as official auctioneers for the department of foods and markets, in the sale of such goods consigned to such market. Such license shall be issued upon written application to the department of foods and markets, stating the full name of the person applying for such license, his address, and such other facts as to his character,

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responsibility and experience, as the commissioner shall require. The issuance of such license shall be in the discretion of the commissioner and shall be without charge. The commissioner shall require a person licensed as an auctioneer pursuant to this section to execute and deliver to him a fidelity bond with satisfactory sureties in such sum as the commissioner may determine, not less than one thousand nor more than three thousand dollars, conditioned for the faithful performance of his duties and the faithful accounting to a consignor of all moneys to which such consignor may be entitled after the deduction of commissions and other expenses authorized by this article. Such auctioneers shall receive no compensation from the state, but shall be entitled to charge commissions for the sale of farm produce, in accordance with the schedules of the department of foods and markets. Every shipper consigning food produce to such licensed auctioneers for sale shall be charged, in addition to the commission of the licensed auctioneer, as above provided, an additional commission of three per centum of the gross amount received for such produce, which shall be paid into the state treasury and applied to the support of the department hereby created. (*Added by L. 1914, ch. 245.*)

Source.—New.

§ 20-d. **Commissions.**—The commissioner shall adopt, and may from time to time amend, a schedule of commissions which official auctioneers shall be authorized to charge for the sale of farm produce at public auction at auction markets under the jurisdiction of the department of foods and markets. Such commissions may vary according to the quality and character of the produce, the size of the lots and number or quantity of the articles sold. The commissioner shall also establish a schedule of charges for inspection by the department of foods and markets. (*Added by L. 1914, ch. 245.*)

Source.—New.

§ 20-e. **Inspection of produce.**—The department of foods and markets, through experts employed for such purposes, shall have power to inspect and determine the grade and condition of farm produce both at collecting centers and receiving centers. (*Added by L. 1914, ch. 245.*)

Source.—New.

§ 20-f. **Consignment to auction market.**—The commissioner may, in the establishment of an auction market, also prescribe the zone from which farm produce may be consigned thereto. The department of foods and markets shall make arrangements for a proper place and be responsible for the safeguarding of food produce consigned to auction markets established by it. Farm produce so consigned to an auction market shall be received by the licensed auctioneer or auctioneers of the department of foods and markets, who shall proceed to sell such produce at public auction as auctioneers for the consignor at the best price obtainable therefor. If

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for any reason such an auctioneer be unable to sell any portion of such produce at public auction, or if he be unable to sell it at auction at a satisfactory price, such unsold portion may be distributed and sold at private sale at the best price obtainable therefor. After such sale, such auctioneer shall deduct his commissions and other authorized charges, and promptly transmit the balance to the consignor. (*Added by L. 1914, ch. 245.*)

Source.—New.

§ 20-g. **Bulletins; lists of producers and consumers.**—The department of foods and markets shall publish a daily bulletin, setting forth the quotations for which produce has been sold for the preceding day in all the principal markets of the state, including the auction markets established by the department of foods and markets, and also giving advice as to the available supplies of the principal farm produce, and as to the demand in the several markets for local as well as foreign produce. The department of foods and markets shall also prepare from time to time bulletins as to the most efficient methods of standardization, packing and transportation, and cause notice thereof to be distributed in such manner as the commissioner may determine. The department of foods and markets shall also investigate the source of supply of food produce and prepare and publish lists of the names and addresses of producers and consignors and supply the same to persons applying therefor. (*Added by L. 1914, ch. 245.*)

Source.—New.

§ 20-h. **Additional duties of department.**—The department of foods and markets, in addition to its other duties, shall investigate delays in transportation, and shall cause to be initiated proper proceedings to prevent restraint of trade or unlawful combinations to fix prices. It shall, when notified by producers, that food products produced with the state seem likely to spoil for lack of a ready market, make such suggestions to such producers or take such steps as seem advisable for facilitating the sale thereof. (*Added by L. 1914, ch. 245.*)

Source.—New.

§ 20-i. **Offenses.**—Any licensed auctioneer doing business at an auction market established by the commissioner, as by this act provided, who shall

1. Impose false charges for handling or services in connection with farm produce; or
2. Fails to account for such farm produce promptly and properly and to make settlements therefor, with intent to defraud; or
3. Makes false or misleading statement or statements as to market conditions with intent to deceive; or
4. Directly or indirectly purchases for his own account goods received by him upon consignment; or

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5. Makes false statements as to grade, condition, marking, quality or quantity of goods shipped or packed in any manner with intent to deceive; or;

6. Makes any charge for commissions, or otherwise, in excess of those authorized by the department of foods and markets,

Is guilty of a misdemeanor, and the commissioner shall forthwith revoke the license granted to such auctioneer and direct his bond to be forfeited. (*Added by L. 1914, ch. 245.*)

Source.—New.

ARTICLE III.

AUCTIONS AND AUCTIONEERS.

Section 20. Conduct of auction sales. (Repealed by L. 1911, ch. 571.)

21. Commissions; penalty.

22. Power of common council of cities.

23. Bond and appointment of auctioneers in cities.

24. Agents of comptroller.

25. Records to be kept by auctioneers.

26. Record open to inspection.

27. Penalties.

28. Limitation.

§ 20. Conduct of auction sales.—*Repealed by L. 1911, ch. 571.*

Note.—Section 20 is superseded by § 102 of Personal Property Law, as added by L. 1911, ch. 571.

§ 21. Commissioners; penalty.—An auctioneer in any county, other than New York or Kings, shall not, without a previous agreement in writing, with the owner or consignee of the goods sold, demand or receive a greater compensation for his services than a commission of two and one-half per centum of the amount of any sale, public or private, made by him. For a violation of this section he shall refund the moneys illegally received and forfeit two hundred and fifty dollars to each person from whom he demands or receives an unlawful compensation or commission.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 51; originally revised from R. S., pt. 1, ch. 17, tit. 1, §§ 23, 24.

What services included.—It has been held that the services included in the statute are merely the offering of the goods for sale and striking them off and that for all services rendered other than those mentioned the auctioneer is entitled to receive a reasonable compensation. *Russell v. Miner* (1872), 61 Barb. 539, 5 Lans. 537.

On the other hand it has been held that the statutory compensation includes not only compensation for the actual selling of the property but every kind of service which may be rendered by the auctioneer in taking the property into his possession and taking care of it while the sale is under advisement, preparing the necessary catalogs, etc. *Russell v. Miner* (1881), 25 Hun 114; *Leeds v. Bowen* (1863), 24 Super. (1 Rob.) 10, 2 Abb. Pr. (N. S.) 43.

Services in preparing for sale.—Where real estate was placed in the hands of brokers for sale at auction and they advertised the property and did all of the

work necessary and proper to prepare for the sale, but the day before the sale was to take place the property was sold at private sale, it was held that the auctioneers were entitled to their disbursements and the reasonable value of their services. *Donald v. Lawson* (1904), 87 N. Y. Supp. 485.

Interrupted sale.—An auctioneer who is employed to sell a stock of goods upon an oral agreement for a compensation greater than two and one-half per cent., and who is stopped, after selling a part, by the employer countermanding the sale, is not entitled to recover commission at the rate agreed, on the value of the whole stock of goods. *Leeds v. Bowen* (1863), 24 Super. (1 Rob.) 10, 2 Abb. Pr. (N. S.) 43.

Disbursements are not comprehended in services. *Russell v. Miner* (1881), 25 Hun 114; *Russell v. Miner* (1872), 61 Barb. 534, 5 Lans. 537.

Payment of fees by purchaser.—Where the terms of a sale made by an auctioneer require that his fees should be paid by the purchaser, he may maintain an action against the purchaser, for such fees, in his own name. *Bleecker v. Franklin* (1853), 2 E. D. Smith 93. See also *Miller v. Burke* (1875), 6 Daly 171, *affd.* 68 N. Y. 615; *Muller v. Maxwell* (1857), 15 Super. (2 Bosw.) 355.

Waiver of section.—It is not essential that the written agreement should be signed by the auctioneer and if signed by the owner and carried into effect by the auctioneer he is entitled to the compensation fixed upon, although in excess of the statutory rate. *Carpenter v. Le Count* (1883), 93 N. Y. 562, *affg.* (1880), 22 Hun. 106.

Section applied.—*Metz v. Campbell* (1895), 11 Misc. 284, 32 N. Y. Supp. 155. *Griffin v. Helmbold* (1878), 72 N. Y. 437; *Matter of Bowlby* (1901), 34 Misc. 311, 69 N. Y. Supp. 783; *Palmer v. Clark* (1877), 4 Abb. N. C. 25; *McKeon v. Horstall* (1881), 13 N. Y. Wkly. Dig. 252, *mod.* 88 N. Y. 429.

§ 22. Power of common council of cities.—Except as otherwise provided in the charter of the city, the common council of a city may designate such place within such city for the sale by auction of horses, carriages and household furniture, as it deems expedient.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 52; originally revised from R. S., pt. 1, ch. 17, tit. 1, § 20.

§ 23. Bond and appointment of auctioneers in cities.—No person, except one whose auction business is confined to the sale of farm property, shall act as auctioneer on the sale at public auction of personal property in any city until he has entered into a bond to the people of the state, with at least two sufficient sureties, in the penalty of five thousand dollars, in a city having a population exceeding fifty thousand, and elsewhere in the penalty of one thousand dollars, conditioned that he will faithfully perform his duties as such auctioneer and render such accounts and pay such duties as may be required of him by law.

Such bond must be approved in writing by the agent appointed by the comptroller, pursuant to this article, or if in a city where there is no such agent, by the mayor or recorder thereof; and must be filed with the comptroller of the state, who must thereon deliver to such person a written certificate of appointment, stating the city for which appointed. Such certificate shall be recorded in a book kept by the comptroller for that purpose and a certified copy thereof shall be delivered to such agent, or if

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there be none, filed in the office of the clerk of the county in which such city is located.

Such undertaking and certificate shall be annually renewed on or before the first Monday of January.

This section does not repeal or supersede the provisions of any local statute or city charter.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 53; originally revised from R. S., pt. 1, ch. 17, tit. 1, §§ 10-14; L. 1883, ch. 52; L. 1846, ch. 62; L. 1878, ch. 287; L. 1883, ch. 310.

Reference.—License of soldier or sailor, § 32, post.

Action on bond.—Upon failure of an auctioneer to pay over to the consignor of goods the proceeds of a sale, his liability upon his statutory bond immediately attaches and a demand for payment of the amount due the consignor need not be pleaded or proven as a condition precedent to the enforcement of the liability of the surety upon the bond. *Plummer v. Barkers Surety Co.* (1906), 52 Misc. 97, 101 N. Y. Supp. 529.

Licensing auctioneers in New York city.—See *People ex rel. Schwab v. Grant* (1891), 126 N. Y. 473, 27 N. E. 964; *Ryan v. City of New York* (1903), 40 Misc. 228, 81 N. Y. Supp. 685; *People ex rel. United Auctioneers v. Scully* (1898), 23 Misc. 732, 53 N. Y. Supp. 125; *People ex rel. Crabtree v. Scully* (1898), 24 Misc. 412, 53 N. Y. Supp. 645. Rept. of Atty. Genl. (1900) 124.

§ 24. **Agents of comptroller.**—The comptroller may employ such agents as he deems necessary in any city to see that the provisions of this article are carried into effect. Such agents may take and approve the bonds required by law and shall transmit all bonds taken and approved by them to the comptroller within ten days after the same are approved. The fees of such agents for taking and approving such bonds shall be five dollars.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 54; originally revised from L. 1849, ch. 399, § 2.

§ 25. **Records to be kept by auctioneers.**—Every auctioneer or person engaged in the business of selling goods at auction, whether acting in his own behalf or as the officer, agent or representative of another, shall upon the receipt or acceptance by him of any goods for the purpose of sale at auction, and before offering the same or any part thereof for sale at auction, write or cause to be written in a book to be kept by him for the purpose, the name and address of the person who employed him to sell such goods at auction, the name and address of the person for whose benefit, behalf or account such goods are to be sold at auction; the name and address of the person from whom such auctioneer received or accepted such goods; the name and address of the person who was the owner, the authorized agent of the owner or the consignor of such goods immediately prior to the receipt or acceptance for the purpose of such sale at auction of the same by such auctioneer; the location, with street and number, if any, of such goods immediately prior to the receipt or acceptance of the same by such auctioneer for the purpose of sale at auction; the date of the receipt or acceptance by such auctioneer of such goods for the purpose of

sale at auction; the place, with street and number, if any, in which such goods are to be held, kept or stored until sold or offered for sale at auction; the place, with street and number, if any, in which such goods are to be sold or offered for sale at auction; a description of such goods, the quantity thereof and the distinctive marks thereon, if any; the terms and conditions upon which such auctioneer receives or accepts such goods for sale at auction. The expression "goods" as used in this section signifies any goods, wares, works of art, commodity, compound or thing, chattels, merchandise or personal property which may be lawfully kept or offered for sale, but shall not include goods damaged at sea or by fire and sold or to be sold for the benefit of the owners, insurers or for the account of whom it may concern or goods sold by virtue of judicial decree. The word "person" as used in this section includes a corporation, joint-stock association or copartnership. Nothing herein shall apply to the sale of real property at auction. (*Added by L. 1910, ch. 640.*)

§ 26. **Record open to inspection.**—The said book and the entries therein, made as provided by the preceding section, shall, at all reasonable times, be open to the inspection of the mayor and the head of the police department of the city in which the auctioneer conducts his business, the district attorney of any county in which said city is located or which is a part of such city, and any person who shall be duly authorized in writing for that purpose by any or either of them and who shall exhibit such written authorization to such auctioneer. (*Added by L. 1910, ch. 640.*)

§ 27. **Penalties.**—Any person who violates or does not comply with the provisions of section twenty-five hereof, or any auctioneer or person engaged in the business of selling goods at auction who shall fail, neglect or refuse to permit or allow an inspection as required by section twenty-six hereof of the book, which he is required to keep according to the provisions of section twenty-five hereof, shall be guilty of a misdemeanor. (*Added by L. 1910, ch. 640.*)

§ 28. **Limitation.**—Sections twenty-five, twenty-six and twenty-seven hereof shall apply only to cities of the first class and do not repeal or supersede the provisions of section thirty-four of the Greater New York charter, as amended by chapter five hundred and forty of the laws of nineteen hundred and nine. (*Added by L. 1910, ch. 640.*)

Art. III-a, §§ 25-29, 29-a-29-g. Private banking.—(*Added by L. 1910, ch. 348, and repealed by L. 1914, ch. 369, §§ 500, 502.*)

Reference.—See Banking Law, art. 4, for this subject.

ARTICLE IV.

PEDDLERS.

Section 30. Application for license.

31. Licenses.
32. Licenses to soldiers and sailors.
33. Penalties.
34. Arrest and conviction of offender.
35. Municipal regulations.
36. License for using dogs before vehicles.

§ 30. Application for license.—No person shall travel from place to place, within this state, for the purpose of carrying to sell or exposing for sale, any goods, wares or merchandise of the growth, product or manufacture of any foreign country, other than family groceries and provisions, without a license as a peddler, granted by the secretary of state, except as otherwise prescribed in section thirty-two hereof. A written application shall be made, to be filed with the secretary of state, signed by the applicant or his authorized agent, in which shall be stated the manner in which the applicant intends to travel and trade, whether on foot or with one or more horses or other beasts of burden, or with any sort of carriage or boat. He shall file with the application, the receipt of the treasurer of the state, showing that he had paid into the state treasury the following duties:

For one year's license and proportionally for any shorter term not less than six months, if he intends to travel on foot, the sum of twenty dollars; if with a single horse or other beast carrying a burden, or with a boat, the sum of thirty dollars; and if with any vehicle or carriage drawn by more than one horse or other animal, the sum of fifty dollars.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 60; originally revised from R. S., pt. 1, ch. 17, tit. 4, § 1, as amended by L. 1880, ch. 72, § 2, and § 3, as amended by L. 1840, ch. 70.

References.—Peddling without a license, or refusing to produce license, a misdemeanor, Penal Law, § 1610. Peddling farm produce in municipalities, General Municipal Law, § 81. Village ordinances as to peddling, Village Law, § 91.

Constitutionality of statutes and ordinances regulating peddling.—A statute or ordinance, which requires agents in this state soliciting orders for a principal residing in another state, is, as to such business, an interference with interstate commerce, and unconstitutional. *Brennan v. Titusville* (1894), 153 U. S. 289, 38 L. ed. 719, 14 Sup. Ct. 829; *Ex parte Hough* (Cir. Ct. W. D., N. Car.) (1895), 69 Fed. Rep. 330; *Aultman, Miller & Co. v. Holder* (Cir. Ct. E. D., Mich.) (1895), 68 Fed. Rep. 467; *Ex parte Loeb* (Cir. Ct. S. Car.) (1896), 72 Fed. Rep. 657; *United States v. Addyston Pipe & Steel Co.* (Cir. Ct. of App., 6th dist.) (1898), 85 Fed. Rep. 271, at p. 295; *In re Tinsman* (Cir. Ct. N. D. of Cal.) (1899), 95 Fed. Rep. 648. If, however, goods are previously shipped into the state and sold directly by the agent, the state may exact a license from the itinerant vender. *Emert v. Missouri* (1894), 156 U. S. 296, 39 L. ed. 430, 15 Sup. Ct. 367. Followed in *re May* (Cir. Ct. D. of Mon.) (1897), 82 Fed. Rep. 422; *Oliver Finney Grocery Co. v. Speed* (Cir. Ct. W. D. of Tenn.) (1898), 87 Fed. Rep. 408, at p. 413. Cited in *Schollenberger v. Pennsylvania* (1897), 171 U. S., at p. 23. For collation of authorities on what con-

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stitutes interstate commerce, see *Adams Express Co. v. Ohio* (1896), 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. 305, at p. 234.

An ordinance imposing a tax in the guise of a license fee on nonresidents selling goods in a village by sample or on order is not justified under a charter provision authorizing the village to regulate the sale of goods by non residents. *People v. Jarvis* (1897), 19 App. Div. 466, 46 N. Y. Supp. 596.

Strict construction.—The legislature may authorize a municipal corporation to regulate hawking and peddling in its streets, but such a statute being in restriction of the common law must be strictly construed; it must appear that defendant's occupation is clearly within its prohibition. *Village of Stamford v. Fisher* (1893), 140 N. Y. 187, 35 N. E. 500, affg. (1892), 63 Hun 123, 17 N. Y. Supp. 609.

Contributory negligence in use of streets.—A duly licensed peddler who was injured by a vehicle driven on a city street cannot be charged with contributory negligence as a matter of law merely because he plied his trade upon the streets. *Collender v. Reardon* (1910), 138 App. Div. 738, 123 N. Y. Supp. 587.

Section cited.—*Village of Stamford v. Fisher* (1892), 63 Hun 123, 17 N. Y. Supp. 609, affd. (1893), 140 N. Y. 187, 35 N. E. 500. Rept. of Atty. Genl. (1908) 520.

§ 31. **Licenses.**—The secretary of state shall, on payment of his fees, and on filing the receipt of the treasurer, countersigned by the comptroller, grant a license under his seal of office, signed by himself or his deputy, authorizing the applicant to travel and trade within this state as a peddler, in the manner stated therein, for the term of one year from the date of the license or for any shorter term not less than six months. Every such license shall be renewed on the expiration thereof by the secretary of state on the same terms and conditions that the original license was granted, if the renewal be applied for.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 61; originally revised from R. S., pt. 1, ch. 17, tit. 4, § 4, and § 5, as amended by L. 1840, ch. 70.

References.—Refusing to produce license on demand, a misdemeanor, Penal Law, § 1610. Licenses in towns; regulations, Town Law, §§ 210–214.

§ 32. **Licenses to soldiers and sailors.**—Every honorably discharged soldier, sailor or marine of the military or naval service of the United States, who is a resident of this state and a veteran of the late rebellion, or of the Spanish-American war, or who shall have served beyond sea, shall have the right to hawk, peddle, vend and sell by auction his own goods, wares or merchandise or solicit trade within this state, by procuring a license for that purpose to be issued as herein provided.

On the presentation to the clerk of any county in which any soldier, sailor or marine may reside of a certificate of honorable discharge from the army or navy of the United States, which discharge shall show that the person presenting it is a veteran of the late rebellion or of the Spanish-American war, or that he has served beyond sea, such county clerk shall issue without cost to such soldier, sailor or marine a license certifying him to be entitled to the benefits of this article. A license issued without cost, under the provisions of this section, shall be personal to the licensee, and any assignment or transfer thereof shall be absolutely void. A person assigning or transferring, or attempting to assign or transfer any such

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license contrary to the provisions of this section shall be guilty of a misdemeanor. (*Amended by L. 1915, ch. 175.*)

Source.—L. 1896, ch. 371, §§ 1, 2, as amended by L. 1899, ch. 659; L. 1904, ch. 556; L. 1905, ch. 162.

Municipal regulations.—A license to peddle granted under this chapter (L. 1896, ch. 371) does not relieve the license from compliance with municipal regulations as to licenses. *City of Buffalo v. Linsman* (1906), 113 App. Div. 584, 98 N. Y. Supp. 737.

A veteran, who holds license under this section which entitles him to peddle goods anywhere in the state, must nevertheless observe such municipal ordinances as are designed to prevent obstruction of the public streets. *Eggleston v. Scheibel* (1908), 60 Misc. 250, 112 N. Y. Supp. 114.

An honorably discharged soldier of the United States, who has procured a license from the county clerk in pursuance of this section is not guilty of a misdemeanor on account of the violation of a municipal ordinance forbidding all persons from occupying or obstructing any portion of any street for the sale of certain specified commodities, in the absence of proof of his having obstructed the street. *People v. Gilbert* (1910), 68 Misc. 48, 123 N. Y. Supp. 264.

A soldier, honorably discharged from the service of the United States and licensed without cost under this section to sell goods, wares and merchandise within the state, who wishes to sell milk, must comply with a regulation of a city board of health requiring a vendor of milk in the city to register his name each year with its clerk before receiving from the board a permit or license to sell milk in the city for one year. *City of Gloversville v. Enos* (1901), 35 Misc. 724, 72 N. Y. Supp. 398, *revd. on other grounds* (1902), 70 App. Div. 326, 75 N. Y. Supp. 245.

Bill poster.—The provisions of this section do not cover the business of a bill-poster. *Rept. of Atty. Genl.* (1907), 564.

Junk dealers.—This section does not exempt veterans from the provisions of the Junk Act (L. 1903, ch. 308). *Rept. of Atty. Genl.* (1903), 389.

Niagara reservation.—Veteran holding a license cannot solicit trade on the Niagara Reservation. *Rept. of Atty. Genl.* (1899) 291. See also *Rept. of Atty. Genl.* (1904) 427.

Section cited.—*Rept. of Atty. Genl.* (1908) 520.

§ 33. **Penalties.**—Every person found traveling and trading within this state contrary to the provisions of this article, or contrary to the terms of any license that may have been granted to him under this article, shall, for each offense, forfeit to the town in which the offense shall be committed the sum of twenty-five dollars, to be applied to the support of the poor of the town. Every person traveling or trading within this state, having a license, who refuses to produce a license as a peddler to any officer or citizen who demands the production of the same shall, for each offense, forfeit to the town in which the demand is made the sum of ten dollars, to be applied to the support of the poor thereof. The refusal of any such person to produce a license when demanded shall be presumptive evidence that he is traveling and trading without a license.

No action for the recovery of any penalty imposed by this article shall be maintained unless it be brought within sixty days after the commission of the offense charged.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 62; originally revised from R. S., pt. 1, ch. 17, tit. 4, §§ 6, 7, 11.

§ 34. **Arrest and conviction of offender.**—The overseers of the poor shall see that the provisions of this article are enforced in their respective towns. Any citizen may arrest any person trading as a peddler who neglects or refuses to produce his license on demand, and shall immediately convey such person before some justice of the peace of the county. If the fact that the person so arrested has traded without a license be proved to the satisfaction of the justice, he shall convict such person of an offense against this article and on such conviction shall issue his warrant to some constable of the county, commanding such constable to levy and collect from the personal property of the offender the sum of twenty-five dollars, with the costs of the proceeding, not exceeding five dollars. The penalty collected on such warrant shall be paid by the justice to the overseer of the poor of the town where the offense was committed.

If it appears in said proceeding that the person arrested refused to produce his license or to disclose his name when lawfully required, no costs shall be allowed such defendant, nor shall he maintain an action for false imprisonment.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 63; originally revised from R. S., pt. 1, ch. 17, tit. 4, § 8, as amended by L. 1840, ch. 70, and § 9.

§ 35. **Municipal regulations.**—This article shall not affect the application of any ordinance, by-law or regulation of a municipal corporation relating to hawkers and peddlers within the limits of such corporation, except as otherwise provided in section thirty-two hereof, but the provisions of this article are to be complied with in addition to the requirements of any such ordinance, by-law or regulation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 64.

Constitutionality of ordinances regulating peddling.—See § 30, and notes. See also Village Law, § 91, subd. 1, and notes. Peddling farm produce in municipalities, General Municipal Law, § 81.

A grocer, with a store in another place, who solicits orders and later delivers the same and takes new orders, is not subject to a municipal ordinance prohibiting hawking or peddling in the public streets. *Village of Stamford v. Fisher* (1893) 140 N. Y. 187, 35 N. E. 500.

Violation of municipal regulations.—See notes to § 32.

Section cited.—*City of Buffalo v. Linsman* (1906), 113 App. Div. 584, 98 N. Y. Supp. 737.

§ 36. **License for using dogs before vehicles.**—Any person who shall use a dog for drawing or helping to draw any vehicle in any city or incorporated village, for peddling or any other business purpose, shall take out a license for that purpose from the mayor of the city or president of the village, and shall have the number of the license and the residence of the owner distinctly painted on such vehicle.

A person violating this section shall forfeit to the city or village where

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the violation occurs one dollar for the first offense and ten dollars for each subsequent offense.

Source.—Domestic Commerce L. (L. 1896, ch. 376 § 65; originally revised from L. 1867, ch. 375, § 6.

Section cited.—Rept. of Atty. Genl. (1908), 520.

ARTICLE V.

PAWNBROKERS.

Section 40. License in certain cities.

41. Licenses, how obtained; penalty for carrying on business without license.
42. Action on bond.
43. Certain entries to be made in book.
44. Memorandum to be given.
45. Book to be open to inspection.
46. Rate of interest.
47. Not to engage in second-hand business.
48. Sale of unclaimed pledge by pawnbroker.
49. Notice of such sale.
50. Disposition of proceeds.
51. Violation of this article.
52. Word "pawnbroker," how to be construed.

§ 40. License in certain cities.—No person, corporation, partnership or firm shall hereafter carry on the business of pawnbroker, in any of the cities of this state having a population of two hundred thousand or more, without having first obtained from the mayor of the city where the business is to be carried on a license authorizing such person to carry on the same in the manner and upon the conditions stated in the succeeding sections of this article. This article does not apply to the city of Rochester. (*Amended by L. 1909, ch. 240, § 31.*)

Source.—L. 1883, ch. 339, § 1. Last sentence from L. 1907, ch. 755, § 635.

References.—Pawnbroking without license, a misdemeanor, Penal Law, § 1590. Incorporation and supervision of personal loan companies, Banking Law, §§ 340–358. Regulation of business of personal loan brokers, Id. §§ 359–371.

Section cited.—Rept. of Atty. Genl. (1915), Vol. 2, p. 330. Rept. of Atty. Genl. (1901) 240.

§ 41. Licenses, how obtained; penalty for carrying on business without license.—The mayor of any such city may from time to time grant, under his hand and the official seal of his office, to such citizens as he shall deem proper and who shall produce to him satisfactory evidence of their good character, a license authorizing such citizen to carry on the business of a pawnbroker, which license shall designate the house in which such person shall carry on said business, and no person, corporation, partnership or firm shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in said license,

under a penalty of one hundred dollars for each day he or they shall exercise or carry on said business without such license or at any other house than the one so designated. Any person receiving such license shall pay therefor the sum of five hundred dollars for the use of the city yearly, and every such license shall expire one year from the date thereof, and may be renewed on application to the mayor each and every year on payment of the same sum and upon performance of the other conditions herein contained. Every person so licensed shall, at the time of receiving such license, file with the mayor granting the same a bond to the local authorities of such city, to be executed by the person so licensed and by two responsible sureties, in the penal sum of ten thousand dollars, to be approved by such mayor, which bond shall be conditioned for the faithful performance of the duties and obligations pertaining to the business so licensed, and the mayor shall have full power and authority to revoke such license for cause. (*Amended by L. 1909, ch. 240, § 31.*)

Source.—L. 1883, ch. 339, § 2.

Hours when business may be transacted.—On week days only from 7 A. M. to 6 P. M., and on Saturday, from 7 A. M. to 6 P. M., and from 7 P. M. until midnight. Penal Law, § 1592.

Section cited.—*People v. Rosenberg* (1908), 59 Misc. 342, 112 N. Y. Supp. 316.

§ 42. Action on bond.—If any person shall be aggrieved by the misconduct of any such licensed pawnbroker, and shall recover judgment against him therefor, such person may, after the return unsatisfied, either in whole or in part, of any execution issued upon said judgment, maintain an action in his own name upon the bond of said pawnbroker in any court having jurisdiction of the amount claimed, provided such court shall, upon application made for the purpose, grant such leave to prosecute.

Source.—L. 1883, ch. 339, § 3.

§ 43. Certain entries to be made in book.—Every such pawnbroker shall keep a book in which shall be fairly written, at the time of such loan, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on such loan, and the name and residence of the person pawning or pledging the said goods, articles or things.

Source.—L. 1883, ch. 339, § 4.

Degree of care of property to be exercised by pawnbroker is that which an ordinarily prudent man would bestow on property of like character under similar circumstances. *Stich v. Samek* (1897), 19 Misc. 534, 43 N. Y. Supp. 1068.

A pawnbroker is liable only for ordinary diligence, and where his place of business is broken into and articles pledged are taken therefrom he is not liable, if he exercised ordinary diligence. *Abbett v. Frederick* (1876), 56 How. Pr. 68.

§ 44. Memorandum to be given.—Every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any goods, article or thing, a memorandum or note signed by him containing the substance of the entry required to be made in his book by the last preceding

section, and no charge shall be made or received by any pawnbroker for any such entry, memorandum or note. The holder of such memorandum or note shall be presumed to be the person entitled to redeem the pledge and the pawnbroker shall deliver such article to the person so presenting such memorandum or note on payment of principal and interest. Should such ticket be lost or mislaid the pawnor shall at once apply to the pawnbroker, in which case it shall be the duty of the pawnbroker to permit such person to examine his books, and on finding the entry for said ticket, note or memorandum so lost and upon his giving to the pawnbroker an exact description of the article pawned the pawnbroker shall issue a second or stop ticket for the same. In case such pawnor neglects to so apply and examine said books and receive such memorandum or note in the manner above stated, the pawnbroker will be bound to deliver the pledge to any person producing such ticket for the redemption thereof. This article is not to be construed as in any manner limiting or affecting such pawnbroker's common law liability in cases where goods are stolen or other legal defects of title exist in the pledgor.

Source.—L. 1883, ch. 339, § 5, as amended by L. 1903, ch. 538.

Delivery to person presenting ticket.—Where a person, who had had many transactions with a pawnbroker, acquiesced when the latter on several occasions delivered the pledge to other persons presenting the pawn ticket, the pawnbroker has implied authority to deliver the pledge to the person in possession of the ticket, and in the absence of a revocation of such authority or of bad faith on the part of the pawnbroker, the latter is not liable to the pledgor for delivering the pledge to a person who obtained possession of the ticket after it had been lost by the pledgor. *Johnson v. Praeger* (1901), 59 App. Div. 339, 69 N. Y. Supp. 836.

Liability of holder of stop ticket fraudulently obtained.—After certain diamond rings had been placed in pawn with plaintiffs they issued a second or stop ticket, as provided by this section, to defendant, a sister of the pawnor, upon her claim that she was the owner of said rings and had lost the pawn ticket. Thereafter, on presentation of the ticket issued to defendant, plaintiffs permitted her to redeem the rings upon her making an affidavit of ownership thereof and of the loss of the original ticket. Subsequently the wife of the pawnor presented the original ticket and obtained judgment in an action for the conversion of the ring. It was held, that defendant herein was liable to plaintiffs for the damage naturally occasioned to them by their reliance on the allegations of the affidavit of ownership. *Simpson v. Pilpoul* (1912), 77 Misc. 108, 136 N. Y. Supp. 46.

Although the memorandum may not comply with statute, it does not invalidate the loan, if legal interest only is charged. *Roosevelt v. Dreyer* (1884), 12 Daly 370.

Delivery of a pawn ticket is a valid consideration for the promise to redeem the property pledged. *Stone v. Demarest* (1916), 95 Misc. 543, 159 N. Y. Supp. 800.

Factor's Act.—Where jewelry was left with a broker for sale and he pledged it with a pawnbroker who acted in good faith, believing the jewelry was the property of the broker it was held that the case came within the Factor's Act. *Schmidt v. Simpsin* (1912), 204 N. Y. 434, 97 N. E. 96, Ann. Cas. 1913 C, 1288, revg. (1910), 139 App. Div. 509, 124 N. Y. Supp. 241.

Section cited.—*Stone v. Demarest* (1916), 95 Misc. 543, 159 N. Y. Supp. 800.

§ 45. *Book to be open to inspection.*—The said book shall at all reason-

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able times be open to the inspection of the mayor, all judges of the criminal courts, the superintendent of police, police inspectors, captains of police and police justices of such cities, or any or either of them, or of any person who shall be duly authorized in writing for that purpose by any or either of them, and who shall exhibit such written authority to such pawnbroker.

Source.—L. 1883, ch. 339, § 6.

Reference.—Refusal to exhibit stolen goods, a misdemeanor, Penal Law, § 1591.

§ 46. **Rate of interest.**—No pawnbroker shall ask, demand or receive any greater rate of interest than three per centum per month, or any fraction of a month, for the first six months, and two per centum per month for each succeeding month, upon any loan not exceeding the sum of one hundred dollars, or than two per centum per month for the first six months and one per centum per month for each succeeding month on any loan exceeding the sum of one hundred dollars.

Source.—L. 1883, ch. 339, § 7.

Reasonable additional charge for insurance is legal. *Stich v. Samek* (1897), 19 Misc. 534, 43 N. Y. Supp. 1068.

Municipal ordinance.—Authority given to the common council of a city to fix rates to be charged by pawnbrokers must be read in connection with this section and therefore an ordinance fixing a higher rate than this section allows is invalid. *Rept. of Atty. Genl.* (1903) 455.

§ 47. **Not to engage in second-hand business.**—No pawnbroker shall purchase any second-hand furniture, metals, clothing or other article or thing whatever, offered to him as a pawn or pledge, nor shall it be lawful for any such pawnbroker, licensed as aforesaid, to engage in any second-hand business.

Source.—L. 1883, ch. 339, § 11, in part.

§ 48. **Sale of unclaimed pledge by pawnbroker.**—No pawnbroker shall sell any pawn or pledge until the same shall have remained one year in his possession, and all such sales shall be at public auction and not otherwise and shall be conducted by licensed auctioneers of the city where the business shall be carried on or of an adjoining city.

Source.—L. 1883, ch. 339, § 8, as amended by L. 1890, ch. 240.

Reference.—Selling before time to redeem has expired, a misdemeanor, Penal Law, § 1592.

§ 49. **Notice of such sale.**—Notice of every such sale shall be published for at least six days previous thereto, in at least two of the daily newspapers printed in the city where the business shall be carried on, and also in two daily newspapers of the city where the sale is to take place and to be designated by said mayor, and such notice shall specify the time and place at which such sale is to take place and the name of the auctioneers by whom the same is to be conducted and a description of the goods or articles to be sold.

L. 1909, ch. 25.

Pawnbrokers.

§§ 50-52, 60.

Source.—L. 1883, ch. 339, § 9, as amended by L. 1890, ch. 240.

§ 50. Disposition of proceeds.—The surplus money, if any, arising from any such sale, after deducting the amount of the loan, the interest then due on the same, and the expense of the advertisement and sale, shall be paid over by the pawnbroker to the person who would be entitled to redeem the pledge in case no such sale had taken place.

Source.—L. 1883, ch. 339, § 10.

Surplus arising on sale.—A pawnbroker must look for reimbursement to the property pledged and not to the pledgor, and where the pawnbroker makes to the same person at different times and upon different articles, several independent loans, and upon the failure of the pledgor to pay any of the loans, sells all of the property pursuant to statute, he cannot apply a surplus arising on the sale of one of the articles to deficiencies arising on the sale of the other articles, but must pay over such surplus to the pledgor. *Stephens v. Simpson* (1904), 94 App. Div. 298, 87 N. Y. Supp. 1068.

§ 51. Violation of this article.—The mayor so licensing such pawnbroker shall have full power and authority to impose fines and penalties of not less than twenty-five dollars nor more than one hundred dollars upon persons offending against any of the foregoing provisions of this article for each and every offense, excepting sections forty and forty-one, and also to suspend his or her license until the same shall be paid to him.

Source.—L. 1883, ch. 339, § 11, in part.

§ 52. Word "pawnbroker," how to be construed.—The word "pawnbroker" contained in this article shall be construed so as to include any person, partnership, or corporation: (1) loaning money on deposit or pledge of personal property, other than securities or printed evidences of indebtedness; or (2) dealing in the purchasing of personal property on condition of selling back at a stipulated price; or (3) designated or doing business as furniture storage warehousemen, and loaning and advancing money upon goods, wares or merchandise pledged or deposited as collateral security.

Source.—L. 1883, ch. 339, § 2, in part, and § 12, as amended by L. 1884, ch. 363.

Art. 5-A, §§ 55-59, 59-a-59-k. Supervisor of small loans.—(*Added by L. 1913, ch. 579, and repealed by L. 1914, ch. 369, and ch. 518, § 38.*)

Reference.—See Banking Law, Art. 9, for this subject.

ARTICLE VI.

JUNK DEALERS.

Section 60. Licenses.

61. Persons not entitled to license.
62. Statement required from persons selling certain property.
63. Certain property to be kept in separate piles.
64. Penalty.

§ 60. Licenses.—It shall be unlawful for any person, association, partnership, or corporation to engage in the business of buying or selling old

§§ 61-63.

Junk dealers.

L. 1903, ch. 25.

metal, which business is herein designated junk business, and which person, association, partnership or corporation is herein designated junk dealer, unless such junk dealer shall have complied with the provisions of this article, obtained a license so to do from the mayor of the city, if the principal place of business of such junk dealer is in a city, or the president of the village if such place of business is in an incorporated village, otherwise from the supervisor of the town in which such place of business is located; for which license shall be paid such mayor, president or supervisor for the use of such city, village or town, the sum of five dollars, which license shall expire on June thirtieth of each year.

Source.—L. 1903, ch. 308, § 1.

Application.—Auctioneers need not take out a license. Rept. of Atty. Genl. (1903) 388.

Provision applies to iron founders who buy old metal. Rept. of Atty. Genl. (1903) 382.

Act giving veterans license to peddle does not exempt them from provisions of this act. Rept. of Atty. Genl. (1903) 389.

§ 61. Persons not entitled to license.—No person, association, partnership or corporation shall be entitled to or receive such license who or which, and in case of a partnership or association any member of which has been, since January first, nineteen hundred and three, or who or which shall hereafter be convicted of larceny or knowingly receiving stolen property, or of a violation of this article.

Source.—L. 1903, ch. 308, § 2.

§ 62. Statement required from persons selling certain property.—On purchasing any pig or pigs of metal, copper wire or brass car journals, such junk dealer shall cause to be subscribed by the person from whom purchased a statement as to when, where and from whom he obtained such property, also his age, residence by city, village or town, and the street and number thereof, if any, and otherwise such description as will reasonably locate the same, his occupation and name of his employer and place of employment or business, which statement the junk dealer shall forthwith file in the office of the chief of police of the city or village in which the purchase was made, if made in a city or incorporated village, and otherwise in the office of the sheriff of the county in which made.

Source.—L. 1903, ch. 308, § 3.

§ 63. Certain property to be kept in separate piles.—Every junk dealer shall on purchasing any of the property described in the last section place and keep each separate purchase in a separate and distinct pile, bundle or package, in the usual place of business of such junk dealer, without removing, melting, cutting or destroying any article thereof, for a period of five days immediately succeeding such purchase, on which package, bundle or pile shall be placed and kept by such dealer a tag bearing the name and residence of the seller, with the date, hour and place of purchase, and the weight thereof.

L. 1909, ch. 25.

Private detectives.

§§ 64, 70.

Source.—L. 1903, ch. 308, § 4.

§ 64. **Penalty.**—Each violation of this article, either by the junk dealer, the agent or servant thereof, and each false statement made in or on any statement or tag above mentioned shall be a misdemeanor and the person convicted shall, in addition to other penalties imposed, forfeit his license to do business. But nothing herein contained shall apply to cities of the first class.

Source.—L. 1903, ch. 308, § 5, as amended by L. 1906, ch. 528.

ARTICLE VII.

(Article amended throughout by L. 1909, ch. 529, and L. 1910, ch. 515.)

PRIVATE DETECTIVES.

Section 70. Licenses.

71. Applications for licenses.
72. Examination of witnesses by state comptroller.
73. Issuance of licenses; fee; bond.
- 73-a. Posting license certificate.
- 73-b. Certificate lost or destroyed.
- 73-c. Removal of bureau, agency or office.
74. License certificates, shields or badges.
- 74-a. Employees.
- 74-b. Employees not to divulge information.
75. Application of article; violations.
76. Comptroller to employ agents.

§ 70. **Licenses.**—No person, firm, company, partnership or corporation shall engage in the business of private detective for hire or reward, or advertise his or their business to be that of detective or of a detective agency, without having first obtained from the comptroller of the state of New York a license so to do, as hereinafter provided, and no person, firm, company, partnership or corporation shall engage in the business of furnishing or supplying for hire and reward information as to the personal character of any person or firm or as to the character or kind of the business and occupation of any person, firm, company or corporation, or own or conduct or maintain a bureau or agency for the above mentioned purposes, except as to the financial rating of persons, firms, companies or corporations, without having first obtained from the comptroller of the state of New York, as hereinafter provided, a license so to do for each such bureau or agency and for each and every subagency, office and branch office to be owned, conducted, managed or maintained by such person, firm, company, partnership or corporation for the conduct of such business. (*Amended by L. 1909, ch. 529, and L. 1910, ch. 515.*)

Source.—L. 1898, ch. 422, § 1, as amended by L. 1901, ch. 362.

L. 1910, ch. 515, § 2.—Nothing in this act contained shall affect the validity of licenses issued prior to the date when this act shall take effect.

Constitutionality.—This article is constitutional, being a valid exercise of the police power of the state. *Fox v. Smith*, 123 App. Div. 369, 108 N. Y. Supp. 181 (1908), *revd. on other grounds* (1909), 197 N. Y. 527, 90 N. E. 1158.

Application.—Persons engaged in the business of obtaining information relative to the personal character, financial standing and habits of individuals should be licensed as private detectives. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 349.

Acting in a single instance for hire.—A person who in a single instance acts as a private detective for hire without a license does not violate this article. Thus, an individual who undertakes to act as a private detective for the purpose of securing evidence upon which to found an action for divorce does not violate the statute, and is entitled to recover the agreed price for services rendered. *Fox v. Smith* (1909), 197 N. Y. 527, 90 N. E. 1158, *revg.* (1908), 123 App. Div. 369, 108 N. Y. Supp. 181.

Effect of license.—A license permitting a private detective to engage in the business of supplying information as to the personal character of any person or firm, or as to the character or kind of business or occupation of any person, firm or corporation, requiring such detective to give a bond, does not relieve him from liability for a violation of § 675 of the Penal Code prohibiting a person from annoying another by offensive or disorderly conduct in any public place. *People v. St. Clair* (1904), 90 App. Div. 239, 86 N. Y. Supp. 77, *revd.* (1904), 179 N. Y. 578, 72 N. E. 1147, on grounds stated in *People v. Weller*, *post*.

Conduct of private detectives.—A private detective, licensed as provided in this act, who "shadows" a person by following him at a distance in the public streets and by watching his house, office, and other places where he went, in order to keep informed as to his movements, so that the process of subpoena could be served upon him at any time, does not commit "an offensive or disorderly act" within the meaning of § 675 of the Penal Code. *People v. Weller* (1904), 179 N. Y. 46, 71 N. E. 462, 1 Ann. Cas. 155. .

Information bureau.—An association, supplying information by means of a bulletin in which forgers, and other dangerous persons are listed must obtain a license. *Rept. of Atty. Genl.* (1901) 283.

Furnishing information to insurance companies.—A person or corporation furnishing information to insurance companies on applicants for insurance, agents, medical examiner's claims, etc., for hire or reward, relating to the personal character, kind of business, occupation and habits of individuals, is required to take out a license under this section. *Rept. of Atty. Genl.* (1915), Vol. 2, p. 313.

Detectives employed by state departments are not private detectives within the meaning of this article. *Rept. of Atty. Genl.* (1909) 586.

A person who is employed solely by a corporation to ascertain and supply information as to the "personal character" of employees of said corporation must take out a license pursuant to this section. *Rept. of Atty. Genl.* (1910) 463.

Underwriters protective associations conducting business along the lines of "special investigations," supplying information as to "whereabouts of individuals," "character of respective tenants," "resources of delinquent debtors," etc., should procure a license under this section. *Rept. of Atty. Genl.* (1910) 435.

Agreement between a licensed private detective and an unlicensed private detective concerning work done by the latter in the name of the former, that the latter should do work for the former in the name of the former and receive a share of profits therefrom, is not in violation of this section. *Rept. of Atty. Genl.*, (1910) 496.

Under sheriffs and deputy sheriffs are not included within this section. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 282.

Attorney not of record in a divorce case, who secured the evidence, does not

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Private detectives.

§ 71.

violate the law although not licensed as a detective. Rept. of Atty. Genl., Aug. 24, 1910.

Officer detailed to hotel.—Police officer detailed as such in a hotel need not procure a detective's license. Rept. of Atty. Genl. (1899) 132.

Agents of anti-saloon league, employed to obtain evidence for, are not required to procure a detective's license. Rept. of Atty. Genl. (1900) 224.

A corporation conducting a bureau or agency is not released from the necessity of procuring a license because of the fact that detectives employed by said corporation are duly licensed. Rept. of Atty. Genl. (1910) 437.

A person who engages in the business of a detective under a corporate name, said person being a director, not having taken out a license in the name of the corporation but using his individual license, violates this section. Rept. of Atty. Genl. (1910) 485.

Corporations acting as private detectives must be licensed. Rept. of Atty. Genl. (1898) 252.

A corporation incorporated for the purpose of conducting a bureau for the collection, transmission, and exchange of information generally, and for the making of statements and adjustments and for the publication of reports, must procure a license under this section. Atty. Genl. Opin., 5 State Dep. Rep. 468 (1915).

§ 71. **Application for licenses.**—Any person, firm, partnership, company or corporation intending to conduct the business of detective or detective agency and any person, firm, partnership, company or corporation intending to conduct the business of furnishing or supplying information as to the personal character of any person or firm, or as to the character or kind of the business and occupation of any person, firm or corporation, or intending to own, conduct, manage or maintain a bureau or agency for the above mentioned purposes, except as to the financial rating of persons, firms or corporations, shall, for each such bureau or agency and for each and every subagency, office and branch office to be owned, conducted, managed or maintained by such person, firm, partnership or corporation for the conduct of such business, present to the comptroller of the state and file in his office a written application, duly signed and verified, as follows:

1. If the applicant is a person, the application shall be signed and verified by such person, and if the applicant is a firm or partnership the application shall be signed and verified by each individual composing or intending to compose such firm or partnership. The application shall state the full name, age, residence, present and previous occupations of each person or individual so signing the same, that he is a citizen of the United States and shall also specify the name of the city, town or village, stating the street and number, if the premises have a street and number, and otherwise such apt description as will reasonably indicate the location thereof, where is to be located the principal place of business and the bureau, agency, subagency, office or branch office for which the license is desired, and such further facts as may be required by the comptroller to show the good character, competency and integrity of each person or individual so signing such application. Every such applicant shall establish

to the satisfaction of the comptroller and by at least two duly acknowledged certificates, that such applicant, if he be a person, or, in the case of a firm, company, partnership or corporation, at least one member of such firm, partnership, company or corporation, has been regularly employed as a detective or shall have been a member of the United States government secret service, a sheriff or member of a city police department of a rank or grade higher than that of patrolman, for a period of not less than three years. Such application shall be approved, as to each person or individual so signing the same, by not less than five reputable citizens, freeholders of the county where such person or individual resides or where it is proposed to own, conduct, manage or maintain the bureau, agency, subagency, office or branch office for which the license is desired, each of whom shall certify that he has personally known the said person or individual for a period of at least five years prior to the filing of such application, that he has read such application and believes each of the statements made therein to be true, that such person is honest, of good character and competent, and not related or connected to the person so certifying by blood or marriage. The certificate of approval shall be signed by such freeholders and duly verified and acknowledged by them before an officer authorized to take oaths and acknowledgment of deeds. All provisions of this section, applying to corporations, shall also apply to joint-stock associations, except that each such joint-stock association shall file a duly certified copy of its certificate of organization in the place of the certified copy of its certificate of incorporation hereinbefore required.

2. If the applicant is a corporation, the application shall be signed and verified by the president, secretary and treasurer thereof, and shall specify the name of the corporation, the date and place of its incorporation, the location of its principal place of business, and the name of the city, town or village, stating the street and number, if the premises have a street and number, and otherwise such apt description as will reasonably indicate the location thereof, where is to be located the bureau, agency, subagency, office or branch office for which the license is desired, the amount of the corporation's outstanding paid up capital stock and whether paid in cash or property, and, if in property, the nature of the same, and shall be accompanied by a duly certified copy of its certificate of incorporation. Each and every requirement of subdivision one of this section as to a person or individual member of a firm or partnership shall apply to the president, secretary and treasurer and each such officer, his successor and successors shall prior to entering upon the discharge of his duties sign and verify a like statement, approved in like manner, as is by said subdivision one prescribed in the case of a person or individual member of a firm or partnership; and in the event of the death, resignation or removal of such officers due notice of that fact shall forthwith be given in writing to the said comptroller. (*Amended by L. 1909, ch. 529, and L. 1910, ch. 515.*)

Source.—L. 1898, ch. 422, § 2, as amended by L. 1901, ch. 362, § 3.

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Dissolution of partnership, surrender of license.—Where a partnership having a detective license is dissolved and the members thereof desire to carry on the business as individuals, they should surrender their partnership license and secure individual licenses; in so doing they should not be refunded their partnership license fee. If however one member of a partnership retires therefrom, the surviving partner may carry on the business under the partnership license. Rept. of Atty. Genl. (1910) 492.

Service for three years as a deputy state superintendent of elections qualifies such person for a private detective's license. Rept. of Atty. Genl. (1911), Vol. 2, p. 422.

§ 72. **Examination of witnesses by state comptroller.**—For the purpose of investigating the character, competency and integrity of the applicants or licensees hereunder, or of the officers or agents thereof, the state comptroller shall have the power to issue subpoenas and compel the attendance of witnesses. All such subpoenas shall be issued under the hand of the comptroller or one of his deputies and the seal of the comptroller, and upon service thereof, the witness shall be tendered the fees to which he would be entitled were he subpoenaed in a court of record. If a person, duly subpoenaed, shall fail to obey such subpoena without reasonable cause or shall without such cause refuse to be examined or to answer any legal or pertinent question as to the character or qualification of such applicant or licensee, he shall be guilty of a misdemeanor. The testimony of witnesses in any such proceeding shall be under oath, which the comptroller or one of his deputies may administer, and wilful false swearing in any such proceeding shall be perjury. (*Amended by L. 1909, ch. 529, and L. 1910, ch. 515.*)

Source.—L. 1903, ch. 308, § 1.

§ 73. **Issuance of licenses; fee; bond.**—The comptroller, when satisfied from an examination of such application and such further inquiry and investigation as he shall deem proper, of the good character, competency and integrity of such applicant, or, if the applicant be a firm, partnership or corporation, of the individual members or officers thereof, shall issue and deliver to such applicant a certificate or license to conduct such business and to own, conduct or maintain a bureau, agency, subagency, office or branch office for the conduct of such business on the premises stated in such application, upon the applicant's paying to the comptroller for each such certificate of license so issued, for the use of the state, a license fee of one hundred and fifty dollars, if a person, or of two hundred dollars if a firm, partnership or corporation, and upon the applicant's executing, delivering and filing in the office of said comptroller, a bond in the sum of two thousand dollars if a person, or of three thousand dollars if a firm, partnership or corporation, conditioned for the faithful and honest conduct of such business by such applicant, which bond as to its form, manner of execution and kind and sufficiency of the surety thereon, must be approved by the said comptroller. The license granted

pursuant to this article shall last for a period of five years, but shall be revocable at all times by the comptroller for cause shown; and in the event of such revocation or of a surrender of such license no refund shall be made in respect of any license fee paid under the provisions of this article. Such bond shall be taken in the name of the people of the state of New York, and any person injured by the wilful, malicious and wrongful act of the principal may bring an action on said bond in his own name to recover damages suffered by reason of such wilful, malicious and wrongful act. The license certificate shall be in a form to be prescribed by the comptroller and shall specify the full name of the applicant, the location of the principal office or place of business and the location of the bureau, agency, subagency, office or branch office for which the license is issued, the date on which it is issued, the date on which it will expire and the names and residences of the person or persons filing the statement required by section seventy-one upon which the license is issued and in the event of a change of any such address or residence the comptroller shall be duly notified in writing of such change within five days thereafter, and failure to give such notification shall be sufficient cause for revocation of such license. No such license shall be issued by the comptroller to a person under the age of twenty-one years. (*Amended by L. 1909, ch. 529, and L. 1910, ch. 515.*)

Source.—L. 1898, ch. 422, § 4.

Where a partnership has dissolved and the members thereof desire to carry on a detective business as individuals, their partnership license fee will not be refunded upon their taking out individual licenses. Rept. of Atty. Genl. (1910) 492.

A license may be revoked by the comptroller for sufficient cause after due examination of the facts. Rept. of Atty. Genl. (1909) 374.

§ 73-a. **Posting license certificate.**—Immediately upon the receipt of the license certificate issued by the comptroller pursuant to this article, the licensee named therein shall cause such license certificate to be posted up and at all times displayed in a conspicuous place in the bureau, agency, subagency, office or branch office for which it is issued, so that all persons visiting such place may readily see the same. Such license certificate shall at all reasonable times be subject to inspection by the comptroller or his duly authorized representative or representatives. It shall be unlawful for any person, firm, partnership or corporation holding such license certificate to post such certificate or to permit such certificate to be posted upon premises other than those described therein or to which it has been transferred pursuant to the provisions of this article, or knowingly to alter, deface or destroy any such license certificate. Every license certificate shall be surrendered to the comptroller within five days after its term shall have expired or after notice in writing to the holder that such license has been revoked. Failure to comply with any of the provisions

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of this section is a misdemeanor and sufficient cause for the revocation of a license. (*Added by L. 1910, ch. 515.*)

§ 73-b. **Certificate lost or destroyed.**—If it shall be established to the satisfaction of the comptroller, in accordance with rules and regulations by him prescribed, that an unexpired license certificate, issued in accordance with the provisions of this article, has been lost or destroyed without fault on the part of the holder, the comptroller shall issue a duplicate license certificate for the unexpired portion of the term of the original license certificate. (*Added by L. 1910, ch. 515.*)

§ 73-c. **Removal of bureau, agency or office.**—If the holder of an unexpired license certificate issued pursuant to this article shall remove the bureau agency, subagency, office or branch office to a place other than that described in the license certificate, he shall, within the twenty-four hours immediately following such removal, give written notice of such removal to the comptroller, which notice shall describe the premises to which such removal is made and the date on which it was made, and send such license certificate to the comptroller, at his office in the city of Albany, who shall write or stamp over his signature across the face of such license certificate a statement to the effect that the holder thereof has removed, on the date stated in such written notice, such bureau, agency, subagency, office or branch office from the place originally described in such license certificate to the place described in such written notice, and such license certificate with the indorsement thereon shall then be returned to the licensee named therein. (*Added by L. 1910, ch. 515.*)

§ 74. **License certificates, shields or badges.**—Upon the issuing of a license as hereinbefore provided the comptroller shall issue to each such person, individual member of a firm or officer of a corporation making and filing a statement required by section seventy-one of this chapter a metal shield or badge, of such shape and description and bearing such inscription as the comptroller may designate, which shall be evidence of due authorization pursuant to the terms of this article. All persons to whom such license certificates, shields or badges shall have been issued shall be responsible for the safe keeping of the same, and shall not loan, let or allow any other person to use, wear or display such certificate, shield, or badge; and any person so parting with such a license, certificate, shield or badge or wearing or displaying the same without authority, or who shall wear or display any license, certificate, shield or badge, purporting to authorize the holder or wearer thereof to act as a private detective unless the same shall have been duly issued pursuant to the provisions of this article shall be guilty of a misdemeanor. Failure to comply with the provisions of this section shall be sufficient cause for revocation of such license, and all such certificates, shields and badges shall be returned to the comptroller within twenty-four hours after the holder thereof has received notice in writing

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of the expiration or revocation of such license. No person except as authorized in this section, shall wear or display a shield or badge of any design or material, purporting to indicate that the wearer or bearer thereof is a detective or is authorized to act as a detective, unless required by law to do so. Any person violating the provisions of this section shall be guilty of a misdemeanor. (*Amended by L. 1909, ch. 529, and L. 1910, ch. 515.*)

The issuance of badges by a private detective to his employees is adequate cause for the revocation of his license. Rept. of Atty. Genl. (1910) 432.

§ 74-a. **Employees.**—The holder of an unexpired license certificate issued pursuant to this article may employ to assist him in his work of detective and in the conduct of such business as many persons as he may deem necessary, and shall at all times during such employment be accountable for the good conduct in the business of each and every person so employed. Any person so in the employ of the holder of such a license certificate need not be the holder of a license certificate issued pursuant to the provisions of this article. Should the holder of an unexpired license certificate falsely state or represent that a person is or has been in his employ, such false statement or misrepresentation shall be sufficient cause for the revocation of such license. Any person falsely stating or representing that he is or has been a detective or employed by a detective agency, shall be guilty of a misdemeanor. (*Added by L. 1910, ch. 515.*)

Source.—L. 1898, ch. 422, § 5, as amended by L. 1899, ch. 318.

§ 74-b. **Employees not to divulge information.**—Any person who is or has been an employee of a holder of a license shall not divulge to any one other than his employer, or as his employer shall direct, except as he may be required by law, any information acquired by him during such employment in respect of any of the work to which he shall have been assigned by such employer. Any such employee violating the provisions of this section and any such employee who shall wilfully make a false report to his employer in respect of any of such work, shall be guilty of a misdemeanor. (*Added by L. 1910, ch. 515.*)

§ 75. **Application of article; violations.**—Nothing in this article shall apply to any detective or officer belonging to the police force of the state, or any county, city, town or village thereof, appointed or elected by due authority of law, or to any person in the employ of any police force or police department of the state, or of any county, city, town or village thereof while engaged in the performance of their official duties; nor shall anything in this article contained be construed to affect in any way attorneys or counselors-at-law in the regular practice of their profession. Any person violating any of the provisions of this article and any employee of a detective agency who shall wilfully make a false report to his employer in respect of any of the work to which he shall have been assigned by said employer shall be guilty of a misdemeanor; and for the enforce-

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ment of this act the comptroller of the state of New York is hereby authorized to expend annually, out of the moneys received as license fees, not to exceed five thousand dollars, in the employment of an agent or agents, the payment of witnesses fees and of other proper measures. (*Amended by L. 1909, ch. 529, and L. 1910, ch. 515.*)

Source.—L. 1901, ch. 362, § 5.

Deputy sheriff or town constable must procure license.—The fact that a person is a duly appointed deputy sheriff and a duly elected town constable does not authorize him to conduct a business as an individual or in the name of "Neef's Detective Bureau," and advertise for work as a detective without first having obtained a license as required by this chapter. Rept. of Atty. Genl. (1910) 446.

Expenditures by comptroller.—Rept. of Atty. Genl. (1910) 454.

Testimony in court.—A detective is not prohibited by this section from giving testimony on the trial of a person for a crime. *People v. Roach* (1915), 215 N. Y. 592, 109 N. E. 618.

Section cited.—Rept. of Atty. Genl. (1910) 496.

§ 76. Comptroller to employ agents.—The comptroller is hereby authorized to employ such agent or agents as he may deem necessary to carry out the provisions of this article and to enforce compliance therewith; and the comptroller and each such agent so employed by him, is hereby endowed, in respect to violations of any of the provisions of this article, with all the powers bestowed upon a peace officer by chapters three and four of title three of part four of the code of criminal procedure. (*Added by L. 1910, ch. 515.*)

ARTICLE 7-A.

(Article added by L. 1915, ch. 454.)

REGISTERED ARCHITECTS.

Section 77. Registered architects.

78. Board of examiners and registration.

79. Qualifications; examination; fees.

79-a. Certificates.

79-b. Violation of article.

§ 77. Registered architects.—Any person residing in or having a place of business in the state, who, before this article takes effect, shall not have been engaged in the practice of architecture in New York state, under the title of architect, shall, before being styled or known as an architect, secure a certificate of his qualification to practice under the title of architect, as provided by this article. Any person who shall have been engaged in the practice of architecture under the title of architect, before this article takes effect, may secure such certificate, in the manner provided by this article. Any person having a certificate pursuant to this article may be styled or known as a registered architect. No other person shall assume such title or use the abbreviation R. A., or any other words, letters or figures to indicate that the person using the same is a registered

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architect; but this article shall not be construed to prevent persons other than architects from filing applications for building permits or obtaining such permits. (*Added by L. 1915, ch. 454 and amended by L. 1917, ch. 358, in effect May 4, 1917.*)

Source.—New.

Construction.—This statute should be discreetly and liberally construed in order to accomplish the legislative purpose. 7 State Dep. Rep. 487.

The status of persons who were known as architects prior to the enactment of the statute is not interfered with, and they may be continued to be known as architects; but, if they desire, the added appellation of "registered architect," they must apply for certification. Atty. Genl. Opin. (1916), 7 State Dep. Rep. 487.

Persons who were, prior to the statute, practicing as architects and who desire to continue as such, without qualifying as registered architects must, under the provision of this section have resided here or had a place of business here while so practicing. Atty. Genl. Opin. (1916), 7 State Dep. Rep. 487.

§ 78. Board of examiners and registration.—There shall be a state board of examiners and registration of architects, who, and their successors, shall be appointed by and hold during the pleasure of the board of regents of the university of the state, and who, subject to the approval and to the rules of the regents, may make rules for the examination and registration of candidates for the certificates provided for by this article. Such board of examiners shall be composed of five architects, who have been in active practice in the state of New York for not less than ten years, previous to their appointment, selected by the regents. Such examiners shall be entitled to such compensation for their services under this article as the board of regents shall determine, not exceeding in the aggregate the amount of fees collected from applicants for certificates.—(*Added by L. 1915, ch. 454 and amended by L. 1917, ch. 358, in effect May 4, 1917.*)

Source.—New.

§ 79. Qualifications; examination; fees.—Any citizen of the United States, or any person who has duly declared his intention of becoming such citizen, being at least twenty-one years of age and of good moral character, may apply for examination or certificate of registration under this article, but before securing such certificate shall submit satisfactory evidence of having satisfactorily completed the course in a high school approved by the regents of the university or the equivalent thereof and subsequent thereto of having satisfactorily completed such courses in mathematics, history and one modern language, as are included in the first two years in an institution, approved by the regents, conferring the degree of bachelor or * arts. Such candidate shall in addition submit satisfactory evidence of at least five years' practical experience in the office or offices of a reputable architect or architects, commencing after the completion of the high school course. The board of examiners may accept satisfactory diplomas or certificates from approved institutions covering the course re-

* So in original.

quired for examination. Upon complying with the above requirements, the applicant shall satisfactorily pass an examination in such technical and professional courses as are established by the board of examiners. The board of examiners in lieu of all examinations may accept satisfactory evidence of any one of the qualifications set forth under subdivisions one and two of this section.

1. A diploma of graduation or satisfactory certificate from an architectural college or school approved by the regents, together with at least three years' practical experience in the office or offices of a reputable architect or architects; but the three years' experience shall be counted only as beginning at the completion of the course leading to the diploma or certificate; the state board of examiners and registration of architects may require applicants under this subdivision to furnish satisfactory evidence of knowledge of professional practice;

2. Registration or certification as an architect in another state or country, where the qualifications required for the same are equal to those required in this state;

3. The board of examiners in lieu of all examinations shall accept satisfactory evidence as to the applicant's character, competency and qualifications, and that he has been continuously engaged in the practice of architecture for more than two years next prior to the date when this article shall take effect, or that he has been actually engaged in the practice of architecture on his own account or as a member of a reputable firm or association for more than one year prior to the date when this article shall take effect; providing the application for such certification shall be made on or before January first, nineteen hundred and eighteen.

Any architect who has lawfully practiced architecture for a period of more than ten years without the state shall be required to take only a practical examination, which shall be of the nature to be determined by the state board of examiners and registration of architects.

Every person applying for examination or certificate of registration under this article shall pay a fee of twenty-five dollars to the board of regents. (*Added by L. 1915, ch. 454, and amended by L. 1917, ch. 358, in effect May 4, 1917.*)

Source.—New.

The time limitations contained in subdivision 3, are not restrictions on subdivisions 1 and 2. Atty. Genl. Opin. (1916), 7 State Dep. Rep. 487.

The requirement of actual, continuous and exclusive service must be construed in the light of the actual practice of a profession and in favor of the applicant who should not be excluded from admission if the canons of good faith and conduct are satisfied. Atty. Genl. Opin. (1916), 7 State Dep. Rep. 467.

A non-resident may present proof of educational and experience qualifications gained outside of the State, for admission to examination under the statute, or he may make application for exemption from examination under subdivisions 1 and 2 like any resident, but the applicant must be a United States citizen or have declared his intention, and the educational qualifications must have been gained in

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schools recognized by the administrative officers. *Atty. Genl. Opin. (1916), 7 State Dep. Rep. 467.*

The board has no power to exclude United States citizens from other states and foreign countries from participating in the benefits of the exemptions under subdivisions 1 and 3. *Atty. Genl. Opin. (1916), 7 State Dep. Rep. 467.*

§ 79-a. **Certificates.**—The result of every examination or other evidence of qualification, as provided by this article, shall be reported to the board of regents by the board of examiners, and a record of the same shall be kept by the board of regents, and such board shall, unless deemed otherwise advisable, issue a certificate of registration to every person certified by the board of examiners as having passed such examination or as being otherwise qualified to be entitled to receive the same. Every person securing such certificates shall file the same with the county clerk of the county in which he resides or maintains a place of business. The board of regents may revoke any certificate, if such action be recommended by the board of examiners, after thirty days' written notice to the holder thereof and after a hearing before the board of examiners, upon proof that such certificate has been obtained by fraud or misrepresentation, or upon proof that the holder of such certificate has been guilty of felony in connection with the practice of architecture. (*Added by L. 1915, ch. 454, and amended by L. 1917, ch. 358, in effect May 4, 1917.*)

Source.—New.

§ 79-b. **Violation of article.**—Any violation of this article shall be a misdemeanor, punishable for the first offense by a fine of not less than fifty and not more than one hundred dollars, and for a subsequent offense by a fine of not less than two hundred nor more than five hundred dollars, or imprisonment for not more than one year, or both. (*Added by L. 1915, ch. 454.*)

Source.—New.

ARTICLE VIII.

PUBLIC ACCOUNTANTS.

Section 80. Certified public accountants.

81. Regents to make rules.

82. Misdemeanor.

§ 80. **Certified public accountants.**—Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, residing or having a place for the regular transaction of business in the state, being over the age of twenty-one years and of good moral character, and who shall have received from the regents of the university a certificate of his qualifications to practice as a public expert accountant as hereinafter provided, shall be styled and known as a certified public accountant; and no other person shall assume such title, or use the abbreviation C. P. A. or any other words, letters, or figures, to indicate that the person using

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the same is such certified public accountant. Any citizen of the United States who has practiced three years as a certified public accountant in another state, under a license or a certificate of his qualifications to so practice, issued by the proper authorities of such state, may, upon payment of the regular fee, in the discretion of the regents of the university, receive a certificate to practice as a certified public accountant without an examination. But he must possess the qualifications required by the rules of the regents of the university and must furnish satisfactory evidence of character and qualifications. (*Amended by L. 1913, ch. 443.*)

Source.—L. 1896, ch. 312, § 1.

§ 81. **Regents to make rules.**—The regents of the university shall make rules for the examination of persons applying for certificates under this article, and may appoint a board of three examiners for the purpose, which board shall be composed of certified public accountants. The regents shall charge for examination and certificate such fee as may be necessary to meet the actual expenses of such examinations, and they shall report, annually, their receipts and expenses under the provisions of this article to the state comptroller, and pay the balance of receipts over expenditures to the state treasurer. The regents may revoke any such certificate for sufficient cause after written notice to the holder thereof and a hearing thereon.

Source.—L. 1896, ch. 312, § 2.

Eligibility of examiners.—Examiners of certified public accountants, appointed under this section, are public officers, and to be eligible must be inhabitants of the state at the time of appointment. Rept. of Atty. Genl. (1902) 338.

Compensation of examiners.—The examiners of public accountants appointed pursuant to this section may be allowed compensation for their services. Rept. of Atty. Genl. (1897) 304.

§ 82. **Misdemeanor.**—Any violation of this article shall be a misdemeanor.

Source.—L. 1896, ch. 312, § 4.

ARTICLE 8-A.

(Article added by L. 1911, ch. 587, and amended by L. 1913, ch. 249.)

CERTIFIED SHORTHAND REPORTERS.

Section 85. Certified shorthand reporter; defined.

86. Qualifications.

87. Idem; examination and certification; revocation.

88. Exceptions.

89. Extension of waiver.

89-a. Violations.

§ 85. **Certified shorthand *reported; defined.**—A certified shorthand reporter is one who has been adjudged competent to report court proceed-

* So in original.

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ings, references, commissions, conventions, deliberative assemblies or meetings of like character. (*Added by L. 1913, ch. 249.*)

Source.—New.

§ 86. **Qualifications.**—Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, residing or having a place for the regular transaction of business in this state, being over the age of twenty-one years, and of good moral character, and who shall have received from the regents of the university a certificate of his qualifications to practice as a public shorthand reporter as hereinafter provided, shall be styled and known as a certified shorthand * reported, and no other person shall assume such title or use the abbreviation C. S. R., or any other words, letters or figures to indicate that the person using the same is such certified shorthand reporter. (*Former § 85 added by L. 1911, ch. 587, and renumbered and amended by L. 1913, ch. 249.*)

Source.—New.

§ 87. **Idem; examination and certification; revocation.**—The regents of the university shall appoint a board of three examiners, which board shall after the year nineteen hundred and fourteen be composed of certified shorthand reporters. The term of office of the members of such board of examiners shall be three years, except that of the first board appointed under this article, one member shall hold office for one year, one member for two years, and one member for three years, such respective terms to be determined by the regents of the university, who shall also fill any vacancies which may occur in such board. Said board of examiners shall, subject to the approval of the regents, make such rules and regulations, not inconsistent with the law, as may be necessary for the proper performance of its duties. Any member of the board may, upon being duly designated by the board or a majority thereof, administer oaths or take testimony concerning any matter within the jurisdiction of the board. The regents shall charge for examination and certificates such fee as may be necessary to meet the actual expenses of such examinations, and they shall report annually their receipts and expenses under the provisions of this article to the state comptroller, and pay the balance of the receipts over expenditures to the state treasurer. The regents may revoke any such certificate for sufficient cause after written notice to the holder thereof, and a hearing thereon. (*Former § 86 added by L. 1911, ch. 587, and renumbered and amended by L. 1913, ch. 249.*)

Source.—New.

§ 88. **Exceptions.**—Any person who shall submit to said board of examiners satisfactory proof as to his character, competency and qualifications, and that he has been actively engaged in the practice of shorthand reporting for more than three years before the enactment of this article, as hereby

* So in original.

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amended, or who is at the time this article, as amended, takes effect a shorthand reporter duly appointed as an official in any court of this state, and who shall apply for such certificate on or before January first, nineteen hundred and fourteen, may, upon the recommendation of said board of examiners, receive from the board of regents a certificate of exemption from such examination, which certificate shall be registered and entitle him to practice as a certified shorthand reporter under this article. (*Former § 87 added by L. 1911, ch. 587, and renumbered and amended by L. 1913, ch. 249.*)

Source.—New.

§ 89. **Extension of waiver.**—Any person who was on the thirtieth day of June, nineteen hundred and eleven, entitled to a certificate of exemption as formerly provided by this article, but who failed or neglected to make application therefor and to present evidence to entitle him thereto on or before June thirtieth, nineteen hundred and twelve, must make such application and present such evidence on or before January first, nineteen hundred and fourteen, or he shall be deemed to have waived his right to such certificate. (*Former § 88 added by L. 1911, ch. 587, and renumbered and amended by L. 1913, ch. 249.*)

Source.—New.

§ 89-a. **Violations.**—Any violation of the provisions of this article shall be a misdemeanor. (*Former § 89 added by L. 1911, ch. 587, and renumbered and amended by L. 1913, ch. 249.*)

Source.—New.

ARTICLE IX.

WAREHOUSEMEN.

- Section 90. Persons who may issue receipts.
91. Form of receipts.
92. Negotiable and non-negotiable receipts.
93. Duplicate receipts must be so marked.
94. Failure to mark "not negotiable."
95. Obligation of warehouseman to deliver.
96. Justification of warehouseman in delivering.
97. Warehouseman's liability for misdelivery.
98. Negotiable receipts must be canceled or marked when goods or part thereof are delivered.
99. Altered receipts.
100. Lost or destroyed receipts.
101. Effect of duplicate receipts.
102. Warehouseman can not set up title in himself.
103. Interpleader of adverse claimants.
104. Warehouseman has reasonable time to determine validity of claims.
105. Adverse title is no defense except as above provided.
106. Liability for non-existence or misdescription of goods.
107. Liability for care of goods.

§ 90.	Warehousemen.	L. 1909, ch. 25.
	108. Goods must be kept separate.	
	109. Commingled goods and warehouseman's liability therefor.	
	110. Attachment or levy upon goods for which a negotiable receipt has been issued.	
	111. Creditors' remedies to reach negotiable receipts.	
	112. What claims are included in the warehouseman's lien.	
	113. Against what property the lien may be enforced.	
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	115. Negotiable receipt must state charges for which lien is claimed.	
	116. Warehouseman need not deliver, until lien is satisfied.	
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	118. Satisfaction of lien by sale.	
	119. Perishable and hazardous goods.	
	120. Other methods of enforcing liens.	
	121. Effect of sale.	
	122. Negotiation of negotiable receipts by delivery and by indorsement.	
	123. Transfer of receipts.	
	124. Who may negotiate a receipt.	
	125. Rights of person to whom a receipt has been negotiated.	
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	127. Transfer of negotiable receipt without indorsement.	
	128. Warranties on sale of receipt.	
	129. Indorser not a guarantor.	
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	133. Negotiation defeats vendor's lien.	
	134. Issue of receipt for goods not received.	
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	136. Issue of duplicate receipts not so marked.	
	137. Issue for warehouseman's goods of receipts which do not state that fact.	
	138. Delivery of goods without obtaining negotiable receipt.	
	139. Negotiation of receipt for mortgaged goods.	
	140. When rules of common law still applicable.	
	141. Interpretation shall give effect to purpose of uniformity.	
	142. Definitions.	
	143. Application to existing receipts.	

§ 90. Persons who may issue receipts.—Warehouse receipts may be issued by any warehouseman.

Source.—L. 1907, ch. 732, § 1.

Consolidators' note.—This article embraces provisions of L. 1907, ch. 732, which, by its title, is "an act in relation to warehouse receipts." This law was prepared prior to its introduction in this state under the direction of the commissioners appointed by the various states for the promotion of uniform legislation in the United States, known as the Commissioners on Uniform State Laws. The act was drawn at the request of the said commissioners by Prof. Samuel Williston, professor of law in the Harvard Law School, and Mr. Barry Mohun of the Bar of Washington, D. C. The commissioners had this act in preparation for three years and distributed copies of it throughout the country inviting criticism and suggestion with the hope of presenting the law in the best possible form. The act as thus prepared has been adopted and is now the law on the subject of

warehouse receipts in Connecticut, Idaho, Illinois, Massachusetts, Montana and New Jersey. No changes have been made in the statute as here incorporated except such as were necessary by reason of consolidation.

§ 91. **Form of receipts.**—Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

- (a) The location of the warehouse where the goods are stored,
- (b) The date of issue of the receipt,
- (c) The consecutive number of the receipt,
- (d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order,
- (e) The rate of storage charges,
- (f) A description of the goods or of the packages containing them,
- (g) The signature of the warehouseman, which may be made by his authorized agent,
- (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and
- (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the foregoing terms.

A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

- (a) Be contrary to the provisions of this article.
- (b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

Source.—L. 1907, ch. 732, §§ 2, 3.

Bonded warehouse described as "free warehouse."—Where the receipt for goods designated the warehouse where they were stored as a "free warehouse" which meant that the internal revenue tax on the goods stored therein were paid, while in fact the warehouse was a bonded warehouse it was held that the warehousemen were liable to a transfer of the receipt for the goods as free goods. *First Nat. Bank v. Dean* (1893), 137 N. Y. 110, 32 N. E. 1108.

Ballor erroneously designated.—The fact that the ballor is erroneously designated in a warehouse receipt as "Mr." instead of "Mrs." is not conclusive against the true owner on the question of title. *Goldenson v. Lawrence* (1896), 16 Misc. 570, 38 N. Y. Supp. 991.

Limitation of liability.—A provision in a railroad parcel room coupon limiting liability of the company to ten dollars impairs its obligation to exercise that degree of care in the safekeeping of the goods intrusted to it which reasonably careful

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men would exercise in regard to their own, and hence is a condition which the company has no right, under this section, to insert in its coupon. *Healy v. New York Central & H. R. R. Co.* (1912), 153 App. Div. 516, 138 N. Y. Supp. 287. See also *Rapp. v. Washington Storage Warehouse & Van Co.* (1911), 75 Misc. 16, 134 N. Y. Supp. 855.

A provision in a warehouse receipt that "perishable goods are received only at the owner's risk" does not relieve the bailee from liability for negligence. *Herzig v. New York Cold Storage Company* (1906), 115 App. Div. 40, 100 N. Y. Supp. 603, *affd.* 190 N. Y. 511, 83 N. E. 1126.

Where no receipt is given at the time of the delivery of the goods a receipt sent to the owner several weeks after the delivery, containing a clause limiting the warehouseman's liability, is not binding on the owner of the goods. *Belzer v. Daub Storage Warehouse & Van Co.* (1911), 164 N. Y. St. Rep. 153, 130 N. Y. Supp. 153.

Laws of 1858.—Sufficiency of receipt under Laws of 1858, ch. 326, see *Yenni v. McNamee* (1871), 45 N. Y. 614.

§ 92. Negotiable and non-negotiable receipts.—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

A receipt in which it is stated that the goods received will be delivered to the bearer or to the order of any person named in such receipt is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void.

Source.—L. 1907, ch. 732, §§ 4, 5.

§ 93. Duplicate receipts must be so marked.—When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

Source.—L. 1907, ch. 732, § 6.

§ 94. Failure to mark "not negotiable."—A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda or written acknowledgments of an informal character.

Source.—L. 1907, ch. 732, § 7.

Rights of bona fide transferee.—The provision of the earlier act (L. 1858, ch. 326, § 6) providing that warehouse receipts not having the words non-negotiable thereon may be transferred by indorsement, imparts to a receipt so transferred negotiable qualities, so far as to protect the purchaser and lienor, irrespective of the validity of the transfers as between the immediate parties thereto and a bona

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Ad e transfer to a purchaser vests the title to the property specified in the receipt in the latter, together with all remedies of the former owner against the warehouseman for a failure to make due delivery. *Whitlock v. Hay* (1874), 58 N. Y. 484.

§ 95. **Obligation of warehouseman to deliver.**—A warehouseman, in the absence of some lawful excuse provided by this article, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

- (a) An offer to satisfy the warehouseman's lien,
- (b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and
- (c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

Source.—L. 1907, ch. 732, § 8.

Tender of fees.—Where a warehouseman refuses to deliver goods to the bailor, on the ground that the latter is not entitled to take them, averring an intention to contest his right in the court, it is not necessary for the bailor to tender the fees due for the storage of the goods before commencing an action for their recovery. *Long Island Brewery Co. v. Fitzpatrick* (1879), 18 Hun 389.

In an action by the owner to recover for conversion of goods stored with a warehouseman by a third person, the owner must make a legal tender of the warehouseman's charges, identify himself, and afford the warehouseman a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead as required by section 18. *Zuber v. Mehrle* (1908), 112 N. Y. Supp. 1093.

Delivery to vendee of bailor.—The heading of a warehouse receipt contained the following clauses among others: "No goods delivered without a written order, or presentation of original receipt." "Goods will not be delivered to any person unless identified and authorized to receive the same." It was held that upon the demand by a vendee of the party who stored the goods, the original receipt being present, and he being accompanied by the person who in the matter of storage acted for the party who stored the goods, and who was there to identify the person making the demand as being the vendee, the above clauses did not warrant a refusal to deliver. *Willner v. Morrell* (1875), 40 Super. (8 J. & S.) 222.

A presumption of negligence arises where a warehouseman fails on demand to deliver goods stored for the owner, which requires the warehouseman to account for his failure to deliver. *Herrman v. New England Navigation* (1911), 143 App. Div. 551, 128 N. Y. Supp. 380; *Burnell v. New York Central R. R. Co.* (1871), 45 N. Y. 184, 6 Am. Rep. 61; *Bank of Oswego v. Doyle* (1883), 91 N. Y. 32, 43 Am. Rep. 634; *Reed v. Crowe* (1885), 13 Daly 164; *Abecasis v. Gray* (1878), 43 Super. (11 J. & S.) 573; *Coleman v. Livingston* (1873), 36 Super. (4 J. & S.) 32, *affd.* (1874), 56 N. Y. 658; *Toplitz v. Timmins* (1904), 88 N. Y. Supp. 946.

Burden of proof.—Proof of the demand for the delivery of goods stored with a warehouseman and his refusal or neglect to deliver or produce the same, is sufficient to cast the burden of proof of diligence in the care and custody of the prop-

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erty upon the warehouseman. *Coleman v. Livingston* (1873), 36 Super. (4 J. & S.) 32, *affd.* (1874), 56 N. Y. 658; *Golden v. Romer* (1880), 20 Hun 438.

The failure of a bonded warehouseman to deliver, upon demand, goods deposited with him, upon which the duties have been paid, casts upon him the burden of accounting for them. *Schwerin v. McKie* (1872), 51 N. Y. 180, 10 Am. Rep. 581; *Lichtenstein v. Jarvis* (1898), 31 App. Div. 33, 52 N. Y. Supp. 605, *affd.* (1900), 164 N. Y. 601, 59 N. E. 1125.

When it appears that the property has been lost or stolen, it then becomes the duty of the party seeking to recover to prove that the loss or theft could have been prevented by the warehouseman's exercise of due care. *Leoncini v. Post* (1891), 37 N. Y. St. Rep. 255, 13 N. Y. Supp. 825; *Schmidt v. Blood* (1831), 9 Wend. 268, 24 Am. Dec. 143; *Kaiser v. Latimer* (1896), 9 App. Div. 36, 41 N. Y. Supp. 94; *Herrmann v. New England Navigation Co.* (1911), 143 App. Div. 551, 128 N. Y. Supp. 380.

Where, in an action against warehousemen for the loss of grain by fire, the defendants, by their answer, have denied the fact of negligence, the burden of proof lies with the plaintiff at all times to prove the fact of negligence, notwithstanding the rule of law that a demand made of warehousemen and their refusal to deliver makes out a *prima facie* case of liability upon their part. *Liberty Ins. Co. v. Central Vermont R. R. Co.* (1897), 19 App. Div. 509, 46 N. Y. Supp. 576.

See also cases cited under section 107 *post*.

§ 96. Justification of warehouseman in delivering.—A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is:

(a) The person lawfully entitled to the possession of the goods, or his agent,

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.

Source.—L. 1907, ch. 732, § 9.

§ 97. Warehouseman's liability for misdelivery.—Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

Source.—L. 1907, ch. 732, § 10.

Unauthorized delivery to stranger.—A warehouseman who holds the trunk of a person on storage, and delivers it to a third person without sufficient authority from the owner, is guilty of conversion. *Pashinska v. Selt* (1897), 20 Misc. 665, 46 N. Y. Supp. 253.

§ 98. **Negotiable receipts must be canceled or marked when goods or part thereof are delivered.**—Except as provided in section one hundred and twenty-one, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

Except as provided in said section one hundred and twenty-one, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

Source.—L. 1907, ch. 732, §§ 11, 12.

§ 99. **Altered receipts.**—The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was

- (a) Immaterial,
- (b) Authorized, or
- (c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

Source.—L. 1907, ch. 732, § 13.

§ 100. **Lost or destroyed receipts.**—Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon

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the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Source.—L. 1907, ch. 732, § 14.

§ 101. **Effect of duplicate receipts.**—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability.

Source.—L. 1907, ch. 732, § 15.

§ 102. **Warehouseman can not set up title in himself.**—No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

Source.—L. 1907, ch. 732, § 16.

§ 103. **Interpleader of adverse claimants.**—If more than one person claim the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.

Source.—L. 1907, ch. 732, § 17.

Indemnity bond.—A warehouseman is not entitled to require a bond of indemnity from the true owner, as a condition of delivering the property, on the ground that adverse claims to it are made. The remedy is by interpleader. *Banfield v. Haeger* (1879), 45 Super. (13 J. & S.) 428, 7 Abb. N. C. 318.

Sufficiency of complaint.—*Manhattan S. & W. Co. v. Bengulat Art Museum* (1913), 155 App. Div. 196, 139 N. Y. Supp. 1073.

§ 104. **Warehouseman has reasonable time to determine validity of claims.**—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Source.—L. 1907, ch. 732, § 18.

Reasonable time.—See *Zuber v. Mehrle* (1908), 112 N. Y. Supp. 1093.

§ 105. **Adverse title is no defense except as above provided.**—Except as provided in the two preceding sections and in sections ninety-six and one hundred and twenty-one, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.

Source.—L. 1907, ch. 732, § 19.

Claim of third person as defense.—A warehouseman will not be permitted to defeat the right of a bailor to recover property by interposing a claim of ownership in a third person. *Leoncini v. Post* (1891), 37 N. Y. St. Rep. 255, 13 N. Y. Supp. 825.

While a bailee may not ordinarily set up the rights of a third person against his bailor when sued for conversion, the right of a third person to whom the bailee has delivered the property may be considered as a defense. *Western Transportation Co. v. Barber* (1874), 56 N. Y. 544; *Kramer v. Haeger Storage Warehouse Co.* (1908), 123 App. Div. 316, 108 N. Y. Supp. 1.

§ 106. **Liability for non-existence or misdescription of goods.**—A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

Source.—L. 1907, ch. 732, § 20.

Goods in packages.—It is no part of the duty of a warehouseman to open packages delivered to him for the purpose of determining their contents, and he is not chargeable with knowledge of their contents when they are not visible and open to inspection. *Dean v. Driggs* (1893), 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302, 33 Am. St. Rep. 721.

Receipt issued by officer of warehouse company to himself.—If an officer of a warehouse company, having express authority to issue negotiable warehouse receipts to others for goods deposited, but having no such authority to issue receipts to himself, does issue receipts in his own favor, to the knowledge, express or implied, of the company's directors, their acquiescence in such acts, after having had a reasonable time to put an end thereto, will permit the inference that the act of certifying in his own favor was within the officer's actual authority, and will estop the company from denying, as to purchasers for value, that the power to so certify in fact existed. *Hanover Nat. Bank v. American Dock & Trust Co.* (1896), 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721.

§ 107. **Liability for care of goods.**—A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care

in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

Source.—L. 1907, ch. 732, § 21.

Liability of warehouseman.—A warehouseman, in the absence of bad faith, is liable only for negligence. *Kaiser v. Latimer* (1896), 9 App. Div. 36, 41 N. Y. Supp. 94; *Chaplin v. Meyer* (1878), 75 N. Y. 260, 31 Am. Rep. 467.

A warehouseman is liable for any loss or injury to goods, caused by his failure to exercise such care in regard to them as a reasonable careful owner of similar goods would exercise, but is not liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. *Buffalo Grain Co. v. Sowerby* (1909), 195 N. Y. 355, 88 N. E. 569; *Jones v. Morgan* (1882), 90 N. Y. 4, 43 Am. Rep. 131; *Madan v. Covert* (1879), 45 Super. (13 J. & S.) 245, affd. (1880), 81 N. Y. 629; *Smith v. Simms* (1875), 51 How. Pr. 305; *Lynch v. Kluber* (1897), 20 Misc. 601, 46 N. Y. Supp. 428.

A warehouseman, therefore, in the exercise of reasonable care, owes a duty to his patrons of making reasonable inspection from time to time to see that the building remains safe and in proper condition. *Buffalo Grain Co. v. Sowerby* (1909), 195 N. Y. 355, 88 N. E. 569.

What omission or want of care will amount to ordinary neglect in such a case is, as a general rule, rather a matter of fact than of law, and if there is any evidence to sustain the verdict of the jury it will not be interfered with by the court. *Smith v. Simms* (1875), 51 How. Pr. 305.

A warehouseman is liable for the negligent injury of goods stored with him though it appear that, after the happening of the injury, the goods were destroyed without his fault, and that they must have been so destroyed, even if no damage had previously occurred. *Powers v. Mitchell* (1842), 3 Hill 545.

Burden of proof.—Where a customer proves that her property was in good condition when it reached the possession of the warehouseman, and that when returned it was damaged in a manner and to an extent that would have been impossible if the property had been properly cared for, the customer has made out a *prima facie* case, and it then becomes the duty of the warehouseman to show that the injury did not happen in consequence of his failure to use all of the care and diligence which a prudent person would exercise in relation to his own property. *Lynch v. Kluber* (1897), 20 Misc. 601, 46 N. Y. Supp. 428. See also *Arent v. Squire & Johnson* (1863), 1 Daly 347; *Reed v. Crowe* (1885), 13 Daly 164; *Murray v. Hayes* (1915), 185 N. Y. St. Rep. 1, 151 N. Y. Supp. 1. But when the warehouseman accounts upon the trial for the damage in a manner which permits an inference that he has not been negligent, the bailor must resume his proofs and re-assume the burden of establishing that the warehouseman was negligent. *Mautner v. Terminal Warehouse Co.* (1899), 25 Misc. 729, 55 N. Y. Supp. 603; *Murray v. Hayes* (1915), 185 N. Y. St. Rep. 1, 151 N. Y. Supp. 1.

Where a new bailee voluntarily assumes to continue the storage of goods and, without intervention upon the part of the bailor, assumes dominion over and moves them to a new location, proof, that the goods were in good condition when originally stored and were partially damaged when finally returned, makes out a *prima facie* case of negligence against the new bailee. *Isler v. F. C. Linde Co.* (1900), 33 Misc. 465, 67 N. Y. Supp. 1072.

Bonded warehouses; effect of Federal statute.—The provision of the act of Congress of 1852, that goods deposited in a private bonded warehouse, authorized

by that act, shall be at the exclusive risk of the owner or importer, was intended solely for the benefit of the government, and does not relieve the warehouse keeper from the duty of exercising ordinary care and prudence nor from the liabilities of other warehousemen to their patrons. *Schwerin v. McKie* (1872), 51 N. Y. 180, 10 Am. Rep. 581.

A cold storage warehouse company, in the absence of an express agreement, impliedly undertakes to maintain the necessary temperature required for the preservation of property stored with it by its customers for the time the property remains stored. *Sutherland v. Albany Cold Storage & Warehouse Co.* (1902), 171 N. Y. 269, 63 N. E. 1100, 89 Am. St. Rep. 815. See also *Wilson v. Linde Co.* (1900), 47 App. Div. 327, 62 N. Y. Supp. 69; *Ballston Refrigerating Storage Co. v. Eastern States Refrigerating Co.* (1911), 142 App. Div. 135, 126 N. Y. Supp. 857, *affd.* (1912), 206 N. Y. 705, 99 N. E. 1103.

A warehouseman who takes fruit for storage under an agreement to keep it at a specified temperature, but allows the temperature to fall so that the fruit becomes frozen and ruined, cannot recover for such storage, but is liable for the damage thereby sustained. *Greenwich Warehouse Co. v. Maxfield* (1894), 8 Misc. 308, 28 N. Y. Supp. 732.

Theft of goods.—Where the theft of goods has been established the burden rests upon the owner of the goods, to establish that the loss or the theft was owing to the negligence or want of care of the warehousemen in respect to the same. *Madan v. Covert* (1879), 45 Super. (13 J. & S.) 245, *affd.* (1880), 81 N. Y. 629; *Claffin v. Meyer* (1878), 75 N. Y. 260, 31 Am. Rep. 467.

A warehouseman from whom goods were stolen at night cannot be charged with negligence in failing to employ a watchman in the interior of the building and to maintain burglar alarms, if such were not the custom of the trade, and he did employ a night watchman in common with other merchants and warehousemen in the vicinity. *Battelle v. Mercantile Warehouse Co.* (1910), 139 App. Div. 649, 124 N. Y. Supp. 135.

Goods destroyed by fire.—Where goods stored in an elevator are destroyed by fire, the maxim *res ipsa loquitur* has no application, as fires often occur without negligence, and it is requisite that the plaintiff should go farther and show from the attendant facts and circumstances that the fire resulted from the negligence of parties in control of the elevator. *Liberty Ins. Co. v. Cent. Vermont R. R. Co.* (1897), 19 App. Div. 509, 46 N. Y. Supp. 576.

Where defendants agreed to store household goods in a designated building, but, in violation of that agreement, stored the articles in another building which, with the articles therein stored, was destroyed by a fire which did not reach the building where they agreed to store the goods, it is reversible error to dismiss an action for breach of contract and for the value of the goods upon the ground that the fire was the proximate cause of the loss and that the defendants were bailees and were not liable for the damages flowing from the loss of property, because it did not appear that the fire occurred through the lack of reasonable care on the part of the defendants. When the property was burned in the building in which the defendants placed it in violation of the agreement, the consequent loss and damage was that which the parties apprehended and sought to avoid, through the agreement, and the defendants must indemnify the plaintiff therefor. *Mortimer v. Otto* (1912), 206 N. Y. 89, 99 N. E. 189.

See also cases cited under section 95 *ante*.

§ 108. **Goods must be kept separate.**—Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which

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a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited.

Source.—L. 1907, ch. 732, § 22.

§ 109. **Commingled goods and warehouseman's liability therefor.**—If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.

The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

Source.—L. 1907, ch. 732, §§ 23, 24.

§ 110. **Attachment or levy upon goods for which a negotiable receipt has been issued.**—If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they can not thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

Source.—L. 1907, ch. 732, § 25.

§ 111. **Creditors' remedies to reach negotiable receipts.**—A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which can not readily be attached or levied upon by ordinary legal process.

Source.—L. 1907, ch. 732, § 26.

§ 112. **What claims are included in the warehouseman's lien.**—Subject to the provisions of section one hundred and fifteen, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooperating and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.

Source.—L. 1907, ch 732, § 27.

References.—Enforcement by sale, § 118, post. May be enforced by other methods, § 120, post. By sale under Lien Law, see Lien Law, §§ 200-205. By action. Lien Law, §§ 206-210.

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Editors' note.—L. 1907, ch. 732, entitled "An act in relation to warehouse receipts" repealed all the laws of the state relating to warehousemen, including § 73 of the Lien L. (L. 1897, ch. 718), as the warehouse liens. Section 73 was originally revised from L. 1885, ch. 526. The above section was enacted as a substitute. The decisions were made with reference to L. 1885, ch. 526, and § 73 of the Lien Law.

Lien before act of 1885.—Under the common law existing before the passage of ch. 526 of the Laws of 1885, a warehouseman had a specific lien upon goods stored with him for the expense connected with such storage, and also for advances made for cartage, labor, weighing and coopering. *Sage v. Gittner* (1851), 11 Barb. 120, but that the lien did not exist for the private storage of goods and merchandise. *Rivara v. Ghio* (1854), 3 E. D. Smith 264; *In re Kelly* (1883), 18 Fed. Rep. 528; *Trust v. Pirsson* (1857), 1 Hilt 292; *Alt v. Weidenburg* (1860), 19 Super. (6 Bosw.) 176.

Lien under act of 1885.—The act of 1885 gave a lien only to a warehouseman or to a person lawfully engaged exclusively in the business of storing goods, wares and merchandise for hire. *Merritt v. Peirano* (1896), 10 App. Div. 563, 42 N. Y. Supp. 97, *affd.* (1901), 167 N. Y. 541, 60 N. E. 1116. By the revision the word "exclusively" has been omitted.

It was also held under such act that in the absence of any agreement therefor a mere volunteer, who accepts the temporary custody of goods, has no lien thereon for storage. *Lyungstrand v. William Haaker Co.* (1896), 16 Misc. 387, 38 N. Y. Supp. 129.

Extent of lien.—A warehouseman has a general lien upon the goods in his possession for all his charges. *Stallman v. Kimberly* (1890), 121 N. Y. 393, 24 N. E. 939.

Storage liens by persons not warehousemen.—The owner of a dock, whose principal business is the receipt and reshipment of iron work, and whose compensation is based on the labor attendant thereon—the storage being merely an incidental matter—when out of a total delivery of some 30,000 tons of ore, there remains upon his dock, after the expiration of eighteen months, over 15,000 tons, is entitled after giving reasonable notice to the owners of the ore, that, unless it be removed by a certain date, storage will be charged thereon, to a lien for storage at reasonable rates, after the date named. *Buffalo Dock Co. v. Ladenburgh* (1897), 19 App. Div. 35, 46 N. Y. Supp. 1067, *affd.* (1901), 162 N. Y. 626, 57 N. E. 1105.

Storage of baggage.—When baggage is carried on a train with a passenger so that he is present upon its arrival, he must take it away as soon as practicable, and if he chooses to leave it with the carrier the latter becomes a warehouseman and is entitled to a lien for storage. *Kressin v. Central Railroad Co.*, N. J. (1907), 119 App. Div. 86, 103 N. Y. Supp. 1002.

Cleaning articles.—The statutory lien does not cover charges for cleaning an article kept in storage. *Reidenback v. Tuck* (1903), 85 N. Y. Supp. 352.

Where goods in storage are replevined the amount of the lien is to be measured by the period of the storage to the date when possession was awarded the plaintiff by the judgment, or at least to the time of trial. *Reidenback v. Tuck* (1903), 85 N. Y. Supp. 352.

A casual bailee who is not a warehouseman or one lawfully engaged in the storage of goods for profit has no lien for charges on goods stored with him. *Alton v. New York Taxicab Co.* (1910), 66 Misc. 191, 121 N. Y. Supp. 271.

§ 113. **Against what property the lien may be enforced.**—Subject to the provisions of section one hundred and fifteen, a warehouseman's lien may be enforced:

(a) Against all goods, whenever deposited, belonging to the person who

is liable as debtor for the claims in regard to which the lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claim in regard to which the lien is asserted, if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.

Source.—L. 1907, ch. 732, § 28.

Lien on property belonging to another.—The purpose of this section is to give a warehouseman a lien for charges against the goods of persons who are primarily liable for the charge incurred and who, by their agreement, create the relation of debtor and creditor. A warehouseman has not a lien upon goods belonging to another, stored by a stranger in fraud of the true owner's rights. *Farrell v. Harlem Terminal S. W. Co.* (1911), 70 Misc. 565, 127 N. Y. Supp. 306.

Storage of mortgaged property.—A warehouseman to whom the mortgagor delivers mortgaged goods, where the mortgage, duly filed, stipulates that they are not to be removed from the mortgagee's residence, acquires no lien for storage purposes. *Baumann v. Jefferson* (1893), 4 Misc. 147, 23 N. Y. Supp. 685; *Baumann v. Post* (1890), 16 Daly 385, 12 N. Y. Supp. 213; *Eisler v. Union Transfer & Storage Co.* (1891), 16 Daly 456, 12 N. Y. Supp. 732; *Allen v. Becket* (1903), 84 N. Y. Supp. 1007; *Singer Mfg. Co. v. Becket* (1903), 85 N. Y. Supp. 391.

A chattel mortgage refilled forty-eight days before the expiration of the year, instead of within thirty days as required by statute, is void as to creditors, and if this were not so it would be void as to a warehouseman in possession of the chattel and whose lien thereon the plaintiff refused to pay. *Industrial Loan Assoc. v. Saul* (1901), 34 Misc. 188, 68 N. Y. Supp. 837.

The lien of the warehouseman is superior to the rights of a mortgagee under a chattel mortgage which has not been refilled within thirty days prior to the expiration of a year from the original filing although at the time the goods were placed in storage the chattel mortgage was valid. *State Trust Co. v. Casino Co.* (1896), 5 App. Div. 381, 39 N. Y. Supp. 258.

Where property, upon which the vendor had a chattel mortgage under which he was entitled to the property upon any default of the owner, was stored in a warehouse, the owner of the property was not a person included within this section giving warehousemen a lien. *Ludwig, Baumann & Co. v. Roth* (1910), 67 Misc. 458, 123 N. Y. Supp. 191.

Portion of property removed.—It was formerly held that where a large quantity of any particular kind of merchandise was stored in a warehouse, and portions of it were, from time to time, taken out without the charge for storage thereon having been paid, the warehouseman had a lien upon the portion left for the storage of the whole. *Schmidt v. Blood* (1832), 9 Wend. 268, 24 Am. Dec. 143.

§ 114. **How the lien may be lost.**—A warehouseman loses his lien upon goods:

- (a) By surrendering possession thereof, or
- (b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this article.

Source.—L. 1907, ch. 732, § 29.

Waiver of lien.—A warehouseman may waive his lien by placing his refusal to deliver the goods on grounds other than his lien, and a tender is not essential before bringing suit where the lien is thus waived. *L. Island Brewing Co. v. Fitzpatrick* (1879), 18 Hun 389.

Where it appears from the course of dealing by the warehouseman, or by the agreement of the party, that the goods stored will be delivered without requiring an immediate payment of the storage, the warehouseman relying upon the credit of the party, there is no lien, because such a delivery is inconsistent with an implied agreement at the time of the deposit, that the property is not to be taken away unless the storage is paid. *Dunham v. Pette* (1861), 1 Daly 112.

§ 115. Negotiable receipt must state charges for which lien is claimed.—If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section one hundred and twelve, although the amount of the charges so enumerated is not stated in the receipt.

Source.—L. 1907, ch. 732, § 30.

§ 116. Warehouseman need not deliver, until lien is satisfied.—A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

Source.—L. 1907, ch. 732, § 31.

Time to enforce.—A warehouseman has no right to hold goods for the protection of the lien and charge storage indefinitely, to the prejudice of the bailor; but it is his duty to enforce his lien within a reasonable time, and thus limit the damages resulting from the breach of contract. *Morgan v. Murtha* (1896), 18 Misc. 438, 42 N. Y. Supp. 374, revg. *Morgan v. Murtha* (1896), 17 Misc. 292, 40 N. Y. Supp. 376.

§ 117. Warehouseman's lien does not preclude other remedies.—Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

Source.—L. 1907, ch. 732, § 32.

§ 118. Satisfaction of lien by sale.—A warehouseman's lien for a claim which has become due may be satisfied as follows: The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

- (a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,
- (b) A brief description of the goods against which the lien exists,
- (c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its

destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

Source.—L. 1907, ch. 732, § 33.

References.—See § 120, authorizing other methods of enforcement, and Lien Law, §§ 200-210.

Notice.—Unless the provisions of the statute regarding notice are complied with the sale is invalid. *Robinson v. Wappans* (1901), 34 Misc. 199, 68 N. Y. Supp. 815.

The warehouseman cannot relieve himself from the requirements of the statute as to notice by an arbitrary insertion in the warehouse receipt of a waiver of notice on the part of the owner. *Sand v. Rosenagel* (1903), 40 Misc. 666, 83 N. Y. Supp. 255.

Redemption.—The owner may redeem the goods stored at any time before sale. *Beken v. Kingsbury* (1906), 113 App. Div. 555, 100 N. Y. Supp. 323.

Liability for sale without notice.—Where a warehouseman who has made advances on goods stored with him, and who has knowledge of facts sufficient to put him on inquiry as to the true ownership of the goods, sells them at private

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sale without notice, instead of by public sale, he is guilty of conversion and liable to the owner for their value, less advances actually shown to have been made. *Beken v. Kingsbury* (1906), 113 App. Div. 555, 100 N. Y. Supp. 323.

§ 119. **Perishable and hazardous goods.**—If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

Source.—L. 1907, ch. 732, § 34.

§ 120. **Other methods of enforcing liens.**—The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

Source.—L. 1907, ch. 732, § 35.

Reference.—Other methods, *Lien Law*, §§ 200-210.

§ 121. **Effect of sale.**—After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

Source.—L. 1907, ch. 732, § 36.

§ 122. **Negotiation of negotiable receipts by delivery and by indorsement.**—A negotiable receipt may be negotiated by delivery:

(a) Where by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

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A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Source.—L. 1907, ch. 732, §§ 37, 38.

§ 123. **Transfer of receipts.**—A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt can not be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

Source.—L. 1907, ch. 732, § 39.

§ 124. **Who may negotiate a receipt.**—A negotiable receipt may be negotiated:

- (a) By the owner thereof, or
- (b) By any person to whom the possession or custody of the receipt has been intrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been intrusted, or if at the time of such intrusting the receipt is in such form that it may be negotiated by delivery.

Source.—L. 1907, ch. 732, § 40.

§ 125. **Rights of person to whom a receipt has been negotiated.**—A person to whom a negotiable receipt has been duly negotiated acquires thereby:

- (a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and
- (b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

Source.—L. 1907, ch. 732, § 41.

Transfer of right of possession.—Under the statute, a warehouseman who issues a negotiable receipt for goods, delivered to him for storage, agrees in advance to hold the goods for the account of any person to whom the receipt is negotiated, and by the very act of negotiation loses his position as bailee for the vendor and is transformed, without further assent, into a bailee for the vendee. The moment that a receipt, negotiable in form, is indorsed and delivered, a new relation of bailor and bailee springs into being, and with the birth of that relation the possession, once held by the bailee for the account of the vendor, is transmuted into a possession for the account of the vendee. The result is a real delivery to the same extent as if the goods had been transported to another warehouse named

by the vendee, and with this transmutation of possession the vendor's lien is at an end. *Rummell v. Blanchard* (1915), 216 N. Y. 348, 110 N. E. 765.

Replevin by transferor after bankruptcy of transferee.—Plaintiffs sold goods, stored in a warehouse, for which they held warehouse receipts, issued in their name, and negotiable in form. These receipts the plaintiffs indorsed and transferred to the purchasers of the goods. Thereafter one of the purchasers tendered the receipts to the warehouseman and requested that new receipts be issued. This was refused because the charges of the warehouseman were not paid. A few days later the purchasers became bankrupt. The goods have never been paid for, and the plaintiffs, on learning that the buyers were insolvent, paid the warehouse charges and demanded delivery. This demand was refused; an action of replevin followed, and thereafter the trustees in bankruptcy of the buyers were substituted as defendants. It was held, that by their transfer of the negotiable warehouse receipts to the purchasers, the plaintiffs lost their lien as vendors and, hence, cannot maintain an action of replevin therefor. *Rummell v. Blanchard* (1915), 216 N. Y. 348, 110 N. E. 765.

Effect on vendor's lien.—Where a seller of goods delivers to the buyer a negotiable warehouse receipt, he cannot afterwards replevy the goods from a trustee appointed on the bankruptcy of the buyer, for the negotiation of the receipt vests the buyer both with title and right of possession. *Rummell v. Blanchard* (1915), 167 App. Div. 654, 153 N. Y. Supp. 159, *affd.* (1915), 216 N. Y. 348, 110 N. E. 765.

A bona fide purchaser of stolen property is not protected against the owner by a warehouse receipt for the stolen property endorsed over to such bona fide purchaser at the time of his purchase. *Mills v. Miller* (1881), 12 N. Y. Wkly. Dig. 221; *Collins v. Rolli* (1880), 20 Hun 246, *affd.* (1881), 85 N. Y. 637.

§ 126. **Rights of person to whom a receipt has been transferred.**—A person to whom a receipt has been transferred but not negotiated acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Source.—L. 1907, ch. 732, § 42.

Liability of warehouseman for delivery to pledgee.—When the holder of a non-negotiable warehouse receipt delivers the same to a third person as security for a loan, together with a receipt for the money, stating that the loan was made on the goods, which receipt, drawn in the handwriting of the lender, is signed by the borrower so that the lender can insert before the signature a statement that the goods were subject to his order, the warehouseman is not liable as for a conversion in delivering the goods, in good faith, to the lender on the presentation of the receipts by him, whether or not he inserted the statement that the goods were subject to his order without authority. *Kramer v. Haeger Storage Warehouse Co.* (1908), 123 App. Div. 316, 108 N. Y. Supp. 1.

Liability of pledgee for storage charges.—A person to whom a warehouse receipt has been transferred as collateral security is vested with a qualified title which gives him the right to take possession of the property upon the surrender and cancellation of the receipt, but since the owner may redeem and the right of possession is subject to the liens of the warehouseman for storage, the title is not absolute, and although, if he so elects, he may reduce the property to possession upon payment of the storage, he is not bound to do so or to pay the charges thereon. *Driggs v. Dean* (1901), 167 N. Y. 121, 60 N. E. 336.

Rights of transferee.—The provisions of the Act of 1858 (L. 1858, ch. 326, § 6), that warehouse receipts not having the words non-negotiable thereon may be transferred by indorsement, imparts to a receipt so transferred the negotiable qualities, so far as to protect the purchaser and lienor, irrespective of the validity of the transfers as between the immediate parties thereto, and a *bona fide* transfer to a purchaser vests the title to the property specified in the receipt in the latter, together with all remedies of the former owner against the warehouseman for a failure to make due delivery. *Whitlock v. Hay* (1874), 58 N. Y. 484.

§ 127. **Transfer of negotiable receipt without indorsement.**—Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Source.—L. 1907, ch. 732, § 43.

§ 128. **Warranties on sale of receipt.**—A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants:

- (a) That the receipt is genuine,
- (b) That he has a legal right to negotiate or transfer it,
- (c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

Source.—L. 1907, ch. 732, § 44.

§ 129. **Indorser not a guarantor.**—The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfil their respective obligations.

Source.—L. 1907, ch. 732, § 45.

§ 130. **No warranty implied from accepting payment of a debt.**—A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the gen-

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uineness of such receipt or the quantity or quality of the goods therein described.

Source.—L. 1907, ch. 732, § 46.

§ 131. When negotiation not impaired by fraud, mistake or duress.—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

Source.—L. 1907, ch. 732, § 47.

§ 132. Subsequent negotiation.—Where a person having sold, mortgaged or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation.

Source.—L. 1907, ch. 732, § 48.

§ 133. Negotiation defeats vendor's lien.—Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or be justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.

Source.—L. 1907, ch. 732, § 49.

Merchandise is not in transit unless it has been delivered to a bailee for the purpose of transportation. *Rummell v. Blanchard* (1915), 216 N. Y. 348, 110 N. E. 765, affg. (1915), 167 App. Div. 654, 153 N. Y. Supp. 159.

§ 134. Issue of receipt for goods not received.—A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Source.—L. 1907, ch. 732, § 50.

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§ 135. **Issue of receipt containing false statement.**—A warehouseman, or any officer, agent or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Source.—L. 1907, ch. 732, § 51.

§ 136. **Issue of duplicate receipts not so marked.**—A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "Duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section one hundred, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Source.—L. 1907, ch. 732, § 52.

§ 137. **Issue for warehouseman's goods of receipts which do not state that fact.**—Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction, shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars or by both.

Source.—L. 1907, ch. 732, § 53.

§ 138. **Delivery of goods without obtaining negotiable receipt.**—A warehouseman, or any officer, agent or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections one hundred and one hundred and twenty-one, be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Source.—L. 1907, ch. 732, § 54.

Waiver.—See *First National Bank v. Bruen* (1886), 23 Wkly. Dig. 90.

§ 139. **Negotiation of receipt for mortgaged goods.**—Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing

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his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment, not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Source.—L. 1907, ch. 732, § 55.

§ 140. When rules of common law still applicable.—In any case not provided for in this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

Source.—L. 1907, ch. 732, § 56.

§ 141. Interpretation shall give effect to purpose of uniformity.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Source.—L. 1907, ch. 732, § 57.

§ 142. Definitions.—(1) In this article, unless the context or subject matter otherwise requires:

“Action” includes counterclaim, set-off and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder” of a receipt means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

(2) A thing is done “in good faith” within the meaning of this article, when it is in fact done honestly, whether it be done negligently or not.

Source.—L. 1907, ch. 732, § 58.

See *Healy v. New York Central & H. R. R. R. Co.* (1912), 153 App. Div. 516, 138 N. Y. Supp. 287.

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§ 143. **Application to existing receipts.**—The provisions of this article do not apply to receipts made and delivered prior to October first, nineteen hundred and seven.

Source.—L. 1907, ch. 732, § 59.

ARTICLE X.

TICKET AGENTS.

Article 10 of L. 1909, ch. 25, was repealed by L. 1910, ch. 348, § 2. It was also repealed and a new article 10 added (§ 150–154) by L. 1910, ch. 349. The Banking Law, L. 1914, ch. 369, § 500, repealed L. 1909, ch. 25, §§ 150–154 and L. 1910, ch. 48, but does not repeal L. 1910, ch. 349, which added the new article, nor L. 1911, ch. 578, amending § 150 as so added. It is, therefore, doubtful if the repeal of Art. 10 as added by L. 1910, ch. 349, has been accomplished. The Legislature of 1917 amended § 154, evidently on the theory that it was still in force.

Section 150. Licenses to sell transportation tickets or orders for transportation to or from foreign countries.

151. Bonds.

152. Revocation of licenses.

153. Penalties for conducting business without license, et cetera.

154. Cancellation of bonds.

§ 150. **Licenses to sell transportation tickets or orders for transportation to or from foreign countries.**—No person, firm, or corporation, other than railroad companies or the agents of such railroad companies or steamship companies duly appointed in writing, shall hereafter engage within this state in the sale of steamship tickets or orders for transportation to or from foreign countries or shall advertise or hold themselves out as authorized or entitled to sell such steamship tickets or orders for transportation without having first procured a license to carry on such business from the comptroller. Such license shall be granted on an application designating the place where the business for which a license is sought is to be carried on, and shall be accompanied by satisfactory proof by affidavit of good moral character. Such license shall be granted upon the payment to the comptroller of a fee of twenty-five dollars, and shall be renewed on payment of a like fee annually. Every license shall contain the name of the licensee, a designation of the city, street and number of the house in which the licensee is authorized to carry on business, and the number and date of such license. Such license shall not be transferred or assigned, nor authorize the licensee or his agents to transact business or to advertise or hold himself or themselves out as authorized and entitled to transact such business at any place other than that designated in the license, except with the written approval of the comptroller. The license shall run to the first day of September next ensuing the date thereof, and no longer, unless sooner revoked by the comptroller. (*Added by L. 1910, ch. 349, and amended by L. 1911, ch. 578.*)

Source.—New.

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Statute is constitutional.—*Musci v. United Surety Co.* (1909), 196 N. Y. 459, 90 N. E. 171; *Goldberg v. People's Surety Co.* (1914), 162 App. Div. 385, 147 N. Y. Supp. 355; *Contra, Patti v. United Surety Co.* (1908), 61 Misc. 445, 115 N. Y. Supp. 844.

The word "transatlantic" is apparently used interchangeably with the word "foreign." *Rept. of Atty. Genl.* (1910) 524.

§ 151. **Bonds.**—The comptroller shall require the applicant for a license to file with the application therefor a bond, in due form, to the people of the state of New York, in the penal sum of two thousand dollars, in cities of the first class, and of one thousand dollars in all other localities, with two or more sufficient sureties, who shall be freeholders within the state of New York, conditioned that the obligor will duly account for all moneys received for steamship tickets or orders for transportation to or from foreign countries, and that the obligor will not be guilty of any fraud or misrepresentation to any purchaser of such tickets or orders. The bond of a surety company approved by the comptroller, or cash, may be accepted in lieu of surety. The comptroller shall keep a book or books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided in this article, the date of the issuance of said licenses and of the filing of such bonds, the name or names of the principals, with a statement of the place of business, and the names of the sureties upon the bonds so filed, which records shall be open to public inspection. A suit to recover on the bond required to be filed under the provisions of this article may be brought by or on the relation of any party aggrieved in a court of competent jurisdiction, and in the event that the obligor on said bond has been guilty of fraud or misrepresentation, may be enforced by the comptroller in the name of the people of the state of New York to recover the full penalty thereof. The fees received for the issuance of any license provided for in this article and the money reserved as the penalty on any bond, enforced by the comptroller, shall be paid into the state treasury, to be used to defray the miscellaneous expenses of the comptroller. (*Added by L. 1910, ch. 349.*)

Source.—New.

Filing of bond by persons receiving deposits of money for the purpose of transmitting the same to foreign countries. *Rept. of Atty. Genl.* (1908), 184.

Bond secures deposits made prior to statute.—*Russo v. Illinois Surety Co.* (1910), 141 App. Div. 690, 125 N. Y. Supp. 991.

Parties to whom benefit of bond accrues.—The bond provided for in this section is for the benefit of every person who deposited money with the agent, and the court will exercise its equitable jurisdiction to prevent the amount of the penalty being paid to some of the persons defrauded to the exclusion of others equally entitled to payment therefrom. An action on the bond is properly brought on behalf of the plaintiff and all others similarly situated. *Guffanti v. National Surety Co.* (1909), 196 N. Y. 452, 90 N. E. 174; See also *Goldberg v. People's Surety Co.* (1914), 162 App. Div. 385, 147 N. Y. Supp. 355; *Cappadona v. Illinois Surety Co.* (1910), 68 Misc. 470, 125 N. Y. Supp. 162; *Illinois Surety Co. v. Mattone* (1910), 132 App. Div. 173, 122 N. Y. Supp. 928.

Enjoining legal actions.—When the principal on a bond defaulted and individual creditors began actions at law against the surety, some of which went to judgment, and one creditor brought a representative suit in equity for a distribution of the amount of the undertaking it was held that the surety was entitled to an injunction restraining all of the actions except the suit in equity, even though it denied liability on the bond. *Illinois Surety Co. v. Mattone* (1910), 138 App. Div. 174, 122 N. Y. Supp. 928.

Release of sureties from future liability upon bonds filed by steamship agencies cannot be granted by the state comptroller. *Rept. of Atty. Genl.* (1909) 382.

The language of this section is mandatory and the comptroller is required to collect a fee of five dollars for every bond filed in his office, even though said bonds may be filed to take the place of a former bond given by the same person for which a former fee has been paid. *Rept. of Atty. Genl.* (1909) 368.

Payment of premiums in advance.—An agreement to pay a certain sum annually for the premium on a bond required by this section by one engaged in selling steamship tickets and forwarding money is to be construed in the absence of any provisions to the contrary as intending a payment in advance. *Illinois Surety Co. v. Paoli* (1910), 66 Misc. 160, 121 N. Y. Supp. 340.

Effect of subsequent amendment of statute on surety's liability.—*Goldberg v. People's Surety Co.* (1914), 162 App. Div. 385, 147 N. Y. Supp. 355; *Sciaballa v. Illinois Surety Co.* (1915), 166 App. Div. 677, 152 N. Y. Supp. 763, *affd.* (1915), 215 N. Y. 692, 109 N. E. 1070; *Engelheim v. Illinois Surety Co.* (1914), 85 Misc. 588, 148 N. Y. Supp. 1072.

§ 152. **Revocation of licenses.**—In the event that any licensee shall be guilty of any fraud or misrepresentation, or shall fail to account for any moneys paid in connection with the sale of any ticket or order for transportation by steamship, the comptroller shall be empowered, on giving such notice to the licensee as he shall deem sufficient, and an opportunity to answer any charges made against such licensee, to revoke the license under which such business shall be carried on. (*Added by L. 1910, ch. 349.*)

Source.—New.

§ 153. **Penalties for conducting business without license, et cetera.**—Any person, firm or corporation carrying on the business specified in this article without having obtained from the comptroller a license therefor, or who shall carry on such business after the revocation of a license to carry on such business, shall be guilty of a misdemeanor. (*Added by L. 1910, ch. 349.*)

§ 154. **Cancellation of bonds.**—At any time after this section takes effect, any person, firm or corporation who has deposited with the comptroller of the state a bond under the provisions of chapter one hundred and eighty-five of the laws of nineteen hundred and seven, as amended by chapter four hundred and seventy-nine of the laws of nineteen hundred and eight or chapter twenty-five of the laws of nineteen hundred and nine or such chapter as amended by chapter three hundred and forty-nine of the laws of nineteen hundred and ten, for the sale of steamship tickets or orders for transportation to or from foreign countries may institute a proceeding in

the supreme court of the county in which such person or firm, or the principal office of the corporation is located, for an order discharging the surety company from any liability under such bond. Such proceeding shall be commenced by filing a verified petition in the office of the clerk of the county in which such person or firm or the principal office of such corporation is located, setting forth the facts relating to the giving of such bond, that such person, firm or corporation has complied with the provisions of such chapters, and has duly accounted for all moneys received for steamship tickets or orders for transportation to or from foreign countries and that the applicant has not been guilty of any frauds or misrepresentations to any purchaser of such tickets or orders. Upon the filing of such verified petition, as aforesaid, the court may issue an order requiring the comptroller, the surety company, and the depositors of any funds for such transportation, to show cause at a special term of the supreme court, at a time and place to be fixed by the court, not less than thirty days from the date of granting the order, why the bond referred to in such petition, given by such surety company, shall not be cancelled and discharged, the surety company relieved from all liability thereunder and any indemnity on surety received and held by such surety company on account of such bond should not be assigned and transferred to such person, firm or corporation. Such order shall prescribe the manner of giving notice which shall be by personal service of the petition and order to show cause aforesaid upon the surety company, the comptroller and the aforesaid depositors, to the extent of at least ten in number, and by the publication of such order to show cause, once a week, for four successive weeks, in two newspapers of general circulation published in the county where such person, firm or corporation has its principal place of business. Upon the return day of such order the court shall hear the application of the petitioner and also of persons interested therein, and at such hearing determine any question of fact or law arising thereon or involved therein, and if upon such hearing it shall appear that such person, firm or corporation has complied with all the provisions of law, and that the facts stated in such petition are true and that proper cause has been shown for granting the prayer of said petitioner, the court shall thereupon issue an order discharging and releasing such surety company from any and all liability on any such bond and shall direct the comptroller to surrender the same to the person, firm or corporation making such application of any sureties held by it as indemnity as aforesaid, and upon the entry of such order and assignment and transfer of such securities as provided in such order, such surety company shall be discharged and released from all and any liability on such bond. (*Added by L. 1910, ch. 349 and amended by L. 1917, ch. 649, in effect May 24, 1917.*)

Source.—New.

ARTICLE XI.

(Article amended by L. 1910, ch. 700.)

EMPLOYMENT AGENCIES.

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Note. L. 1910, ch. 700, § 2.—The amendment of article eleven of the general business law by this act shall not affect the licenses issued pursuant to such article prior to the taking effect of this act until the expiration of such licenses or unless such licenses are terminated as provided herein. Such amendment shall not affect the tenure of office of the commissioner of licenses, the deputy commissioner of licenses or of inspectors, or of the employees to whom the enforcement of such law relative to employment agencies is now intrusted, or any action, or cause of action, arising from the provisions of article eleven of the general business law.

§ 170. **Application of article.**—1. This article shall apply to all cities of the state, except that the provisions hereof relating to domestic and commercial employment agencies shall not apply to cities of the third class. This article does not apply to employment agencies which procure employment for persons as teachers exclusively, or employment for persons in technical or executive positions in recognized educational institutions; to registries conducted by duly incorporated associations of registered nurses; and employment bureaus conducted by registered medical institutions or duly incorporated hospitals. Nor does such article apply to departments or bureaus maintained by persons for the purpose of securing help or employees where no fee is charged. (*Amended by L. 1910, ch. 700.*)

Constitutionality.—This statute is not in conflict with the constitutional right to carry on a lawful business without legislative interference. It is legislation

which has for its object the promotion of public health, safety, morals, convenience and general welfare, and also tends to prevent fraud and immorality. It is therefore within the police power of the legislature. *People ex rel. Armstrong v. Warden of the City Prison of New York* (1905), 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325.

Agreement with employment agency to furnish laborers.—An employment agency, licensed under this act, has the right to employ others not licensed to bring in laborers looking for work. *Calugerovich v. Yuzzolino* (1908), 110 N. Y. Supp. 984.

An unlicensed theatrical employment agency cannot maintain an action for services rendered. *Myers v. Walton* (1912), 76 Misc. 510, 135 N. Y. Supp. 574.

§ 171. **Definitions.**—1. When used in this article the following terms are defined as herein specified. The term “person” means and includes an individual, company, society, association, corporation, manager, contractor, subcontractor or their agents or employees.

2. The term “employment agency” means and includes the business of conducting, as owner, agent, manager, contractor, subcontractor or in any other capacity an intelligence office, domestic and commercial employment agency, theatrical employment agency, general employment bureau, shipping agency, nurses’ registry, or any other agency or office for the purpose of procuring or attempting to procure help or employment or engagements for persons seeking employment or engagements, or for the registration of persons seeking such help, employment or engagement, or for giving information as to where and of whom such help, employment or engagement may be procured, where a fee or other valuable consideration is exacted, or attempted to be collected for such services, whether such business is conducted in a building or on the street or elsewhere.

3. The term “theatrical employment agency” means and includes the business of conducting an agency, bureau, office or any other place for the purpose of procuring or offering, promising or attempting to provide engagements for circus, vaudeville, theatrical and other entertainments or exhibitions or performances, or of giving information as to where such engagements may be procured or provided, whether such business is conducted in a building, on the street or elsewhere, but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor. (*Subd. amended by L. 1917, ch. 770, in effect June 6, 1917.*)

4. The term “theatrical engagement” means and includes any engagement or employment of a person as an actor, performer or entertainer in a circus, vaudeville, theatrical and other entertainment, exhibition or performance.

5. The term “emergency engagement” means and includes an engagement which has to be performed within twenty-four hours from the time when the contract for such engagement is made.

6. The term “fee” means and includes any money or other valuable

consideration paid or promised to be paid for services rendered or to be rendered by any person conducting an employment agency of any kind under the provisions of this article. Such term includes any excess of money received by any such person over what has been paid out by him for the transportation, transfer of baggage, or board and lodging for any applicant for employment; such term also includes the difference between the amount of money received by any such person who furnishes employees, performers or entertainers for circus, vaudeville, theatrical and other entertainments, exhibitions or performances, and the amount paid by him to the said employees, performers or entertainers whom he hires or provides for such entertainments, exhibitions or performances.

7. The term "privilege" means and includes the furnishing of food, supplies, tools or shelter to contract laborers, commonly known as commissary privileges. (*Amended by L. 1910, ch. 700.*)

§ 172. License required.—A person shall not open, keep, maintain or carry on any employment agency, as defined in the preceding section, unless he shall have first procured a license therefor as provided in this article from the mayor or the commissioner of licenses of the city in which such person intends to conduct such agency. Such license shall be posted in a conspicuous place in said agency. Any person who shall open or conduct such an employment agency without first procuring said license shall be guilty of a misdemeanor and shall be punishable by a fine of not less than twenty-five dollars and not more than two hundred and fifty dollars, or by imprisonment for a period of not more than one year, or both, at the discretion of the court. (*Amended by L. 1910, ch. 700.*)

§ 173. Application for license.—An application for such license shall be made to the mayor or commissioner of licenses, in case such office shall have been established as herein provided. Such application shall be written and in the form prescribed by the mayor or commissioner of licenses, and shall state the name and address of the applicant; the street and number of the building or place where the business is to be conducted; whether the applicant proposes to conduct a lodging house for the unemployed separate from the agency which he proposes to conduct; the business or occupation engaged in by the applicant for at least two years immediately preceding the date of the application. Such application shall be accompanied by the affidavits of at least two reputable residents of the city to the effect that the applicant is a person of good moral character. (*Amended by L. 1910, ch. 700.*)

§ 174. Procedure upon application; grant of license.—Upon the receipt of an application for a license the mayor or commissioner of licenses shall cause the name and address of the applicant, and the street and number of the place where the agency is to be conducted, to be posted in a conspicuous place in his public office. The said mayor or commissioner of licenses shall

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investigate or cause to be investigated the character and responsibility of the applicant and shall examine or cause to be examined the premises designated in such application as the place in which it is proposed to conduct such agency. Any person may file, within one week after such application is so posted in the said office, a written protest against the issuance of such license. Such protest shall be in writing and signed by the person filing the same or his authorized agent or attorney, and shall state reasons why the said license should not be granted. Upon the filing of such protest the mayor or commissioner of licenses shall appoint a time and place for the hearing of such application, and shall give at least five days' notice of such time and place to the applicant and person filing such protest. The said mayor or commissioner of licenses may administer oaths, subpoena witnesses and take testimony in respect to the matters contained in such application and protest or complaints of any character for violations of this article, and may receive evidence in the form of affidavits pertaining to such matters. If it shall appear upon such hearing or from the inspection or examination made by the said mayor or commissioner of licenses that the said protest is sustained or that the applicant is not a person of good character, or that the place where such agency is to be conducted is not a suitable place therefor, or that the applicant has not complied with the provisions of this article, the said application shall be denied and a license shall not be granted. Each application should be granted or refused within thirty days from the date of its filing. The license shall run to the first Tuesday of May next following the date thereof and no later, unless sooner revoked by the mayor or the commissioner of licenses. No license shall be granted to a person to conduct the business of an employment agency in rooms used for living purposes or where boarders or lodgers are kept or where meals are served or where persons sleep or in connection with a building or premises where intoxicating liquors are sold to be consumed on the premises, excepting cafés and restaurants in office buildings. (*Amended by L. 1910, ch. 700.*)

§ 175. **Form and contents of license.**—Every license shall contain the name of the person licensed, a designation of the city, street and number of the house in which the person licensed is authorized to carry on the said employment agency, and the number and date of such license. Such license shall not be valid to protect any other than the person to whom it is issued or any place other than that designated in the license and shall not be transferred or assigned to any other person unless consent is obtained from the mayor or commissioner of licenses, as hereinafter provided. If such licensed person shall conduct a lodging house for the unemployed separate and apart from such agency, it shall be so designated in the license. (*Amended by L. 1910, ch. 700.*)

§ 176. **Assignment or transfer of license; change of location.**—A license granted as provided in this article shall not be assigned or transferred

without the consent of the mayor or commissioner of licenses. Applications for such consent shall be made in the same manner as an application for a license, and all the provisions of sections one hundred and seventy-three and one hundred and seventy-four relating to the granting of applications for licenses, including the procedure upon such application and the posting of the names and addresses of applicants shall apply to applications for such consent. No license fee shall be required upon such assignment or transfer. The location of an employment agency shall not be changed without the consent of the mayor or commissioner of licenses, and such change of location shall be indorsed upon the license. (*Amended by L. 1910, ch. 700.*)

Refusal to consent to change of location—remedy.—The commissioner of licenses in the city of New York has no power to refuse to consent to a change of location of the business of a licensed employment agency on the sole ground that the licensee, having sold his business, had agreed with his vendee not to engage in a similar business elsewhere. Where the commissioner's refusal to consent to a change of the location was based solely on the objection aforesaid, mandamus lies to compel him to act although the consent is to some extent a matter of discretion. *People ex rel. Cosby v. Robinson* (1910), 141 App. Div. 656, 126 N. Y. Supp. 546.

§ 177. **Bonds and license fees.**—1. Every person licensed under the provisions of this act to carry on the business of an employment agency shall pay to the mayor or the commissioner of licenses a license fee of twenty-five dollars before such license is issued. He shall also deposit before such license is issued, with the commissioner of licenses, in every city where there is a commissioner of licenses, or clerk of the city, a bond in the penal sum of one thousand dollars with two or more sureties or a duly authorized surety company, to be approved by the mayor or the commissioner of licenses.

2. The bond executed as provided in the preceding subdivision of this section shall be payable to the people of the city in which any such license is issued and shall be conditioned that the person applying for the license will comply with this article, and shall pay all damages occasioned to any person by reason of any misstatement, misrepresentation, fraud or deceit, or any unlawful act or omission of any licensed person, his agents or employees, while acting within the scope of their employment, made, committed or omitted in the business conducted under such license, or caused by any other violation of this article in carrying on the business for which such license is granted.

3. If at any time, in the opinion of the mayor, or the commissioner of licenses, the sureties or any of them shall become irresponsible the person holding such license shall, upon notice from the mayor or the commissioner of licenses, give a new bond, subject to the provisions of this section. The failure to give a new bond within ten days after such notice, in the discretion of the mayor or commissioner of licenses, shall operate as a revocation

of such license and the license shall be thereupon returned to the mayor or the commissioner of licenses who shall destroy the same. (*Amended by L. 1910, ch. 700.*)

§ 178. **Action on bond; suits how brought.**—All claims or suits brought in any court against any licensed person may be brought in the name of the person damaged upon the bond deposited with city by such licensed person as provided in section one hundred and seventy-seven and may be transferred and assigned as other claims for damages in civil suits. The amount of damages claimed by plaintiff, and not the penalty named in the bond, shall determine the jurisdiction of the court in which the action is brought. Where such licensed person has departed from the state with intent to defraud his creditors or to avoid the service of a summons in an action brought under this section, service shall be made upon the surety as prescribed in the code of civil procedure. A copy of such summons shall be mailed to the last known post-office address of the residence of the licensed person and the place where he conducted such employment agency, as shown by the records of the mayor or commissioner of licenses. Such service thereof shall be deemed to be made when not less than the number of days shall have intervened between the dates of service and the return of the same as provided by the code of civil procedure for the particular court in which suit has been brought. (*Amended by L. 1910, ch. 700.*)

§ 179. **Registers to be kept.**—It shall be the duty of every licensed person to keep a register, approved by the mayor or the commissioner of licenses, in which shall be entered, in the English language, the date of the application for employment; the name and address of the applicant to whom employment is promised or offered, or to whom information or assistance is given in respect to such employment; the amount of the fee received, and whenever possible, the names and addresses of former employers or persons to whom such applicant is known. Such licensed person shall also enter in the same or in a separate register, approved by the mayor or commissioner of licenses, in the English language, the name and address of every applicant accepted for help, the date of such application, kind of help requested, the names of the persons sent, with the designation of the one employed, the amount of the fee received and the rate of wages agreed upon. No such licensed person, his agent or employees, shall make any false entry in such registers. It shall be the duty of every licensed person, whenever possible, to communicate orally or in writing with at least one of the persons mentioned as references for every applicant for work in private families, or employed in a fiduciary capacity, and the result of such investigation shall be kept on file in such agency; provided, that if the applicant for help voluntarily waives in writing such investigation of references by the licensed person, failure on the part of the licensed person to make such investigation shall not be deemed a violation of this section. (*Amended by L. 1910, ch. 700.*)

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§ 180. **Statements to be filed in theatrical employment agencies.**—Every licensed person conducting a theatrical employment agency, before making a theatrical engagement, except an emergency engagement, for any person with any applicant for services in any such engagement shall prepare and file in such agency a written statement signed and verified by such licensed person setting forth how long the applicant has been engaged in the theatrical business. Such statement shall set forth whether or not such applicant has failed to pay salaries or left stranded any companies, in which such applicant and, if a corporation any of its officers or directors, have been financially interested during the five years preceding the date of application and, further, shall set forth the names of at least two persons as references. If such applicant is a corporation, such statement shall set forth the names of the officers and directors thereof and the length of time such corporation or any of its officers have been engaged in the theatrical business and the amount of its paid-up capital stock. If any allegation in such written, verified statement is made upon information and belief, the person verifying the statement shall set forth the sources of his information and the grounds of his belief. Such statement so on file shall be kept for the benefit of any person whose services are sought by any such applicant as employer. (*Amended by L. 1910, ch. 700.*)

Constitutionality; injunction.—A temporary injunction will not be granted to restrain city officers from enforcing the provisions of this law regarding theatrical agencies where the question of the constitutionality of the statute is raised and it does not appear that the plaintiff will suffer substantial and irreparable loss by complying with the statute until its validity can be determined at final hearing. *United Booking Offices of America v. Gaynor* (1911), 185 Fed. 1003.

§ 181. **Card to be furnished to applicant for employment.**—Every such licensed person shall give to each applicant for domestic or commercial employment a card or printed paper containing the name of the applicant, the name and address of such employment agency and the written name and address of the person to whom the applicant is sent for employment; kind of services to be performed; rate of wages or compensation; the time of such services, if definite, and if indefinite, to be so stated; and the name and address of person authorizing the hiring of such applicant, and the cost of transportation if the services are required outside of the city where such agency is located. (*Amended by L. 1910, ch. 700.*)

§ 182. **Employment contract.**—A licensed person shall not induce or attempt to induce any employee to leave his employment with a view to obtaining other employment through such agency. Whenever such licensed person or any other acting for him, agrees to send one or more persons to work as contract laborers in any one place outside the city in which such agency is located, the said licensed person shall file with the mayor or commissioner of licenses, within five days after the contract is made, a statement containing the following items: Name and address of the employer; name and address of the employee; nature of the work to be performed, hours

of labor; wages offered, destination of the persons employed, and terms of transportation. A duplicate copy of this statement shall be given to the applicant for employment, in a language which he is able to understand, before he leaves the city. (*Amended by L. 1910, ch. 700.*)

§ 183. **Theatrical employment; contracts.**—Every licensed person who shall procure for or offer to an applicant a theatrical engagement shall have executed in duplicate a contract or deliver to the parties as herein set forth a statement containing the name and address of the applicant; the name * address of the employer of the applicant and of the person acting for such employer in employing such applicant; the time and duration of such engagement; the amount to be paid to such applicant; the character of entertainment to be given or services to be rendered; the number of performances per day or per week that are to be given by said applicant; if a vaudeville engagement, the name of the person by whom the transportation is to be paid, and if by the applicant, either the cost of transportation between the places where said entertainment or services are to be given or rendered, or the average cost of transportation between the places where such services are to be given or rendered; and if a dramatic engagement the cost of transportation to the place where the services begin if paid by the applicant; and the gross commission or fees to be paid by said applicant and to whom. Such contracts or statements shall contain no other conditions and provisions except such as are equitable between the parties thereto and do not constitute an unreasonable restriction of business. Forms of such contract and statement in blank shall be first approved by the mayor or commissioner of licenses and his determination shall be reviewable by certiorari. One of such duplicate contracts or of such statements shall be delivered to the person engaging the applicant and the other shall be retained by the applicant. The licensed person procuring such engagement for such applicant shall keep on file or enter in a book provided for that purpose a copy of such contract or statement. (*Added by L. 1910, ch. 700, and amended by L. 1916, ch. 587.*)

§ 184. **Inspection of registers, books and records.**—All registers, books, records and other papers required to be kept pursuant to this article in any employment agency shall be open at all reasonable hours to the inspection of the mayor or commissioner of licenses, and to any duly authorized agent or inspector of such mayor or commissioner. (*Amended by L. 1910, ch. 700.*)

§ 185. **Fees charged by persons conducting employment agencies.**—1. The gross fees of licensed persons charged to applicants for employment as lumbermen, agricultural hands, coachmen, grooms, hostlers, seamstresses, cooks, waiters, waitresses, scrubwomen, laundresses, maids, nurses (except professionals) and all domestics and servants, unskilled workers and

* Omission in original.

general laborers, shall not in any case exceed ten per centum of the first month's wages and for all other applicants for employment shall not exceed the amount of the first week's wages or salary unless the period of employment is for at least one year, and at a yearly salary, and in that event the gross fee charged shall not exceed five per centum of the first year's salary, except when the employment or engagement is of a temporary nature, not to exceed in any single contract one month, then the fee shall not exceed ten per centum of the salary paid.

2. The gross fees of licensed persons charged to applicants for theatrical engagements by one or more such licensed persons, individually or collectively procuring such engagements, except vaudeville or circus engagements, shall not in any case exceed the gross amount of five per centum of the wages or salary of the engagement when the engagement is less than ten weeks; and an amount of five per centum of the salary or wages per week for ten weeks of a season's engagement constituting ten weeks or more. The gross fees charged by such licensed persons to applicants for vaudeville or circus engagements by one or more such licensed persons, individually or collectively, procuring such engagement, shall not in any case exceed five per centum of the salary or wages paid. The gross fees for a theatrical engagement, except an emergency engagement, shall be due and payable at the end of each week of the engagement, and shall be based on the amount of compensation actually received for such engagement, except when such engagement is unfulfilled through any act within the control of the applicant for such engagement.

3. A licensed person conducting any employment agency under this article shall not receive or accept any valuable thing or gift as a fee or in lieu thereof. No such licensed person shall divide or share, either directly or indirectly, the fees herein allowed, with contractors, subcontractors, employers or their agents, foremen or any one in their employ, or if the contractors, subcontractors or employers be a corporation, any of the officers, directors or employees of the same to whom applicants for employment or theatrical engagements are sent except fees paid for theatrical engagements where the applicant has received his salary in full less such fees and the division of such fees can be made without injury or loss to him. (*Subd. amended by L. 1916, ch. 587.*)

4. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction of any licensed person for any violation thereof shall be subject to a fine of not less than twenty-five dollars and not more than two hundred and fifty dollars, or imprisonment for not more than one year, or both, at the discretion of the court, and the mayor or commissioner of licenses shall forthwith cancel and revoke the license of such person. (*Section amended by L. 1910, ch. 700, subd. 3, amended by L. 1916, ch. 587.*)

Enjoining enforcement of contract.—An injunction will not be granted to restrain the enforcement of a contract to pay commissions for engagements as an actor

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on the ground that it provides a higher rate of commission than the law allows as the defense is one that could be set up in an action to recover the commissions. *Miller v. Myers* (1912), 75 Misc. 297, 135 N. Y. Supp. 73, *affd.* (1912), 151 App. Div. 938, 135 N. Y. Supp. 1128.

§ 186. **Return of fees.**—1. In case a person applying for help or employment of a domestic or commercial employment agency shall not accept help or obtain employment through such agency, then the licensed person conducting such agency shall on demand repay the full amount of the said fee, allowing three days' time to determine the fact of the applicant's failure to obtain help or employment. If an employee furnished fails to remain one week in the situation, a new employee shall be furnished to the applicant for help if he so elects, or three-fifths of the fee returned, within four days of demand; provided said applicant for help notifies said licensed person within thirty days of the failure of the applicant to accept the position or of the applicant's discharge for cause. If the employee is discharged within one week without said employee's fault another position shall be furnished, or three-fifths of the fee returned to the applicant for employment if he so elects. Failure of said applicant for help to notify said licensed person that such has been obtained through means other than said agency shall entitle said licensed person to retain or collect three-fifths of the said fee.

2. No such licensed person shall send out any applicant for employment without having obtained, either orally or in writing, a bona fide order therefor, and if it shall appear that no employment of the kind applied for existed at the place to which said applicant was directed, the said licensed person shall refund to such applicant within three days of demand any sums paid by said applicant for transportation in going to and returning from said place, and all fees paid by said applicant. (*Amended by L. 1910, ch. 700.*)

§ 187. **Receipt for fees paid.**—It shall be the duty of every such licensed person conducting an employment agency to give to every applicant for employment from whom a fee shall be received a receipt in which shall be stated, the name of said applicant, the date and amount of the fee, and the purpose for which it was paid, and to every applicant for help a receipt stating the name and address of said applicant, the date and amount of the fee, and the kind of help to be provided. Every such receipt, excepting those given by theatrical employment agencies, shall have printed on the back thereof a copy of sections one hundred and eighty-five, one hundred and eighty-six, one hundred and eighty-seven, in the English language and in any language which the person to whom the receipt is issued can understand. (*Amended by L. 1910, ch. 700.*)

§ 188. **Copies of law to be posted.**—Every licensed person shall post in a conspicuous place in each room of such agency sections one hundred and seventy-eight, one hundred and eighty, one hundred and eighty-one,

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one hundred and eighty-two, one hundred and eighty-three, one hundred and eighty-five, one hundred and eighty-six, one hundred and eighty-seven and one hundred and eighty-nine, of this article, which shall be printed in large type in languages in which persons commonly doing business with such office can understand. Such printed law shall also contain the name and address of the officer charged with the enforcement of this article in such city. (*Amended by L. 1910, ch. 700.*)

§ 189. **False or misleading advertisements and information.**—No licensed person conducting any employment agency shall publish or cause to be published any false or fraudulent or misleading information, representation, notice or advertisement; all advertisements of such employment agency by means of cards, circulars, or signs and in newspapers and other publications, and all letter-heads, receipts and blanks shall be printed and contain the licensed name and address of such employment agent and the word agency, and no licensed person shall give any false information, or make any false promise or false representation concerning an engagement or employment to any applicant who shall register or apply for an engagement or employment or help. (*Amended by L. 1910, ch. 700.*)

§ 190. **Prohibitions as to employment agencies.**—No licensed person conducting an employment agency shall send or cause to be sent any female as a servant, employee, inmate, entertainer or performer, or any male as an employee or entertainer to any place of bad repute, house of ill-fame, or assignation house, or to any house or place of amusement kept for immoral purposes, or places resorted to for the purposes of prostitution, or gambling house, the character of which such licensed person could have ascertained upon reasonable inquiry. No licensed person shall send out any female applicant for employment, without making a reasonable effort to investigate the character of the employer. Nor shall any such licensed person send any female as an entertainer or performer to any place where such female will be required or permitted to sell, offer for sale or solicit the sale of intoxicating liquors to those present or assembled as an audience or otherwise in such place or in any rooms or buildings adjacent thereto. No licensed person shall knowingly permit any persons of bad character, prostitutes, gamblers, intoxicated persons or procurers to frequent such agency. No licensed person shall accept any application for employment made by or on behalf of any child or shall place or assist in placing any such child in any employment whatever in violation of article twenty of the education law, relating to compulsory education, and in violation of the labor law. No licensed person, his agents, servants or employees shall induce or compel any person to enter such agency for any purpose, by the use of force or by taking forcible possession of said person's property.

No person shall procure or offer to procure help or employment in rooms or on premises where intoxicating liquors are sold to be consumed on the premises whether or not dues or a fee or privilege are exacted, charged or

received directly or indirectly, except in office buildings in which are located cafes and restaurants. For the violation of any of the foregoing provisions of this section the penalty shall be a fine of not less than twenty-five dollars, and not more than two hundred and fifty dollars, or imprisonment for a period of not more than one year, or both, at the discretion of the court. (*Amended by L. 1910, ch. 700.*)

§ 191. Enforcement of provisions of this article.—1. In cities of the second and third class and in cities of the first class having a population of less than three hundred thousand, this article, so far as it relates to such cities, shall be enforced by the mayor or an officer appointed by him.

2. In cities of the first class having a population of three hundred thousand or more the enforcement of this article so far as it relates to such cities shall be intrusted to a commissioner to be known as a commissioner of licenses, who shall be appointed by the mayor, and whose salary, together with those of a deputy commissioner, and inspectors to be appointed by him, shall be fixed by the board of estimate and apportionment. Said commissioner of licenses and deputy commissioner shall have no other occupation or business. The commissioner of licenses shall appoint inspectors, who shall make at least bi-monthly visits to every such agency. Said inspectors shall have suitable badges which they shall exhibit on demand of any person with whom they may have official business. Such inspectors shall see that all the provisions of this article, so far as it relates to such cities, are complied with, and shall have no other occupation or business.

3. Complaints against any such licensed person shall be made orally or in writing to the mayor or commissioner of licenses, or be sent in an affidavit form without appearing in person, and reasonable notice thereof, not less than one day, shall be given in writing to said licensed person by serving upon the licensed person either personally or by leaving the same with the person in charge of his office, a concise statement of the facts constituting the complaint, and a hearing pursuant to the powers granted to the mayor or commissioner of licenses as provided in section one hundred and seventy-four shall be had before the mayor or commissioner of licenses within one week from the date of the filing of the complaint and no adjournment shall be taken for a period longer than one week. A daily calendar of all hearings shall be kept by the mayor or commissioner of licenses and shall be posted in a conspicuous place in his public office for at least one day before the date of such hearings. The mayor or commissioner of licenses shall render his decision within eight days from the time the matter is finally submitted to him. Said mayor or commissioner of licenses shall keep a record of all such complaints and hearings. The said mayor or commissioner of licenses may refuse to issue and shall revoke any license for any good cause shown, within the meaning and purpose of this article and when it is shown to the satisfaction of the mayor or com-

missioner of licenses that any licensed person is guilty of any immoral, fraudulent or illegal conduct in connection with the conduct of said business, it shall be the duty of the mayor or the commissioner of licenses to revoke the license of such person; but notice of the charges shall be presented and reasonable opportunity shall be given said licensed person to defend himself. Whenever said mayor or commissioner of licenses shall refuse to issue or shall revoke the license of an employment agency, said determination may be reviewed by certiorari. Whenever for any cause such license is revoked, said mayor or commissioner of licenses shall not within three years from the date of such revocation issue another license to said licensed person or his representative or to any person with whom he is to be associated in the business of furnishing employment, help or engagements. In the absence of the commissioner of licenses, the deputy commissioner of licenses may conduct hearings and act upon applications for licenses, and revoke such licenses. (*Section amended by L. 1910, ch. 700; subd. 3 amended by L. 1912, ch. 261.*)

Mandamus will lie where there is a refusal to consent to the change of a location of a business already licensed. *People ex rel. Cosley v. Robinson* (1910), 141 App. Div. 656, 126 N. Y. Supp. 546.

Certiorari.—After a license would have expired by its own time limitation, certiorari will not lie to review a revocation of the license made during its term. *People ex rel. Pechtold v. Bogart* (1907), 122 App. Div. 872, 107 N. Y. Supp. 831.

Two days notice of a hearing of charges against a licensee is, in the absence of special reasons for longer notice, a sufficient compliance with the statute which requires a reasonable notice, not less than one day. *People ex rel. Pechtold v. Bogart* (1907), 122 App. Div. 872, 107 N. Y. Supp. 831.

§ 192. **Penalties for violations.**—The violation of any provision of this article except as otherwise provided in this article shall be punishable by a fine not to exceed twenty-five dollars, and any city magistrate, police justice, justice of the peace, or any inferior magistrate having original jurisdiction in criminal cases, shall have power to impose said fine, and in default of payment thereof to commit the person so offending for a period not exceeding thirty days. The said mayor or commissioner of licenses or any person, his agent or attorney, aggrieved because of the violations of this article shall institute criminal proceedings for its enforcement before any court of competent jurisdiction. (*Amended by L. 1910, ch. 700.*)

ARTICLE XII.

HOTELS AND BOARDING HOUSES.

Section 200. Safes; limited liability.

201. Liability for loss of clothing limited.

202. Loss by fire.

203. Value of animals.

204. Register to be kept.

205. Hotel keepers to provide fire-escapes.

- 206. Rates to be posted; penalty for violation.
- 207. Sale of unclaimed articles and other property covered by his lien.
- 208. Disposition of proceeds of sale.
- 209. Certain sales after eighteen months.

§ 200. **Safes; limited liability.**—Whenever the proprietor or manager of any hotel, inn or steamboat shall provide a safe in the office of such hotel or steamboat, or other convenient place for the safe keeping of any money, jewels or ornaments belonging to the guests of or travelers in such hotel, inn or steamboat, and shall notify the guests or travelers thereof by posting a notice stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited, in a public and conspicuous place and manner in the office and public rooms, and in the public parlors of such hotel or inn, or salon of such steamboat; and if such guest or traveler shall neglect to deliver such money, jewels or ornaments to the person in charge of such office for deposit in such safe, the proprietor or manager of such hotel or steamboat shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest or traveler by theft or otherwise; but no hotel or steamboat proprietor, manager or lessee shall be obliged to receive property on deposit for safe keeping exceeding five hundred dollars in value; and if such guest or traveler shall deliver such money, jewels or ornaments to the person in charge of such office, for deposit in such safe, said proprietor, manager or lessee shall not be liable for any loss thereof, sustained by such guest or traveler by theft or otherwise, in any sum exceeding the sum of two hundred and fifty dollars, unless by special agreement in writing with such proprietor, manager or lessee.

Source.—L. 1855; ch. 421, § 1, as amended by L. 1883, ch. 227; L. 1892, ch. 284; L. 1897, ch. 305.

Reference.—Lien of hotel keeper, Lien Law, § 181.

Construction of statute.—As the statute modifies the common law liability of an innkeeper it must be strictly construed. *Rauh v. Wolf* (1909), 62 Misc. 621, 116 N. Y. Supp. 13.

It seems, that, the statute is not so much to be construed as limiting the liability of the innkeeper as it is to charge the guest with negligence in case he does not avail himself of the protection afforded. The innkeeper is still strictly an insurer but a failure by the guest to comply with the statute on his part will be such negligence as will defeat the enforcement of liability. *Wies v. Hoffman House* (1899), 28 Misc. 225, 59 N. Y. Supp. 38.

Effect of statute is to modify common-law liability of innkeepers as applied to loss of money, jewels and ornaments of guests which are not deposited in the safe, when one is provided for that purpose. *Wilkins v. Earle* (1871), 44 N. Y. 172, 4 Am. Rep. 655. Compare *Bowman v. De Peyster* (1867), 2 Daly 200.

Notice.—Failure to give notice required by statute destroys the privileges thereby afforded. *Hancock v. Rand* (1883), 94 N. Y. 1, 46 Am. Rep. 112.

An innkeeper, though he has not complied with the law by posting notice, may limit his liability by actual oral notice to the guest of a reasonable regulation. *Purvis v. Coleman* (1860), 21 N. Y. 111; *Herter v. Dwyer* (1911), 129 N. Y. Supp. 505.

Where a guest at a hotel enters his name on the register under a heading that states that "money, jewels and other valuable packages, it is agreed shall be

placed in the safe in the office, otherwise the proprietor shall not be responsible for any loss" and there is no proof that the notice was seen or assented to by the guest, it is not his contract. *Bernstein v. Sweeny* (1871), 33 Super. (1 J. & S.) 271.

Neglect to deposit, what constitutes. See *Bendetson v. French* (1871), 46 N. Y. 286; *Hyatt v. Taylor* (1870), 42 N. Y. 258.

The statute applies to every case where the guest has the time and opportunity to make the deposit. *Rosenplaenter v. Roessle* (1873), 54 N. Y. 262.

Waiver of requirement that valuables be deposited by the manager of a hotel will bind the proprietor. *Friedman v. Breslin* (1900), 51 App. Div. 268, 65 N. Y. Supp. 5, *affd.* (1901), 169 N. Y. 574, 61 N. E. 1129.

Tender of valuables and a refusal by the clerk of the hotel to receive them renders proprietor liable for their loss. *Lucia v. Omel* (1899), 46 App. Div. 200, 61 N. Y. Supp. 659.

Action based on negligence and not on common law liability.—While a hotel keeper was moving the goods of a guest from one suite of rooms in a hotel to another suite, which the hotel keeper requested the guest to accept instead of the rooms theretofore occupied by her, a jewel case and its contents were either lost or stolen through the alleged negligence of the hotel keeper and his servants. In an action to recover the value of the jewels, it was held, that a defense that a safe was provided for keeping money, jewels and ornaments belonging to its guests and posted notices to that effect in the hotel and that plaintiff neglected to deliver the jewels in question to defendant for deposit in such safe was demurrable. If the cause of action were based upon the common law liability of an innkeeper as an insurer of the property of guests, irrespective of any question of negligence, the protection afforded by this section would apply and the defense be good, but as the action was not based entirely on defendant's liability as innkeeper but upon the alleged negligence or dishonest acts of defendant or its employees, the statute had no application. *Chatillon v. Co-operative Apartment Co.* (1915), 90 Misc. 108, 152 N. Y. Supp. 593, *affd.* (1915), 171 App. Div. 910, 155 N. Y. Supp. 1097.

The recovery of a guest for the loss of property delivered to the innkeeper is not limited to said sum of \$200, where she bases her action, not upon his liability as an innkeeper, but upon his affirmative negligence in failing to take proper care of the property after he had removed it from his safe during a fire. *Hyman v. South Coast Hotel Co.* (1911), 146 App. Div. 341, 130 N. Y. Supp. 766.

Watch.—Watch of a guest used by him in the ordinary manner is not a jewel or ornament within the meaning of this act, and the innkeeper is liable for the loss thereof in the room of the guest. *Ramaley v. Leland* (1871), 43 N. Y. 549, 3 Am. Rep. 728; *Gill v. Libby* (1861), 36 Barb. 70; *Becker v. Warner* (1895), 90 Hun 187, 35 N. Y. Supp. 739; *Bernstein v. Sweeny* (1871), 33 Super. (1 J. & S.) 271; *Bowman v. De Peyster* (1867), 2 Daly 203.

Jewels and ornaments.—A dozen silver table forks, a silver soup-ladle, and a gold watch in common use are not jewels or ornaments within the statute. *Briggs v. Todd* (1899), 28 Misc. 208, 59 N. Y. Supp. 23.

Various articles worn by the guest in ordinary dress are not within the statute. *Rosenplaenter v. Roessle* (1873), 54 N. Y. 262. *Wies v. Hoffman Home* (1899), 28 Misc. 225, 59 N. Y. Supp. 38.

A chain, a purse and a rosary, being all articles of use, not worn for ornament, are not within the statute. *Rauh v. Wolf* (1909), 62 Misc. 621, 116 N. Y. Supp. 13.

Amount of money or jewels.—The statute applies to any amount of money, even though only what is sufficient for the guest's ordinary traveling expenses. *Hyatt v. Taylor* (1868), 51 Barb. 632, *affd.* (1870), 42 N. Y. 258.

See also notes under § 201 *post*.

§ 201. Liability for loss of clothing limited.—No hotel keeper shall be liable to any guest for the loss of wearing apparel, goods or merchandise for any sum exceeding the sum of five hundred dollars, where it shall appear that such loss occurred without the fault or negligence of such hotel keeper; nor shall he be liable in any sum for the loss of any article of wearing apparel, cane, umbrella, satchel, valise, box, bag, bundle or other chattel belonging to such guest, and not within a room assigned to him, unless the same shall be specially intrusted to the care and custody of such hotel keeper or his servants.

Source.—L. 1855, ch. 421, § 2, as added by L. 1883, ch. 227.

The common-law rule defining the liability of an innkeeper to his guest for the loss of property given in his custody as that of an insurer has been steadily and firmly upheld by the courts, and the latest cases, even as the earlier ones, make him absolutely liable, without proof of any negligence on his part, for all losses occasioned from any cause other than the act of God or the public enemy. *Grinnell v. Cook* (1842), 3 Hill 485, 38 Am. Dec. 663; *Wies v. Hoffman House* (1899), 28 Misc. 225, 59 N. Y. Supp. 38; *Hulett v. Swift* (1865), 33 N. Y. 571, 88 Am. Dec. 405; *Adams v. New Jersey Steamboat Co.* (1896), 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; *Metzger v. Schnabel* (1898), 23 Misc. 698, 52 N. Y. Supp. 105; *Needles v. Howard* (1850), 1 E. D. Smith 54; *Washburn v. Jones* (1851), 14 Barb. 193; *Piper v. Manny* (1839), 21 Wend. 282; *Willard v. Reinhardt* (1853), 2 E. D. Smith 148.

An innkeeper's liability is not limited by the common law, like that of carriers, to the care merely of that species of property which comes under the denomination of baggage. If he receives his guest and his goods, including goods, chattels, and movables of any kind or description, he charges himself with their safe keeping. *Van Wyck v. Howard* (1856), 12 How. Pr. 147.

Innkeepers are chargeable for the goods of their guests, lost or stolen out of their inns; and to render them liable it is not necessary that the goods be delivered into their special keeping nor to prove negligence. *Clute v. Wiggins* (1817), 14 Johns. 175, 7 Am. Dec. 448.

But the liability as insurer presupposes the relation of host and guest. Thus he is not responsible, except as an ordinary bailee for hire, for the safe-keeping of a horse left at the inn stable for the night, by one who was neither a lodger nor a guest. *Ingallsbee v. Wood* (1865), 33 N. Y. 577, 88 Am. Dec. 409; *Ticehurst v. Beinbrink* (1911), 72 Misc. 365, 129 N. Y. Supp. 838. To the same effect, see *Bean v. Ford* (1909), 65 Misc. 481, 119 N. Y. Supp. 1074; *George v. Depierreis* (1896), 17 Misc. 400, 39 N. Y. Supp. 1082.

Negligence of guest.—An innkeeper will be discharged from liability for a loss when it is attributable to the negligence, fault or fraud of the guest. *Classen v. Leopold* (1870), 32 Super. (2 Sweeny) 705; *Hulett v. Swift* (1865), 33 N. Y. 571, 88 Am. Dec. 405; *Fowler v. Dorlon* (1856), 24 Barb. 384.

The distinction between a boarding house and an inn is this: In a boarding house, the guest is under an express contract, at a certain rate, for a certain period of time; but in an inn there is no express engagement; the guest being on his way, is entertained from day to day, according to his business, upon an implied contract. *Willard v. Reinhardt* (1853), 2 E. D. Smith 148.

Who are innkeepers.—Where a person in an application for a liquor license swears that he keeps an inn that fact will be taken as established in an action by a guest to charge the innkeeper with liability for goods lost. *Kopper v. Willis*, 9 Daly 460, 11 N. Y. Wkly. Dig. 415.

A proprietor of a house or hotel, kept on what is called the "European plan,"

is the "proprietor of a hotel" within the meaning of the statute. *Bernstein v. Sweeney* (1871), 33 Super. (1 J. & S.) 271.

Who is guest.—One who leaves his horse at an inn, without receiving or asking accommodation or entertainment there, but to the knowledge of the innkeeper is provided for and lodged at the house of another does not become a guest of the innkeeper. *Ingalsbee v. Wood* (1862), 36 Barb. 452, *affd.* (1865), 33 N. Y. 577.

A foreign army officer, who takes a room in a hotel for an indefinite time at an agreed price of one dollar and twenty-five cents per week, is a guest and not a boarder, and the hotel keeper is liable to him for the value of wearing apparel which disappeared from his room, in some unexplained manner, and without any negligence on his part. *Metzger v. Schnabel* (1898), 23 Misc. 698, 52 N. Y. Supp. 105.

A person who calls to visit a guest and incidentally to enjoy the hospitality of the hotel is not a guest. *Gostenhofer v. Clair* (1881), 13 N. Y. Wkly. Dig. 502.

Purchasing liquor at an inn has been held sufficient to constitute the purchaser a guest. *McDonald v. Edgerton* (1849), 5 Barb. 560.

A person who attends a dance at an inn at the invitation of the innkeeper who furnishes the music, supper and stabling for a specified price, is not a guest. *Fitch v. Casler* (1879), 17 Hun 126.

Termination of liability.—An innkeeper's liability for the baggage of his guest is not terminated the instant the guest pays his bill and leaves the hotel, but continues for such a reasonable time thereafter as may be necessary for him to secure its removal. *Maxwell v. Gerard* (1895), 84 Hun 537, 32 N. Y. Supp. 849; *Kaplan v. Titus* (1910), 140 App. Div. 416, 125 N. Y. Supp. 397.

If a person, after becoming a guest at an inn, goes away for a brief period, leaving his property, intending to return, he is to be considered as still continuing a guest. *McDonald v. Edgerton* (1849), 5 Barb. 560.

Restaurant keepers.—The strict rules governing the liability of hotel and innkeepers do not apply to the keeper of a restaurant. *Montgomery v. Ladjing* (1899), 30 Misc. 92, 61 N. Y. Supp. 840; *Block v. Sherry* (1904), 43 Misc. 342, 87 N. Y. Supp. 160; *Simpson v. Rourke* (1895), 13 Misc. 230, 34 N. Y. Supp. 11; *Harris v. Child's Unique Dairy Co.* (1903), 84 N. Y. Supp. 260; *Carpenter v. Taylor* (1856), 1 Hilt. 193.

But while this is so, they are still responsible for damages caused by the negligence of their servants while in the conduct of the business for which they are employed. Hence a woman may recover of the proprietor of a restaurant the value of a dress she wore when dining there where a waiter in attendance ruined the dress by negligently spilling water over it. *Block v. Sherry* (1904), 43 Misc. 342, 87 N. Y. Supp. 160.

Delivery into keeping of innkeeper.—It is not necessary that goods should be placed in the special keeping of an innkeeper in order to make him liable in case of loss. *McDonald v. Edgerton* (1849), 5 Barb. 560.

An innkeeper is responsible for the safe-keeping of a load of goods belonging to a traveler who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeeper, although such place be an opened unclosed space near the public highway. *Piper v. Manny* (1839), 21 Wend. 282.

Packages received from third persons for guests.—An innkeeper may well refuse to receive packages of goods from third persons, but if he does receive them for the accommodation of his guests, he acts in his character of innkeeper, and subject to the responsibilities of that relation. *Needles v. Howard* (1850), 1 E. D. Smith 54.

Guest taking meal only.—An innkeeper is liable for the loss of a guest's overcoat, though the same is stolen while the guest is at the inn merely for the purpose of partaking of a meal in the restaurant attached to the inn, and though

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the guest goes there for that purpose only, and does not himself pay for that meal, and does not record his name in any register, provided that the restaurant business is not independent of the inn. *Kapper v. Willis* (1881), 11 N. Y. Wkly. Dig. 415.

But it has been held that the mere taking of dinner without notice to the proprietor or clerk does not make a guest of a person who has called to visit one of the guests of the hotel. *Gostenhofer v. Clair* (1881), 13 N. Y. Wkly. Dig. 502.

Coat hung in office behind desk.—Where a guest hangs his overcoat upon one of a row of hooks, placed in the office of a hotel behind the desk and used by guests for that purpose, and so hangs it in the presence of a person apparently in charge of the office, the landlord is liable for the subsequent unexplained loss of the overcoat and cannot, where he has not established any particular place for keeping overcoats, escape liability by insisting that the overcoat had not been specially entrusted to his care and custody within the meaning of this section. *Bradner v. Mullen* (1899), 27 Misc. 479, 59 N. Y. Supp. 178.

Locking door.—It is not necessary that a guest should keep his room locked at all times during his absence, to entitle him to protection against robbery, and to make an innkeeper liable for loss from such cause. *Buddenburg v. Benner* (1856), 1 Hilt. 84.

The mere giving to, and acceptance by, a guest of the key of his chamber does not impose on him any duty or obligation to keep the door locked and the omission to lock the door upon retiring for the night does not constitute such negligence as to relieve the innkeeper from liability for a theft of the guest's goods from his room during the night. *Classen v. Leopold* (1870), 32 Super. (2 Sweeny) 705.

Liability for loss of baggage.—An innkeeper or boarding house keeper is not liable for baggage stolen from a guest, if the guest refuses to place it in a particular place of security, when requested to do so by the landlord or his servants. *Wilson v. Halpin* (1865), 1 Daly 496, 30 How. Pr. 124; *Toub v. Schmidt* (1891), 60 Hun 409, 15 N. Y. Supp. 16.

Loss of property of boarders.—The common law liability of an innkeeper as an insurer does not extend to boarders as distinguished from guests. *Crapo v. Rockwell* (1905), 48 Misc. 1, 94 N. Y. Supp. 1122.

§ 202. Loss by fire.—No inn keeper shall be liable for the loss or destruction by fire of property received by him from a guest, stored or being with the knowledge of such guest in a barn or other out-building, where it shall appear that such loss or destruction was the work of an incendiary, and occurred without the fault or negligence of such inn keeper.

Source.—L. 1866, ch. 658, § 1.

Burden of proof.—Under the provisions of this section the burden is upon the innkeeper to show that the fire was an incendiary one, and to show absence of negligence on his part. *Faucett v. Nichols* (1876), 64 N. Y. 377.

§ 203. Value of animals.—No animal belonging to a guest and destroyed by fire while on the premises of any inn keeper shall be deemed of greater value than three hundred dollars, unless an agreement shall be proved between such guest and inn keeper that a higher estimate shall be made of the same.

Source.—L. 1866, ch. 658, § 2.

Liability for loss of horse.—Where one makes a contract with an innkeeper to stable and care for his horse, but does not become or intend to become a guest,

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the innkeeper is not liable as such for the loss of the horse. *Tillhurst v. Beinbrink* (1911), 72 Misc. 365, 375, 129 N. Y. Supp. 838.

§ 204. **Register to be kept.**—The proprietor or manager of any hotel, tavern, inn, boarding or lodging house shall keep a register which shall show the name, residence, date of arrival and departure of his guests, providing such proprietor or manager shall be under a contract with a corporation, association, partnership or individual by the terms of which such corporation, association, partnership or individual is entitled to receive a percentage of the receipts from such business, which register shall be subject to the inspection of any corporation, association, partnership or individual who shall be under a contract with such proprietor or manager by the terms of which such corporation, association, partnership or individual is entitled to receive a percentage of the receipts from such business.

Source.—L. 1896, ch. 588, § 1.

§ 205. **Hotel keepers to provide fire-escapes.**—Every owner, lessee, proprietor or manager of a hotel, not fireproof, exceeding two stories in height, shall cause to be placed a rope or other better appliance, to be used as a fire-escape, in each room of such hotel, used as a lodging-room, above the ground floor, which rope or other appliance shall be securely fastened into one of the joists or timbers next adjoining a frame of a window of such room. Such rope or appliance shall be at all times kept coiled up and exposed to the plain view of any occupant of said room, the coil to be fastened in such a slight manner as to be easily and quickly loosened and uncoiled; and if a rope, it shall be not less than three-fourths of an inch in diameter, and of sufficient length to reach from such window to the ground. Such rope, appliance, iron hook or eye and fastenings shall be of sufficient strength to sustain a weight of four hundred pounds. Such owner, lessee, proprietor or manager must cause to be posted in a conspicuous place in each room and hall of such hotel, above the ground floor, a printed notice to the effect that the rope or appliance is so placed in each such room for use in case of fire, and giving full directions for such use.

It is the duty of the chief engineer or the officer performing the duties of a chief engineer of the fire department of a city or village to inspect, or cause to be inspected by some person deputized by him for that purpose, in the months of January and July of each year, each such room of every hotel in his city or village, and to ascertain if the provisions of this section are complied with, and to make and file a written report with the mayor, president or other officer performing the duties of chief executive of such city or village, on or before the fifteenth day of February and August of each year, showing what hotels he had so inspected, and specifying which of them have fully complied with the provisions of this section, and which, if any, have not, and in what respect and to what extent. An owner, lessee, proprietor, manager or other person who obstructs or prevents such inspection is liable to a penalty of fifty dollars for each such offense. Such

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mayor, president or other chief executive officer, shall sue for such penalty in the name of his city or village, and shall proceed against any person criminally violating this section.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 40; originally revised from L. 1887, ch. 720, §§ 1, 2, 4.

Reference.—Failure to provide fire escapes, or to inspect, a misdemeanor, Penal Law, § 1905.

Inapplicable to New York city.—So held as to L. 1887, ch. 720, on the ground that a thorough system of fire escapes was provided by §§ 471-517 of L. 1882, ch. 410, as amended by L. 1887, ch. 566. *People v. Pierson* (Gen. Term) (1891), 59 Hun 450, 13 N. Y. Supp. 365. These provisions of the Consolidation act continued in force by Greater New York charter, § 647 (now § 407).

Waiver.—A guest who occupies for six months a room in a hotel knowing that the same is not equipped with fire escapes as required by this section, must be held to have waived all right to maintain an action against the owner of the hotel for injuries received by reason of his failure to supply the room with a rope. *Armando v. Ferguson* (1899), 37 App. Div. 160, 55 N. Y. Supp. 769.

Section cited.—Rept. of Atty. Genl. (1912) Vol. 2, p. 306.

§ 206. Rates to be posted; penalty for violation.—Every keeper of a hotel or inn shall post in a public and conspicuous place and manner in the office or public room, and in the public parlors of such hotel or inn, a printed copy of this section and sections two hundred and two hundred and one, and a statement of the charges or rate of charges by the day and for meals furnished and for lodging. No charge or sum shall be collected or received by any such hotel keeper or inn keeper for any service not actually rendered or for a longer time than the person so charged actually remained at such hotel or inn, nor for a higher rate of charge for the use of such room or board, lodging or meals than is specified in the rate of charges required to be posted by the last preceding sentence; provided such guest shall have given such hotel keeper or inn keeper notice at the office of his departure. For any violation of this section the offender shall forfeit to the injured party three times the amount so charged, and shall not be entitled to receive any money for meals, services or time charged.

Source.—L. 1883, ch. 227, § 3.

§ 207. Sale of unclaimed articles and other property covered by his lien.—Any keeper of a hotel, apartment hotel, inn, boarding-house or lodging-house, except an *emigrant lodging-house, who shall have a lien for fare, lodging, accommodation or board upon any goods, baggage or other chattel property, or, who, for a period of six months, shall have in custody any unclaimed trunk, box, valise, package or parcel, or other chattel property, may, in the manner provided by this section, sell the same at public auction to the highest bidder for cash, and out of the proceeds of such sale may, in case of lien, retain the amount of such lien and the expense of advertisement and sale, and, in case of unclaimed property, the expense of storage, advertisement and sale thereof. Not less than fifteen days

* So in original.

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prior to the time of the sale, a notice of the time and place of holding the sale, and containing a brief description of the goods, baggage and articles to be sold, shall be published in a newspaper published in the city or town in which such hotel, apartment hotel, inn, boarding-house or lodging-house is situated; but if there be none, then in such newspaper published nearest such city or town; and such notice shall also be mailed to said guest, boarder or owner of such chattel articles and property, directed to the address which he may have left with such keeper; if no address was so left, then such notice shall be mailed to said guest, boarder or owner, directed to the post-office of the city or town in which such hotel, apartment hotel, inn, boarding-house or lodging-house is situated; and if the place of residence of such guest, boarder or owner is known to such keeper, whether or not an address was left with such keeper, such notice shall be mailed to said guest, boarder or owner, directed to said place of residence; such notice shall be mailed in the manner aforesaid at least fifteen days prior to the time of the sale. (*Amended by L. 1910, ch. 215.*)

Source.—L. 1901, ch. 313, § 1.

Reference.—Lien of hotel keeper, Lien Law, § 181.

§ 208. **Disposition of proceeds of sale.**—Such keeper shall, out of the proceeds of such sale, retain the amount of his lien or storage charges and the expense of advertising and sale, and shall make an entry of the articles sold, the amount received therefor, the amounts retained by him as aforesaid, and if there be any surplus, he shall, within ten days after such sale, upon demand, pay over such surplus to such guest, boarder or person whose property was sold. In case such surplus shall not be demanded and paid as aforesaid, within said ten days, then within five days thereafter, such keeper shall pay said surplus to the treasurer of the county or chamberlain or other chief fiscal officer of the city in which such sale took place, and shall, at the same time, file with said treasurer or chamberlain or other chief fiscal officer a statement in writing containing the name and place of residence, so far as they are known, of the guest, boarder or person whose goods, baggage or chattel articles were sold, the articles sold and the price at which they were sold, the name and address of the auctioneer making the sale, and a copy of the notice published. Said treasurer, chamberlain or other chief fiscal officer shall keep said surplus money for and credit the same to the person named in said statement as such guest, boarder or person, and shall pay the same to him or his executors or administrators, upon demand, and upon furnishing satisfactory evidence of identity to such treasurer, chamberlain or other chief fiscal officer. (*Amended by L. 1910, ch. 215.*)

Source.—L. 1901, ch. 313, §§ 2, 3.

§ 209. **Certain sales after eighteen months.**—Any keeper of a hotel, apartment hotel, inn, boarding-house or lodging-house, except an emigrant lodging-house, whose lien for fare, lodging, accommodation or board upon

any goods, baggage or other chattel property, shall not have been paid for a period of eighteen months, may sell such property at public auction for cash to the highest bidder upon mailing a notice inclosed in a securely closed post-paid wrapper, directed to the person who left such property with such keeper, at the post-office of the city, town or village where such hotel, apartment hotel, inn, boarding-house or lodging-house is situated, such notice to contain a statement of the time and place when and where such goods, baggage or other chattel property will be sold and such notice shall be mailed at least fifteen days before such sale shall take place. Such keeper shall, out of the proceeds of such sale, retain the amount of his lien and the expense of selling such property, and, if there be any surplus, he shall, within ten days after such sale, upon demand, pay over such surplus to the person whose property was sold. In case such surplus shall not be demanded and paid as aforesaid, within said ten days, then within five days thereafter, such keeper shall pay such surplus to the treasurer of the county or chamberlain or other chief fiscal officer of the city in which such sale took place, and shall, at the same time, file with said treasurer, chamberlain or other chief fiscal officer a statement in writing containing the name of the person whose property was sold, the price at which it was sold, the date of such sale and by whom sold. Such surplus shall be kept and disposed of in the manner provided in section two hundred and eight of this chapter. Nothing contained in this article shall preclude any other remedy now existing for the enforcement and satisfaction of a lien of the keeper of a hotel, apartment hotel, inn, boarding-house or lodging-house, except an emigrant lodging-house, nor bar his right to recover for so much of the debt as shall not be paid through such sale. (*Added by L. 1910, ch. 215.*)

Constitutionality.—The provisions of the General Business Law requiring a fire-proof booth for moving picture machines are constitutional and a proper exercise of the police power. *Matter of Whitten* (1912), 152 App. Div. 506, 137 N. Y. Supp. 360.

License for operator of moving picture show in New York city.—The plaintiff, upon being refused a renewal of his license to operate a moving picture show in the city of New York upon the ground that the inclosure or booth in which the moving picture machine was operated did not comply with the provisions of this article, made a motion for a writ of certiorari to review the proceedings relating to the renewal of his license, brought a suit in equity to enjoin interference with his business and applied for a peremptory writ of mandamus commanding the authorities to permit him to conduct his moving picture show. He was unsuccessful in each of the proceedings, and appealed from orders denying him the relief sought. The plaintiff admitted that his inclosure or booth did not comply with the statute, but contended that there was no provision, either of statute applicable to the city of New York, or municipal ordinance thereof, which required the operator of a moving picture show to obtain a license therefor. It was held, that the orders denying relief to the plaintiff should be affirmed; that if a license is unnecessary the plaintiff may conduct his business and maintain an action for trespass or a suit in equity against those interfering therewith, but if a license is necessary the act of the city officials in granting or withholding the same is not a

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judicial act reviewable by certiorari. Matter of Whitten (1912), 152 App. Div. 506, 137 N. Y. Supp. 360.

ARTICLE 12-A.

(Article added by L. 1911, ch. 756, and amended by L. 1913, ch. 308.)

PUBLIC ENTERTAINMENTS OR EXHIBITIONS BY CINEMATOGRAPH OR ANY OTHER APPARATUS FOR PROJECTING MOVING PICTURES.

Section 209. Fireproof booth for cinematograph or any other apparatus for projecting moving pictures.

210. Construction of booth; approval of plans and specifications.

211. This article not retroactive under certain conditions.

212. Inspection; certificate for permanent booths.

213. Portable booth for temporary exhibitions.

214. Exemption and requirements for miniature cinematograph machines.

215. Inspection; certificate for portable booths and inclosures for miniature cinematograph machines.

216. Penalty for violating this article.

§ 209. Fireproof booth for cinematograph or any other apparatus for projecting moving pictures.—No cinematograph or any other apparatus for projecting moving pictures, save as excepted in sections two hundred and eleven and two hundred and thirteen of this article, which apparatus uses combustible films of more than ten inches in length, shall be set up for use or used in any building, place of public assemblage or entertainment, unless such apparatus for the projecting of moving pictures shall be inclosed therein in a booth or inclosure constructed of concrete, brick, hollow tile or other approved fireproof material or any approved fireproof framework covered or lined with asbestos board, or with some other approved fire-resisting material, and unless such booth shall have been constructed as provided in section two hundred and ten of this article and the certificate provided in section two hundred and twelve of this article shall have been issued to the owner or lessee of the premises wherein such booth is situated. (*Added by L. 1911, ch. 756, and amended by L. 1913, ch. 308.*)

§ 210. Construction of booth; approval of plans and specifications.—The booths provided for in section two hundred and nine of this article shall be constructed according to plans and specifications which shall have been first approved, in a city, by the mayor or chief executive officer of the city department having supervision of the erection of buildings in such city; in a village, by the president of such village; in a town outside the boundaries of a city or village, by the supervisor of such town. Provided, however, that no plans and specifications for the construction of such booths shall be approved by any public official, unless the following requirements are substantially provided for in such plans and specifications:

1. Dimensions. Such booths shall be at least six feet in height. If one machine is to be operated in such booth the floor space shall be not less than forty-eight square feet. If more than one machine is to be oper-

ated therein, an additional twenty-four square feet shall be provided for each such additional machine.

2. General specifications. In case such booth is not constructed of concrete, brick, hollow tile or other approved fireproof material than asbestos, such booth shall be constructed with an angle framework of approved fireproof material, the angles to be not less than one and one quarter inches by three-sixteenths of an inch thick, the adjacent members being joined firmly with angle plates of metal. The angle members of the framework shall be spaced not more than four feet apart on the sides and not more than three feet apart on the front and back and top of such booth. The sheets of asbestos board or other approved fire-resisting material shall be at least one-quarter of an inch in thickness and shall be securely attached to the framework by means of metal bolts and rivets. The fire-resisting material shall completely cover the sides, tops and all joints of such booth. The floor space occupied by the booth shall be covered with fire-resisting material not less than three-eighths of an inch in thickness. The booth shall be insulated so that it will not conduct electricity to any other portion of the building. There shall be provided for the booth a door not less than two feet wide and five feet ten inches high, consisting of an angle frame of approved fireproof material covered with sheets of approved fireproof material one-quarter of an inch thick, and attached to the framework of the booth by hinges, in such a manner that the door shall be kept closed at all times, when not used for ingress or egress.

The operating windows, one for each machine to be operated therein and one for the operator thereof, shall be no larger than reasonably necessary, to secure the desired service, and shutters of approved fireproof material shall be provided for each window. When the windows are open, the shutters shall be so suspended and arranged that they will automatically close the window openings, upon the operating of some suitable fusible or mechanical releasing device.

Where a booth is so built that it may be constructed to open directly on the outside of the building through a window, such window shall be permitted for the comfort of the operator, but such booth shall not be exempted from the requirement of the installation of a vent flue as hereinafter prescribed. Said booths shall contain an approved fireproof box for the storage of films not on the projecting machine. Films shall not be stored in any other place on the premises; they shall be rewound and repaired either in the booth or in some other fireproof inclosure. The booth in which the picture machine is operated shall be provided with an opening or vent flue in its roof or upper part of its side wall leading to the outdoor air. The vent-flue shall have a minimum cross-sectional area of fifty square inches and shall be fireproof. When the booth is in use there shall be a constant current of air passing outward through said opening or vent flue at the rate of not less than thirty cubic feet per minute. (*Added by L. 1911, ch. 756, and amended by L. 1913, ch. 308.*)

§ 211. **This article not retroactive under certain conditions.**—Sections two hundred and nine and two hundred and ten of this article shall not be retroactive for any booth approved by the appropriate public authority or official prior to this article taking effect, provided such booth have or be so reconstructed of the same material as to have dimensions as specified in section two hundred and ten of this article; provided such booth conform to the specification of section two hundred and ten as regards vent flue, box for storage of films, specifications for rewinding and repairing films and specifications for windows and doors, and provided such booth be of rigid fireproof material, and be insulated so as not to conduct electricity to any other part of the building and be so separated from any adjacent combustible material as not to communicate fire through intense heat in case of combustion within the booth. (*Added by L. 1913, ch. 308.*)

§ 212. **Inspection; certificate for permanent booths.**—After the construction of such booth shall have been completed, the public officer charged herein with the duty of passing upon the plans and specifications therefor shall within three days after receipt of notice in writing that such booth has been completed cause such booth to be inspected. If the provisions of sections two hundred and nine, and two hundred and ten of this article have been complied with, such public officer shall issue to the owner or lessee of the premises wherein such booth is situated a certificate stating that the provisions of sections two hundred and nine and two hundred and ten of this article have been complied with. (*Former § 211, as added by L. 1911, ch. 756, and renumbered and amended by L. 1913, ch. 308.*)

§ 213. **Portable booth for temporary exhibitions.**—Where motion pictures are exhibited daily for not more than one month, or not oftener than three times a week, in educational or religious institutions or bona fide social, scientific, political or athletic clubs, a portable booth may be substituted for the booth required in sections two hundred and nine and two hundred and ten of this article. Such booth shall have a height of not less than six feet and an area of not less than twenty square feet and shall be constructed of asbestos board, sheet steel of no less gauge than twenty-four; or some other approved fireproof material. Such portable booth shall conform to the specifications of section two hundred and ten of this article with reference to windows and door, but not with reference to vent flues. The floor of such booth shall be elevated above the permanent support on which it is placed by a space of at least one-half inch, sufficient to allow the passage of air between the floor of the booth and the platform on which the booth rests, and the booth shall be insulated so that it will not conduct electricity to any other portion of the building. (*Added by L. 1913, ch. 308.*)

§ 214. **Exemption and requirements for miniature cinematograph machines.**—The above sections, two hundred and nine, two hundred and ten,

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two hundred and eleven, two hundred and twelve and two hundred and thirteen, referring to permanent and portable booths, shall not apply (a) to any miniature motion picture machine in which the maximum electric current used for the light shall be three hundred and fifty watts. Such miniature machine shall be operated in an approved box of fireproof material constructed with a fusible link or other approved releasing device to close instantaneously and completely in case of combustion within the box. The light in said miniature machine shall be completely inclosed in a metal lantern box covered with an unremovable roof. (b) To the use or operation of any so-called miniature motion picture apparatus which uses only an enclosed incandescent electric lamp and approved acetate of cellulose or slow burning films, and is of such construction that films ordinarily used on full-sized commercial picture apparatus cannot be used therewith. (*Added by L. 1913, ch. 308, and amended by L. 1916, ch. 185.*)

§ 215. **Inspection; certificate for portable booths and *miniature cinematograph machines.**—Before moving pictures shall be exhibited with a portable booth, under section two hundred and thirteen of this article, and before a miniature machine without a booth shall be used as prescribed in section two hundred and fourteen of this article, there shall be obtained from the appropriate authority, as defined in section two hundred and ten of this article, a certificate of approval. (*Added by L. 1913, ch. 308.*)

ARTICLE XIII.

FLOUR AND MEAL.

Section 220. How packed.

- 221. Size of casks.
- 222. How casks shall be marked and branded.
- 223. Casks of wheat flour, how branded.
- 224. Casks of rye flour, how branded.
- 225. Casks of meal, how branded.
- 226. Prohibition against wrong marking.
- 227. Counterfeiting marks prohibited.
- 228. Prohibition against the sale of mixed flour.
- 229. Prohibition against the transportation of Indian meal on deck.

§ 220. **How packed.**—All wheat flour, rye flour, Indian meal or buck-wheat meal manufactured in this state for exportation shall be packed in good strong casks made of seasoned oak or other sufficient timber, and hooped with at least ten hoops, three of which shall be on each chime, and properly nailed.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 70; originally revised from R. S. pt. 1, ch. 17, tit. 2, § 3.

Reference.—Provisions of this article are to be enforced and carried into effect by department of farms and markets, Farms and Markets Law, § 100.

* So in original.

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§ 221. **Size of casks.**—The casks shall be of two sizes only. One size shall contain one hundred and ninety-six pounds of flour or meal, with staves twenty-seven inches long and each head sixteen and one-half inches in diameter; and the other size shall contain ninety-eight pounds, with staves twenty-two inches long and each head fourteen inches in diameter, or with staves twenty-seven inches long and each head not more than twelve inches in diameter. But Indian meal may likewise be packed in hogsheads which shall contain eight hundred pounds.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 71; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 4.

§ 222. **How casks shall be marked and branded.**—The casks shall be made as nearly straight as may be, and their tare shall be marked on the head with a marking iron; they shall be branded with the weight of the flour and meal contained therein, and branded or painted with the initial letter of the christian name and the surname at full length of the manufacturer thereof; except hogsheads of Indian meal, on which the weight only shall be branded.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 72; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 5, and L. 1833, ch. 261.

Reference.—False branding, a misdemeanor, Penal Law, § 435.

§ 223. **Casks of wheat flour, how branded.**—Every such cask of wheat flour shall also be branded as follows: If a very superior quality, "extra superfine"; if of a quality now branded "superfine," with the word "superfine"; if of a third quality, "fine"; if of a fourth quality, "fine middlings"; if of a fifth quality, "middlings"; if of a sixth quality, "ship stuffs."

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 23; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 6.

Reference.—False branding, a misdemeanor, Penal Law, § 435.

§ 224. **Casks of rye flour, how branded.**—Each cask of rye flour intended for the first quality shall be branded with the words "superfine rye flour," and each cask intended for the second quality, with the words "fine rye flour."

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 74; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 7.

Reference.—False branding, a misdemeanor, Penal Law, § 435.

§ 225. **Casks of meal, how branded.**—Each cask of Indian meal shall be branded with the words "Indian meal"; and each cask of buckwheat meal, with the letter and the word "B meal."

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 75; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 8.

Reference.—False branding, a misdemeanor, Penal Law, § 435.

§ 226. **Prohibition against wrong marking.**—A person shall not knowingly offer for sale any cask of flour or meal upon which the tare is undermarked, or in which there is a less quantity of meal than is branded

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thereupon. A manufacturer of flour or meal shall not undermark the tare of any cask, or put therein a less quantity of meal than is branded thereupon; but if the light weight of any such cask has been occasioned by some accident unknown to the manufacturer, and which happened after the packing of the cask, it shall not be deemed a violation of this section.

A person violating any provision of this section shall forfeit to the people of the state the sum of five dollars for every such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 76; originally revised from R. S. Pt. 1, ch. 17, tit. 2, §§ 17, 18.

Reference.—False marking, a misdemeanor, Penal Law, § 435.

§ 227. **Counterfeiting marks prohibited.**—No person shall alter or counterfeit any brand marks, whether state or private, made under the provisions of this article, or put any flour or meal in any empty cask previously used and branded, and offer the same for sale in such cask without first cutting out the brands.

A person violating the provisions of this section in regard to altering or counterfeiting any brand marks shall forfeit to the people of the state the sum of one hundred dollars for each such violation, and a person violating any other provision of this section shall forfeit to the people of the state the sum of five dollars for each such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 77; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 21.

Reference.—Using false marks as to manufacture, a misdemeanor, Penal Law, § 436.

§ 228. **Prohibition against the sale of mixed flour.**—No person shall knowingly offer for sale as good wheat flour, any flour which contains a mixture of Indian meal, or any other mixtures, or any unsound flour. A person violating this section shall forfeit to the people of the state the sum of five dollars for each such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 78; originally revised from R. S. Pt. 1, ch. 17, tit. 2, § 22.

References.—Adulterations generally, Public Health Law, §§ 40-50; of food products, Agricultural Law, §§ 30, 200, 201. Enforcement of laws relative to adulterations, Farms and Markets Law, §§ 30, 100. Criminal liability, Penal Law, §§ 1748-1750.

§ 229. **Prohibition against the transportation of Indian meal on deck.**—No person having charge of any vessel shall transport, into the city of New York, any Indian meal upon the deck of any vessel.

Every person violating this section shall forfeit to the people of the state twenty cents for every barrel and eighty cents for every hogshead transported in violation of this section.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 79; originally revised from R. S. pt. 1, ch. 17, tit. 2, § 23.

ARTICLE XIV.

BEEF AND PORK.

Section 240. Barrels and tierces, how made.

241. Barrels in Suffolk, Kings, Queens and Nassau counties.

242. Qualities of pork.

§ 240. **Barrels and tierces, how made.**—All barrels in which any pork or beef is repacked, shall be of good, seasoned white oak or white ash staves and heading, free from every defect; and each barrel shall contain two hundred pounds of beef or pork.

The barrel shall measure seventeen and one-half inches between the chimes, and be twenty-eight inches long, and hooped with twelve good, hickory, white oak or other substantial hoops. If made of ash staves, it shall be hooped with at least fourteen hoops. The staves and heads shall be of good thick stuff, the heads not less than three-quarters of an inch thick; and each stave, on each edge, at the bilge, shall not be less than one-half an inch thick, when finished. The hoops shall be well set and driven, and the barrels branded on the bilge with at least the initial letters of the cooper's name. The half barrel shall contain not less than fifteen, nor more than sixteen gallons, and be made in proportion to and of like materials as a whole barrel, and shall contain one-half of the quantity of beef or pork of the whole barrel.

The tierce shall be made in proportion to and of like materials as a barrel, and shall contain three hundred pounds of beef or pork.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 90; originally revised from R. S. pt. 1, ch. 17, tit. 2, §§ 36, 37, 39.

References.—Provisions of this article enforced by council of farms and markets, see Farms and Markets Law, §§ 30, 100.

§ 241. **Barrels in Suffolk, Kings, Queens and Nassau counties.**—All beef and pork which is repacked in and exported from the counties of Suffolk, Kings, Queens and Nassau, may be packed in barrels as nearly straight as may be, made of good, seasoned red oak staves and heading of the growth of such counties respectively, free from sap and every defect and made otherwise as above directed.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 91; originally revised from R. S. pt. 1, ch. 17, tit. 2, § 40.

§ 242. **Qualities of pork.**—Each barrel of pork shall be branded on one of its heads by its name, and contain either "mess pork," "prime pork" or "cargo pork." "Mess pork" consists of the sides of good, fat hogs, exclusive of all other pieces. "Prime pork" is pork of which there is in a barrel not more than three shoulders, the legs being cut off at the knee joint, not more than twenty-four pounds of heads which have the ears and snouts cut off, the snouts cut off to the opening of the jaws, and the brains

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and bloody *grizzle taken out of the heads; and the rest made up of side pieces, neck and tail pieces. "Cargo pork" is pork of which there is not in a barrel more than thirty pounds of head and four shoulders, and it shall be otherwise merchantable pork. "Side pork" so repacked, shall be cut from the back bone to the belly, in pieces about five inches wide, and which in weight are not under four pounds; otherwise, the barrels containing the same shall not be branded merchantable pork.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 92; originally revised from R. S. pt. 1, ch. 17, tit. 2, § 42.

References.—False branding, a misdemeanor, Penal Law, § 435. Disposing of unwholesome food, Penal Law, § 1750. Adulteration of food products, Agricultural Law, §§ 30, 200, 201. Adulterations generally, Public Health Law, §§ 40–50. Enforcement of laws as to adulteration of food products, Farms and Markets Law, § 100.

ARTICLE XV.

HOPS, HAY AND STRAW.

Section 250. Bales of hops to be marked.

251. Adulteration of hops prohibited; counterfeiting marks.

252. Standard weight of hop bales and tare thereon.

253. Presser of hay and straw defined; correct scales to be used; bales to be marked.

254. Prohibition against the adulteration of hay.

255. Weight to be marked on bale.

§ 250. **Bales of hops to be marked.**—Every person putting up hops for sale or exportation shall mark or stamp on each bale or other package containing the same, in a legible manner, the initial letter of his christian name, and his surname at full length, and the gross weight of such bale or package, before its removal from the place where the hops are put up.

A person violating this section shall forfeit to the people of the state the sum of five dollars for each such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 100; originally revised from R. S. pt. 1, ch. 17, tit. 2, § 163; L. 1884, ch. 94, § 2, as amended by L. 1889, ch. 239.

Reference.—False marking a misdemeanor, Penal Law, § 435.

§ 251. **Adulteration of hops prohibited; counterfeiting marks.**—No person shall intermix with any hops any foreign or improper substance, or in any manner adulterate their quality.

No person shall counterfeit the marks on any bale or package of hops, or empty any bale or package of hops so marked, for the purpose of putting therein other hops for sale or exportation, without first erasing such marks.

A person violating any provision of this section shall forfeit to the people of the state the sum of one hundred dollars for each such violation.

* So in original.

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Source.—Domestic Commerce L. (L. 1896, ch. 376) § 101; originally revised from R. S., pt. 1, ch. 17, tit. 2, §§ 166, 168.

References.—Adulterations generally, Public Health Law, §§ 40-50. Of food products, Agricultural Law, § 30-52. Criminal liability, Penal Law, § 1748, 1750.

§ 252. **Standard weight of hop bales and tare thereon.**—A bale of hops sold in this state shall not weigh less than one hundred and seventy-five nor more than two hundred and ten pounds. The tare to be deducted is five pounds. The standard weight of sacking for baling is not less than twenty-four nor more than thirty ounces for each yard; five yards thereof is the maximum quantity to be used for each bale, and any excess in the weight of such sacking or other extraneous matter used in baling may be deducted as additional tare.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 102; originally revised from L. 1884, ch. 94, § 1, as amended by L. 1889, ch. 239.

§ 253. **Presser of hay and straw defined; correct scales to be used; bales to be marked.**—The term "presser" as used in this and the following sections of this article shall mean the person, firm, association or corporation owning or having possession and operating the hay press. A presser who presses hay or straw for market shall use correct scales, properly sealed. Every presser of hay or straw for market shall mark each bale of any of such commodities pressed by him with his name and business address and the correct weight of the bale. These markings shall be made upon a tag, securely fastened to the bale, of not less than one and one-half inches in width and three inches in length.

A person violating this section shall forfeit to the people of the state the sum of five dollars for each such violation. (*Amended by L. 1913, ch. 96.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 103; originally revised from R. S., pt. 1, ch. 17, tit. 3, §§ 5, 7, 8; L. 1860, ch. 155.

References.—Violation of regulations for sale of baled hay or straw, Penal Law, § 2417. False marking, a misdemeanor, Penal Law, § 435.

§ 254. **Prohibition against the adulteration of hay.**—No person shall put or conceal in any such bundle of hay any wet or damaged hay, or other materials, or hay of any inferior quality to that which plainly appears upon the outside of such bundle.

A person violating this section shall forfeit to the people of the state the sum of five dollars for each such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 104; originally revised from R. S., pt. 1, ch. 17, tit. 3, §§ 6, 7.

§ 255. **Weight to be marked on bale.**—The gross weight shall be plainly marked on each bale of hay or straw sold or offered for sale in this state; and no baled hay or straw shall be so sold or offered for sale which weighs less than such gross weight after deducting five pounds from such bale for shrinkage. And no baled hay or straw shall be so sold or offered for sale

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with more than twenty pounds of wood to the bale, the weight of which is two hundred pounds or upward, or more than ten pounds of wood for bales weighing less than two hundred pounds.

A person violating any provision of this section shall forfeit to the people of the state the sum of five dollars for each such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 105; originally revised from L. 1875, ch. 175, §§ 1, 2.

Reference.—False marking, a misdemeanor, Penal Law, § 435.

ARTICLE XVI.

ICE.

Section 260. Cutting and harvesting ice by adjoining proprietors.

261. Protection of rights.

262. Center of river defined.

263. Catskill creek.

§ 260. Cutting and harvesting ice by adjoining proprietors.—Whenever the owner or lessee of lands bordering upon the Hudson river shall require the ice formed in said river between the center thereof and said lands for the purpose of filling any icehouse now erected, or which may at the time of the formation of such ice hereafter be erected on any such lands adjoining the same, such owner or lessee of said lands and icehouses shall have the exclusive privilege of cutting and harvesting all the ice so formed in said river in front of and adjacent to said lands and between the same and the center of said river; provided such owner or lessee shall have indicated his intention of exercising such privilege by staking out so much of said ice as shall be required for said purpose, which said staking out shall not be required to be done until the ice has attained a thickness of four inches; and provided, also, such owner or lessee shall surround the cuttings and openings made with fences of bushes or other safeguards to warn all persons of such cuttings and openings. And, whenever any icehouse is located on an island in said river, this article shall apply to all ice formed opposite the shores of such island in both channels into which said river shall be divided by such island, subject to the provision hereinafter contained; and it shall not be lawful for any person other than the owner or lessee of such lands and icehouses, whether located on the banks of the river or on such island, to take possession of or cut the ice so staked out in said river or channel between the center thereof and his lands, and the same is prohibited after such owner or lessee shall have complied with the foregoing requirements.

Source.—L. 1895, ch. 953, § 1.

References.—Violation of section as to ice-cutting, a misdemeanor, Penal Law, § 1904. Cutting ice in canals, Canal Law, § 33; Penal Law, § 1748. Cutting ice in front of premises of another, Penal Law, § 1100. Injury to ice-fields and harvested ice, Id. § 1425.

Staking out of ice in navigable stream.—A person who causes ice, not less than

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four inches thick, to be staked out in a navigable creek, a tributary of the Hudson river, in front of the lands of an adjoining owner, and owns no icehouse upon the stream, and does not claim that he needs such ice, acquires no property in or jurisdiction over it, under the provisions of this section. The mere staking out of free ice in a navigable stream, under such circumstances, does not constitute an appropriation thereof so as to give the person property therein. *Hudson River Ice Co. v. Brady* (1913), 158 App. Div. 142, 142 N. Y. Supp. 819.

Section cited.—*City of Rochester v. Gray* (1910), 121 N. Y. Supp. 42, *affd.* (1910), 138 App. Div. 918, 123 N. Y. Supp. 1111.

§ 261. **Protection of rights.**—Whenever such ice shall have been so staked out, all ice lying between the center of the said river, as hereinafter defined, and such lands, or so much thereof as shall be required for the purpose of filling the icehouse erected thereon, as aforesaid, shall be and become the personal property of the owner or lessee of such lands and icehouses, and any person trespassing upon or taking the same for commercial purposes or otherwise, shall be liable to such owner or lessee for the value of the ice so taken, and for any damage, in like manner as for an injury done to any other property, and an action may be maintained for a permanent injunction, or for the value of the ice so taken, or for any damage; and a temporary injunction may be granted, restraining any defendant from trespassing upon or taking the said ice for commercial purposes or otherwise, pending the determination of the action. The granting of such temporary injunction shall be subject to the provisions of the code of civil procedure, chapter seven, title two. Nothing contained in this article, however, shall be construed as in any manner affecting, impairing or interfering with the right of any owner, lessee or occupant of lands bordering upon or adjacent to the Hudson river or Catskill creek to the unrestricted use of the premises owned, leased or occupied by him for any lawful purpose.

Source.—L. 1895, ch. 953, § 2, as amended by L. 1899, ch. 264; L. 1904, ch. 749.

Effect of amendment of 1904.—The amendment of 1904 which added to this act the provision relating to the use of premises bordering upon the Hudson river for any lawful purpose, defeats the right of a person who has staked out an ice field in such river to an injunction restraining a manufacturer of cement from so conducting his business on the shore of the river as to permit coal dust, cinders and dirt from being carried upon the ice. No property right was acquired by the act of 1895, which would prevent the enactment of a statute permitting the unrestricted use of other property upon the banks of the river for a lawful purpose. *American Ice Co. v. Catskill Cement Co.* (1904), 99 App. Div. 31, 90 N. Y. Supp. 801.

§ 262. **Center of river defined.**—The center of such river is hereby defined to be a line halfway between low-water mark on the east bank and low-water mark on the west bank of such river. Where an island intervenes, having an icehouse or icehouses thereon, the center of the river, for the purpose of this article, is hereby defined to be a line in each channel into which said river is thereby divided, halfway between low-water mark along the shore of such island bordering upon such channel and the banks

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of such river opposite such island. Where there are, or shall be, dykes erected along both banks of said river, or along either shore of such island and also along the bank of said river, opposite thereto, the center of said river is hereby defined to be a line halfway between said dykes. Where there is, or shall be erected, a dyke along one shore of such island, or along one bank of said river only, the center of said river is hereby defined to be a line halfway between said dyke and low-water mark along the opposite bank of said river, or along the opposite shore of such island, where an island intervenes. Nothing in this article shall be construed to deprive the public from the right to travel or drive over such ice for any or all legitimate purposes whatever.

Source.—L. 1895, ch. 953, § 3.

§ 263. **Catskill creek.**—This article shall apply to lands bordering upon navigable tide water of the Catskill creek.

Source.—L. 1895, ch. 953, § 4-a, added by L. 1899, ch. 264.

ARTICLE XVII.

MILK CANS.

Section 270. Unlawful detention of milk cans.

271. Penalty and action to recover.

272. Search warrant.

273. Railroad or steamboat company may act as agent of owner.

274. Assistance of policeman or constable.

§ 270. **Unlawful detention of milk cans.**—No person shall, without the consent of the owner or shipper, or his agent, use, sell, dispose of, buy or traffic in any can, irrespective of its condition, or the use to which it may have been applied, belonging to any dealer in or shipper of milk or cream in this state or which may be shipped to any town, village or city in the state, which can has the name or initials of such owner, dealer or shipper stamped, marked or fastened thereupon, or wilfully mar, erase or change by re-marking or otherwise such name or initials.

If any person, without the consent of such owner, dealer or shipper, or his agent, uses, sells, disposes of, buys, traffics in or has in his possession or under his control any such can, it shall be presumptive evidence that such use, sale, disposal, purchase, traffic or possession is unlawful.

Any such owner, dealer or shipper, or his agent, may take possession of any can used in violation of this article wherever found, and if filled or partly filled with milk or cream, and the person in whose possession it is found does not, when requested, immediately empty the same, such owner, dealer or shipper, or his agent, may empty the same into the street or elsewhere, and shall not be liable for damages for any act done pursuant to the provisions of this article.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 29, in part, as amended by

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L. 1900, ch. 543; L. 1902, ch. 482; originally revised from L. 1865, ch. 295, and L. 1887, ch. 401, as amended by L. 1890, ch. 25.

Consolidators' note.—The Domestic Commerce Law contained one section (29) relating to the unlawful detention of milk cans. L. 1896, ch. 977, passed after the Domestic Commerce Law at the same session, was an act in relation to milk cans, amending L. 1887, ch. 401. L. 1887, ch. 401, was incorporated in Domestic Commerce Law, § 29, and repealed in the schedule. Under Statutory Construction Law, § 33, L. 1896, ch. 977, was not superseded by the provisions of the Domestic Commerce Law, but Domestic Commerce Law, § 29, was amended "to read as follows" by L. 1902, ch. 482, and this being the last voice of the legislature upon the subject and covering the entire ground, has been considered as superseding L. 1896, ch. 977. The existence of the Domestic Commerce Law provision was also recognized by an amendment made by L. 1900, ch. 543. L. 1896, ch. 977, has not been in terms affected since its enactment.

References.—Unsanitary cans condemned, Agricultural Law, § 46; cans to be cleaned before return, *Id.* § 47. Remarking and using again milk cans, *Id.* § 36. Provisions of article to be enforced by department of farms and markets, Farms and Markets Law, §§ 30, 100.

Constitutional.—The legislature has the power to enact that the possession or control of milk cans without consent of the owner shall be presumptive evidence of the unlawful use or sale. Knowledge is not essential to the commission of offense. *Monroe Dairy Ass'n v. Stanley* (1892), 65 Hun 163, 20 N. Y. Supp. 19.

Proof of condition of can.—In an action to recover a penalty under this section, the condition of the can is immaterial; a dismissal of the complaint after the plaintiff had proved the condition in which the can was and the purpose for which it was used was erroneous. *Schmidt v. Justus* (1905), 46 Misc. 459, 92 N. Y. Supp. 362.

The amendment of 1900 supersedes *Bell v. Moen's Asphaltic Cement Co.* (1898), 32 App. Div. 362, 52 N. Y. Supp. 1084, holding that a can must be capable of use as a milk can in order to make its use by others unlawful.

§ 271. Penalty and action to recover.—Any person violating any provision of this article shall forfeit to such owner or dealer or shipper or his agent the sum of fifty dollars for every such violation, and an action may be brought therefor in the name of any such agent without joining the real party in interest that he represents, and in any such action brought for any such violation different persons may be joined as plaintiffs, whether jointly or severally interested therein, and different persons may be joined as defendants therein who have severally violated any such provisions, and a recovery may be had in favor of one or more of such plaintiffs against one or more of such defendants.

Such action may be brought in a court of record having jurisdiction thereof, and the place of trial thereof may be laid in the county where such owner, dealer or shipper resides at the time of the commencement thereof, or it may be brought in a justice's court or other court not of record having similar jurisdiction in the city or county where a violation of this section is committed; the municipal court of the city of New York shall have jurisdiction of such action irrespective of the residence of any party or the location of the subject-matter.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 29, in part, as amended by

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L. 1900, ch. 543; L. 1902, ch. 482; originally revised from L. 1865, ch. 295, and L. 1887, ch. 401, as amended by L. 1890, ch. 25.

Reference.—Recovery of penalties for violations of law the enforcement of which is within the jurisdiction of the department of farms and markets, Farms and Markets Law, § 58.

Accumulated penalties.—The provision for a penalty "for every such violation" of the statute only allows a recovery for each violation, irrespective of the number of cans in the possession of the defendant. If the legislature intends to allow accumulated penalties, it must so provide in so many words. *United State Condensed Milk Co. v. Smith* (1906), 116 App. Div. 15, 101 N. Y. Supp. 129, *affd.* (1908), 191 N. Y. 536, 84 N. E. 1122.

Change of venue.—This section repeals by implication § 983 of the Code of Civil Procedure so far as it provides that the place of trial may be laid in the county where the owner of the milk cans resides. The provision that "if the venue is laid in the county where the owner, dealer, or shipper resides, it shall not be changed for any cause," is unconstitutional, and does not prevent the venue from being changed on the ground of convenience of witnesses. *Warner v. Palmer* (1901), 66 App. Div. 127, 72 N. Y. Supp. 703. *See also* *Bell v. Polymero* (1904), 99 App. Div. 303, 90 N. Y. Supp. 920; *Bell v. Niewahner* (1900), 54 App. Div. 530, 66 N. Y. Supp. 1096. The effect of this decision seems to be superseded by later amendments.

The place of trial of an action brought by an agent residing in one county against a defendant residing in another county cannot be properly laid in a third county where the owner resides and the defendant may require the place of trial to be changed to the county of his residence. *Walsh v. Maroney* (1907), 53 Misc. 369, 104 N. Y. Supp. 758.

Statute of limitation.—A statute of limitation, Code Civ. Pro. § 383, subd. 3, providing that an action to recover a penalty must be commenced within three years after the cause of action has accrued, does not apply to an action brought under the above section for the unlawful possession and use of a milk can by the defendant on a date about two weeks prior to the commencement of the action, although it appears that at the time the action was commenced the defendant had been in possession and use of the can for more than three years. *Bell v. Gibson* (1902), 71 App. Div. 472, 75 N. Y. Supp. 753.

Costs.—When former owners of milk cans have sold them to a corporation of which they became officers, and the corporation directs its agent to sue for the statutory penalty for an unlawful detention of the cans, a defendant who succeeds on trial is not entitled to charge the former owners with the costs under section 3247 of the Code of Civil Procedure as being beneficially interested, for the action was brought in behalf of the corporation and not the former owners of the cans. *Pierson v. Clark* (1906), 116 App. Div. 519, 101 N. Y. Supp. 719.

§ 272. **Search warrant.**—If at the time of the issue of the summons in a court not of record, the plaintiff or his agent make affidavit that he has reason to believe and does believe that any defendant has any such can or cans secreted upon his premises the justice or other magistrate of court issuing the summons must, without requiring an undertaking, grant an order for the arrest of the defendant, which order shall also contain a direction to the officer to whom the same is issued, to immediately search the place or premises mentioned in said affidavit, and if any such can or cans are there found, to bring the same together with the defendant or other persons in whose possession said can or cans are found, before such

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justice, magistrate or court. The proceedings may be amended at any time by adding parties or otherwise as justice may require; and the judgment may provide for the disposition of the can or cans so found.

If upon the issue of any such process, the constable, or other officer, shall be unable to find the person or persons therein named, but shall find any can or cans, as therein set forth, he shall bring such can or cans before such justice or magistrate, who shall thereupon proceed to determine the right of such complainant thereto, and if upon such hearing had thereon he shall be satisfied that such can or cans rightfully belong to such complainant, or that he is entitled to the possession thereof, he shall forthwith deliver the same into his possession or the possession of his agent.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 29, in part, as amended by L. 1900, ch. 543; L. 1902, ch. 482; originally revised from L. 1865, ch. 295 and L. 1887, ch. 401, as amended by L. 1890, ch. 25.

§ 273. **Railroad or steamboat company may act as agent of owner.**—The several superintendents of the railroad companies, and the branches and connections thereof, and steamboat lines operating their roads or lines, or any portion thereof, in this state shall have power to collect, gather and take into possession from any person or whenever found thereupon, any cans belonging to any such owner, dealer or shipper, and return the same to such owner, dealer or shipper and may appoint an agent for that purpose, and such superintendent and such agent appointed by him shall have the same power and authority under this article as an agent of such owner, dealer or shipper.

The certificate of such superintendent appointing such agent duly acknowledged shall be presumptive evidence of the appointment and authority of such agent.

Source.—Domestic Commerce L. (L. 1896, ch. 376), § 29, in part, as amended by L. 1900, ch. 543; L. 1902, ch. 482; originally revised from L. 1865, ch. 295 and L. 1887, ch. 401, as amended by L. 1890, ch. 25.

§ 274. **Assistance of policeman or constable.**—Any person authorized by this article to seize and take into his possession any such cans may, in case of resistance, call to his aid any police officer or constable of the town, village or city who shall when so called on assist him in seizing or taking possession of such cans.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 29, in part, as amended by L. 1900, ch. 543; L. 1902, ch. 482; originally revised from L. 1865, ch. 295, and L. 1887, ch. 401, as amended by L. 1890, ch. 25.

ARTICLE XVIII.

FREIGHT AND BAGGAGE.

Section 280. Duty of carrier as to unclaimed articles.

281. Description to be made and published.

282. Packages to be opened and contents sold; proceeds of sale.

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- 283. Lien for expenses of proceedings.
- 284. Penalty for violation of preceding sections.
- 285. Sale of unclaimed articles by express companies; notice thereof; disposition of proceeds of sale.
- 286. Surplus to be paid to owner.
- 287. After five years if unclaimed to be paid to county treasurer.

§ 280. **Duty of carrier as to unclaimed articles.**—The proprietors of the several lines of stages and the proprietors of the several canal boat lines, and the proprietors of the several steamboats, who shall have any unclaimed trunks, boxes or baggage within their custody, shall immediately enter the time the same was left, with a proper description thereof, in a book to be by them provided and kept for that purpose. In case the name and residence of the owner shall be ascertained it shall be the duty of such person who shall have any such property as above specified, to immediately notify the owner thereof by mail.

Source.—L. 1837, ch. 300, § 1, as amended by L. 1901, ch. 313.

See also Railroad Law, § 46. This act applied to hotels prior to the amendment of 1901. As to hotels, see §§ 207, 208, ante. See *McClellan v. Wyatt*, 11 N. Y. Supp. 686 (1890); *Baumann v. Post*, 12 N. Y. Supp. 213 (1890).

Consolidators' note.—The reference in this section to "incorporated railroad companies" has been omitted, as the subject of the disposition of unclaimed articles by railroads is covered by the Railroad Law, § 46.

Section cited.—*Magnus v. Platt* (1909), 62 Misc. 499, 115 N. Y. Supp. 824.

§ 281. **Description to be made and published.**—In case there shall not be any information obtained as to the owner, it shall be the duty of the person having the possession thereof, to make out a correct written description of all such property as shall have been unclaimed for thirty days, stating the time the same came into his possession, and publish said description in a newspaper designated by him in his county once a week for three weeks successively.

Source.—L. 1837, ch. 300, § 2.

Consolidators' note.—The reference in this section to the "State paper" has been changed to conform to the provisions of the Executive Law, § 83.

§ 282. **Packages to be opened and contents sold; proceeds of sale.**—In case the said property shall remain unclaimed for sixty days after the said publication, it shall be the duty of the person or company having possession thereof, to apply to a magistrate of the town or city in which said property is retained, in whose presence and under whose direction said property shall be opened and examined, and an inventory thereof taken by said magistrate; and if the name and residence of the owner is ascertained by such examination, it shall be the duty of the magistrate forthwith to direct a notice thereof to such owner, by mail; and if said property shall remain unclaimed for three months after such examination, it shall be the further duty of the person or company having possession thereof to apply to a magistrate as aforesaid; and if said magistrate shall deem such property of sufficient value, he shall cause the same to be sold at public

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auction, giving six days' previous notice of the time and place of such sale; and from the proceeds of such sale he shall pay the charges and expenses legally incurred in respect to said property, or a ratable proportion thereof to each claimant, if insufficient for the payment of the whole amount; and the balance of the proceeds of such sale, if any, the said magistrate shall immediately pay the overseers of the poor of said town or city, for the use of the poor thereof; and the said overseers shall make an entry of such amount, and the time of receiving the same, upon their official records, and it shall be subject, at any time within seven years thereafter, to be reclaimed by, and refunded to, the owner of such property, his heirs or assigns, on satisfactory proof of such ownership.

Source.—L. 1837, ch. 300, § 3.

§ 283. **Lien for expenses of proceedings.**—The person making the entry of unclaimed property as above specified, shall be entitled to twelve and a half cents for each trunk, box, bale, package or bundle so entered, and shall have a lien on the property so entered, until payment shall be made; and in case any additional expense shall be incurred for printing, the lien shall continue until payment shall be made for such additional expense.

Source.—L. 1837, ch. 300, § 4.

§ 284. **Penalty for violation of preceding sections.**—In case any person shall neglect or refuse to comply with the provisions of the preceding sections of this article, he shall forfeit the sum of five dollars for each and every trunk, box or bundle of baggage so neglected as above specified, to the benefit of any person who shall sue for the same, in his own name, in an action of debt in any court having cognizance thereof.

Source.—L. 1837, ch. 300, § 5.

§ 285. **Sale of unclaimed articles by express companies; notice thereof; disposition of proceeds of sale.**—Every express company, or person engaged in the express business, who shall have had any unclaimed article, goods or things, not perishable, in its or his possession, for a period of one year at least, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such article, goods or thing, and the expenses of advertising and sale thereof; but no such sale shall be made, until the expiration of four weeks from the first publication of notice of such sale, in a newspaper published at or nearest the place at which such article, goods or thing was directed to be left, and also at the place where such sale is to take place; and said notice shall contain a description of such article, goods or thing, the place at which the same was to be left, as near as may be, together with the name of the person to whom directed, if known, and the expenses incurred for advertising shall be a lien upon such article, goods or thing, in a ratable proportion, according to the value of each article, package or parcel, if more than one.

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In case such unclaimed article, goods or thing shall in its nature be perishable, the same may be sold as soon as it can be, on giving the notice required in this section, after its receipt at the city, town or village to which it was directed.

Source.—L. 1855, ch. 523, §§ 1, 2.

§ 286. Surplus to be paid to owner.—Such express company, or person engaged in the express business, shall make an entry of the balance of the proceeds of the sale, if any, of each article, goods or thing directed to the same person, as near as can be ascertained, and at any time within five years thereafter, shall refund any surplus so retained to the owner of such article, goods or thing, his heirs or assigns, on satisfactory proof of such ownership.

Source.—L. 1855, ch. 523, § 3.

§ 287. After five years if unclaimed to be paid to county treasurer.—In case such balance shall not be claimed by the rightful owner within five years after the sale as above specified, then it shall be paid to the county treasurer, for the use of the county poor of said county.

Source.—L. 1855, ch. 523, § 4.

ARTICLE XIX.

OIL AND DISTILLED SPIRITS.

Section 300. Standard of domestic distilled spirits.

301. Sperm oil.
302. Storage of petroleum.
303. Standard test and storage of refined petroleum and kerosene oil.
304. Standard and storage of illuminating oils.
305. Inspectors of storage.
306. Fire and light within one hundred and fifty feet of warehouses in the counties of New York, Kings, Queens and Nassau prohibited.
307. Penalties and the enforcement thereof.
308. Plugging abandoned oil wells.
309. Penalty for neglecting to plug abandoned well.
310. Adjoining proprietor may act.

§ 300. Standard of domestic distilled spirits.—Domestic distilled spirits, at a temperature of sixty degrees Fahrenheit, which have a specific gravity of nine thousand three hundred and thirty-five as compared with the gravity of pure distilled water at the same temperature estimated at ten thousand, shall be deemed first proof.

The strength of any such spirits below or above first proof shall be calculated decimally, or by the percentage in reference to such standard, and shall be denoted as so many per centum below or above first proof as the actual difference in strength shall be.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 20; originally revised from R. S., pt. 1, ch. 17, tit. 2, § 171.

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Consolidators' note.—Oil and distilled spirits. The title of this article was formerly "Regulations of trade and business," but this title was broad enough to cover all the provisions of the law. The sections in this article relating to oil and distilled spirits have been retained herein. The subject of "trade-marks" formerly covered by § 28 has been incorporated in new article 24. Former § 29 has been covered by new article 17, "milk cans." Sections 30–32, 39, 41–45 have been placed in new article 26, "miscellaneous." Sections 33–38 have been omitted, as covered by L. 1904, ch. 567, adding a new article to Agricultural Law. Section 40 becomes § 205.

§ 301. **Sperm oils.**—Pure sperm oil, at the temperature of sixty degrees Fahrenheit, shall have the same specific gravity as domestic distilled spirits of forty-eight per centum above first proof at the same temperature; and whale oil, at that temperature, shall have the same specific gravity as such spirits of eight per centum above first proof, as established by this article. The specific gravity of such oils may be tested by a hydrometer or an oleometer. The secretary of state shall furnish, at the expense of the state, to the clerk of each county, a correct oleometer, graduated to show the difference between pure sperm oil and whale oil, which shall be kept by such clerk for public use as a standard and true test of pure sperm oils. All oils under the name of sperm, lamp, summer, fall and winter oils shall be deemed to be sold as and for pure sperm oil. All oils sold under the name of sperm, lamp, summer, fall or winter oils, which shall be adulterated from pure sperm oil, shall be deemed whale oil, and the vendor shall be liable to the purchaser for the difference in value between pure sperm and crude whale oil.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 21; originally revised from L. 1836, ch. 475, §§ 1–4.

§ 302. **Storage of petroleum.**—Crude petroleum, earth or rock oil, or any of its products, shall not be kept on sale or stored in any place or building within the corporate limits of any city in this state, except in the city of New York, unless in detached and properly ventilated warehouses, the exterior walls of which are stone, brick or iron, specially adapted to that purpose, with raised sills at least two feet high, or the ground floor of which is at least two feet below the level of the street or adjoining land, so as to effectually prevent the overflow of such substances beyond the premises where kept or stored.

No part of such warehouses shall be occupied as a dwelling, and if less than fifty feet from any adjacent building, such warehouse must be separated therefrom by a brick or stone wall at least ten feet in height and sixteen inches thick.

None of such articles shall be allowed to remain on the sidewalk beyond the front line of any building or in the street, a longer time than is actually necessary for storage, shipment or delivery of the same, nor after sunset.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 22; originally revised from L. 1865, ch. 773, §§ 1, 2, 4.

Reference.—Storage, etc., in New York city, Greater New York charter, §§ 765ff.

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Pipes for transporting oil, laid in a city street, do not constitute a nuisance *per se*. See *Lee v. Vacuum Oil Company* (1889), 54 Hun 156, 7 N. Y. Supp. 426.

§ 303. Standard test and storage of refined petroleum and kerosene oil.—

Refined petroleum or kerosene oil shall not be kept on sale or stored in any such city, the fire test of which shall be less than one hundred and ten degrees Fahrenheit, determined by authorized inspectors using G. Tagliabue's or other improved instruments and the barrels or packages containing the same shall be legibly stamped or marked with the inspector's official stamp or mark. If stored above the cellar or basement of any building and in barrels of not over forty-five gallons each, or in metallic vessels or tanks for the convenience of retailing, the quantity so stored shall not exceed the contents of ten barrels, unless packed in hermetically sealed metallic packages, when such quantity shall not exceed one hundred barrels. If stored in cellars or basements surrounded by walls of brick or stone, and at least two feet below the level of the sidewalk, street or adjacent land, such quantity shall not exceed the contents of one hundred and fifty barrels, unless stored in warehouses specially adapted for the purpose pursuant to this article. No more than five barrels thereof shall be kept or stored in any building occupied wholly or in part as a dwelling.

Not more than ten barrels of benzine or naphtha shall be kept or stored in any building, and not more than three barrels thereof in any building any part of which is occupied as a dwelling.

This and the preceding section shall not prevent the storage of crude or refined petroleum in wrought-iron tanks detached from any building and especially adapted for that purpose, or in other tanks so constructed that the top is at least two feet below the street or the adjoining land and covered with at least one foot of earth, and appurtenant to or connected with a refinery, with the approval of the inspectors of buildings, fire marshal or other proper authorities.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 23; originally revised from L. 1866, ch. 773, § 3, as amended by L. 1866, ch. 872.

§ 304. Standard and storage of illuminating oils.—No person shall manufacture or have in his possession or sell or give away for illuminating or heating purposes in lamps or stoves within this state, any oil, or burning fluid wholly or partly composed of naphtha, coal oil, petroleum or products thereof, or of other substances or materials emitting an inflammable vapor which will flash at a temperature below one hundred degrees Fahrenheit according to the instruments and tests approved by the state board of health.

No such oil or fluid which will ignite at a temperature below three hundred degrees Fahrenheit shall be burned or be carried as freight in any passenger or baggage car or passenger boat moved by steam or electric power in this state, or in any stage or street car, however propelled, except that coal oil, petroleum and its products may be carried, when

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securely packed in barrels or metallic packages, in passenger boats propelled by steam when there are no other public means of transportation.

The state board of health shall prescribe the tests and instruments by which such oils and fluids shall be tested, and shall adopt such measures to enforce the provisions of this section and such rules and regulations for collecting, examining and testing samples of such oils and fluids as to them may seem necessary. The public analysts employed by or under the direction of such board shall test the samples of such oils and fluids as may be submitted to them under the rules of the board, for which they shall receive such reasonable compensation as the board may allow.

Naphtha and other illuminating products of petroleum which will not stand the flash test required by this section, may be used for illuminating or heating purposes only in the following cases:

1. In street lamps and open air receptacles apart from any building, factory or inhabited house in which the vapor is burned.

2. In dwellings, factories or other places of business when vaporized in secure tanks or metallic generators made for that purpose, in which the vapor so generated is used for lighting or heating.

3. For use in the manufacture of illuminating gas in gas manufactories situated apart from dwellings and other buildings.

Any person violating any provision of this section shall forfeit to the city or village, or if not in a city or village to the town in which the violation occurs, the sum of one hundred dollars for every such violation, and for every day or part of a day that such violation occurs.

This section shall not apply to the city of New York, and shall not supersede but shall be in addition to the ordinances or regulations of any city or village made pursuant to law for the inspection or control of combustible materials therein.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 24; originally revised from L. 1882, ch. 292.

Reference.—Violation, a misdemeanor, Penal Law, § 1902.

§ 305. Inspectors of storage.—The inspectors of buildings or other proper authorities in every such city shall make an examination of all the premises where any of the articles or substances specified in the preceding sections of this article are kept or stored, and report any violation thereof to the authorities of the city whose duty it is to enforce the provisions thereof.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 25; originally revised from L. 1865, ch. 773, § 5.

§ 306. Fire and light within one hundred and fifty feet of warehouses in the counties of New York, Kings, Queens and Nassau prohibited.—No person shall bring, have, keep or use or suffer or permit to be brought, kept, had or used on board of any ship, vessel, canal boat, barge, lighter, boat or other craft lying at or within the distance of one hundred and fifty feet of any

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warehouse, yard, shed, dock, pier, bulkhead, wharf or other place within the counties of New York, Kings, Queens or Nassau at, in or upon which petroleum oil or any of its products is stored or is kept for export or in quantities exceeding ten thousand gallons, or at, in or upon any such warehouse, shed, yard, dock, pier, bulkhead or other place, any lighted match or lighted cigar, cigarette or pipe, or any fire or light of any kind, except in strict conformity to the written permission of the owner, lessee or superintendent of such warehouse, yard, shed, dock, pier, bulkhead, wharf or other place, specifying the fire or light to be kept, had or used, the particular purpose for and the place or spot at which the same may be so kept, had or used and the particular manner of keeping, having and using the same.

This section shall not apply to steam tugs while transacting their ordinary business nor to steam fire engines engaged in extinguishing fires.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 26; originally revised from L. 1879, ch. 324.

References.—Same subject, Greater New York charter, § 768. Violation of section, a misdemeanor, Penal Law, § 1903.

§ 307. Penalties and the enforcement thereof.—Every person violating the provisions of this article, relating to the test for refined petroleum and oil, shall forfeit to the people of the state the sum of five hundred dollars for each violation.

Every person violating any provision of this article, relating to the storage or keeping for sale of any article, substance or product herein specified, shall forfeit to the people of the state, the sum of two hundred and fifty dollars for each day and part of a day that such violation continues.

Every person violating any provisions of this article, relating to the incumbering of any sidewalk or street, shall forfeit the sum of twenty-five dollars for each day and part of a day that such violation continues, to be paid, if in a city or village, to such city or village, and elsewhere, to the town in which such violation occurs.

The mayor and common council of every city or other proper authorities thereof, shall, by ordinance or resolution, provide for the proper enforcement of the provisions of the preceding sections of this article, and in every such city, the moneys collected by the city as penalties for the violation of any such ordinance or resolution or of any of such provisions, shall be applied to the support of the poor therein, except in Brooklyn, where they shall be paid into the widows and orphans' fund of the fire department, and except in Buffalo, where they shall be paid to the treasurer of the firemen's benevolent association of the city for its use and benefit.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 27; originally revised from L. 1865, ch. 773, §§ 6, 7, as amended by L. 1866, ch. 872.

References.—Same subject, Greater New York charter, § 773. Unauthorized manufacture, sale or use of illuminating oils, a misdemeanor, Penal Law, § 1902.

§ 308. **Plugging abandoned oil wells.**—Whenever any well shall have been put down for the purpose of exploring for and producing oil or gas, upon abandoning or ceasing to operate the same, the owner or operator shall, for the purpose of excluding all water from the oil or gas-bearing rock, and before drawing the casing, fill up the well with sand or rock sediment to the depth of at least twenty feet above the third sand or oil-bearing rock, in case of an oil well, or any gas-bearing rock, in case of a gas well; and in case of an oil well, drive a round, seasoned wooden plug, at least two feet in length, equal in diameter to the diameter of the well below the casing, to a point at least five feet below the bottom of the casing, and whether an oil or gas well, immediately after the drawing of the casing, shall drive a round, wooden plug into the well at the point just below where the lower end of the casing shall have rested, which plug shall be at least three feet in length, tapering in form, and to be of the same diameter at the distance of eighteen inches from the smaller end as the diameter of the well below the point at which it is to be driven; and after it has been properly driven, shall fill in on top of same with sand or rock sediment to the depth of at least five feet.

Source.—L. 1879, ch. 217, § 1, as amended by L. 1882, ch. 64; L. 1893, ch. 256.

§ 309. **Penalty for neglecting to plug abandoned well.**—Any person who shall violate the provisions of the last section shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine of not less than two hundred nor exceeding five hundred dollars, or by imprisonment in the county jail of the county where the conviction shall be had, for a time not exceeding one year, or both such fine and imprisonment, in the discretion of the court before whom such conviction shall be had; one-half of the fine so imposed to be paid to the informer, the residue to the use of the school district in which such well may be situated.

Source.—L. 1879, ch. 217, § 2, as amended by L. 1882, ch. 64.

§ 310. **Adjoining proprietor may act.**—Whenever any owner or operator shall neglect or refuse to comply with the provisions of section three hundred and eight of this article, the owner of or operator upon, any land adjoining that upon which such abandoned well may be, may enter, take possession of such abandoned well and plug the same, as provided by this article, at the expense of the owner or operator whose duty it may be to plug the same.

Source.—L. 1879, ch. 217, § 3, as amended by L. 1882, ch. 64.

ARTICLE XX.

GAS.

Section 320. Standard of purity.

321. Standard of illuminating power.

322. Standard of pressure.

323. Penalty.

L. 1909, ch. 25.

Gas.

§§ 320-323.

§ 320. **Standard of purity.**—The gas furnished or supplied by any corporation, association, partnership or person in any city of the second class shall be free from sulphuretted hydrogen, to be determined by exposing for thirty seconds a slip of white paper saturated with acetate of lead to a jet of gas flowing about five feet per hour, and each one hundred cubic feet shall not contain more than ten grains of ammonia nor twenty grains of sulphur.

Source.—L. 1907, ch. 557, § 1.

References.—Incorporation of gas companies and powers thereof. Transportation Corporations Law, §§ 60-66; powers and jurisdiction of public service commissions in respect to gas and gas companies, Public Service Commissions Law, §§ 65-67. Interference with gas mains, etc., a misdemeanor, Penal Law, § 1431.

§ 321. **Standard of illuminating power.**—The maximum illuminating power required and minimum illuminating power permitted of gas so furnished or supplied in any such city shall be as follows: If a coal gas, sixteen candles; if a mixed coal and water gas, eighteen candles; and if a carburetted water gas, twenty candles. A candle shall mean a sperm candle, six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour. The test for illuminating power shall be made with gas obtained from a service pipe or main located at a distance of not less than one mile nor more than one and one-half miles from any distributing holder, using, for coal gas and mixed coal and water gas containing more than fifty per centum of coal gas an F Argand burner, and for mixed coal and water gas containing fifty per centum and less of coal gas and for carburetted water gas a number seven slit union Bray burner, on a basis of consumption of five cubic feet of gas per hour.

Source.—L. 1907, ch. 557, § 2.

§ 322. **Standard of pressure.**—The minimum pressure of gas so furnished or supplied which shall be permitted in any service main in any such city shall be sufficient to balance a column of water one and one-half inches in height. The maximum pressure therein allowed shall be an amount sufficient to balance a column of water three and three-fourths inches in height, plus an allowance at the rate of one inch for variation of each one hundred feet of increase in altitude in the distributing system between the holder and the point of consumption, except that no maximum pressure shall be prescribed in service mains the pressure of gas from which is regulated by service governors, supplied and maintained without charge to consumers.

Source.—L. 1907, ch. 557, § 3.

§ 323. **Penalty.**—A violation of any of the provisions of this article shall constitute a misdemeanor.

Source.—L. 1907, ch. 557, § 4.

ARTICLE XXI.

NEWSPAPERS AND PERIODICALS.

Section 330. Publication of owner's name.

331. Penalty for failing to publish.

332. Penalty for false statement.

333. Contracts with Sunday papers.

§ 330. **Publication of owner's name.**—Every newspaper, magazine or other periodically printed publication published in this state, shall publish in every copy of every issue, upon the outer cover or at the head of the editorial page, the full name and address of the owner, owners, proprietor or proprietors of such publication; and if said publication shall be owned or published by a corporation, then the name of the corporation and the address of its principal place of business shall be published, together with the full names and addresses of the president, secretary and treasurer thereof; and if the said publication shall be owned or published by a partnership, limited partnership, or an unincorporated joint-stock association, then the full names and addresses of the partners, or officers and managers of said partnership, limited partnership or unincorporated joint-stock association shall be published in like manner. The representative capacities of those named shall be indicated in like manner.

Source.—L. 1907, ch. 475, § 1.

Reference.—Publisher not to misrepresent newspaper circulation, Penal Law, § 946.

§ 331. **Penalty for failing to publish.**—Any person, partnership, limited partnership, unincorporated joint-stock association or corporation publishing in the state of New York a newspaper, magazine or other periodically printed publication which omits, fails or neglects to carry out the provisions of the preceding section shall be guilty of a misdemeanor for each issue of such publication over which such neglect or failure so to do extends; and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars.

Source.—L. 1907, ch. 475, § 2.

§ 332. **Penalty for false statement.**—Any person, partnership, limited partnership, unincorporated joint-stock association or corporation causing or knowingly permitting his, their or its name or names to be published in such manner as to indicate or denote that he, they or it is or are the publisher or publishers of a publication such as specified in section three hundred and thirty of this article, and not indicating truly, shall be liable to the same extent as the real publisher or publishers would be in any suit for damages involving such publication in the subject-matter thereof brought against such person, partnership, limited partnership, unincorporated joint-stock association or corporation as the publisher or publishers, or as the alleged publisher or publishers of such publication.

Source.—L. 1907, ch. 475, § 3.

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§ 333. **Contracts with Sunday papers.**—All contracts or agreements of any nature made with the publishers or proprietors of any paper dated, published or issued on the first day of the week shall be as valid, legal and binding, as contracts made with newspapers dated or published on any other day of the week.

Source.—L. 1871, ch. 702, § 1.

ARTICLE XXII.

MONOPOLIES

Section 340. Contracts for monopoly illegal and void.

341. Penalty.

342. Action to restrain and prevent.

343. Procedure; application for order.

344. Order for examination.

345. No person excused from answering.

346. Powers of referee.

§ 340. **Contracts for monopoly illegal and void.**—Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

Source.—L. 1899, ch. 690, § 1.

Reference.—Monopolies by corporations prohibited, Stock Corporation Law, § 14.

Constitutionality.—This act (L. 1899, ch. 690) does not infringe upon personal liberty without due process of law and does not come within the express or implied prohibition of the state or federal constitutions; the act does not impose non-judicial duties upon judicial officers and its constitutionality cannot be successfully attacked on that ground. *Matter of Davies* (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

Construed with Penal Law, section 580.—Sections 340 and 341 of the General Business Law, prohibiting the creation or attempt to create a monopoly, do not repeal either directly or by implication section 580 of the Penal Law forbidding a conspiracy to do any act injurious to trade. There is no repugnancy between the two statutes. *People v. Dwyer* (1914), 160 App. Div. 542, 145 N. Y. Supp. 748, *affd.* (1915), 215 N. Y. 46, 109 N. E. 103.

Continuation of former acts, proceeding against an alleged unlawful combination under the authority of this act is not too late because the combination had been formed before the proceeding was commenced and even before the statute was passed, since the act is a substantial re-enactment of the earlier statute, and according to the statutory construction law must be construed as a continuation thereof, and as it aims to prevent the consummation and maintenanc of unlaw-

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ful combinations it reaches those already formed, those which are still maintained and those in the process of consummation. *Matter of Davies* (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

The object of this article is to destroy monopolies in the manufacture, production and sale in this state of commodities in a common use, and in this respect, it is little more than a codification of the common law upon the subject and is to be construed with reference thereto. *Matter of Jackson*, 57 Misc. 1, 107 N. Y. Supp. 799 (1907); *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

What constitutes a monopoly.—The monopoly condemned by the statute need not be a complete and absolute one, excluding all competition, in complete control of the production and sale of a commodity. In the modern sense a monopoly is created where, as the result of effort to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or in a few persons or corporations acting together, that they have the power practically to control prices of a commodity and thus suppress competition. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will, enhance prices to the detriment of the public, is a legal monopoly. While a monopoly in the strict, technical and absolute sense may not be created in an article which can be indefinitely produced, it may, however, be created in a legal sense, whether the supply is restricted by nature or is susceptible of indefinite production. *People v. North River Sugar Refining Co.* (1889), 54 Hun. 355, note, 3 N. Y. Supp. 401, 2 L. R. A. 33, *affd.* (1889), 54 Hun. 354, 7 N. Y. Supp. 406, 5 L. R. A. 386, *affd.* (1890), 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843.

The term "arrangement" as used in this section has a broader meaning than either the word "contract," "agreement," or "combination." It includes various contracts, agreements, acquisition of property and rights, by purchase or merger of other corporations, and other acts whereby a monopoly is created or attempted. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

Total suppression of competition not necessary.—To vitiate contracts in restraint of trade such as this act condemns, it need not be shown that the arrangement in fact resulted or might result in a total suppression of all competition, or in a complete and absolute monopoly of the business. All that is essential is that it restrains competition and tends to deprive the public of the advantages which flow from free competition. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

Refusal to sell goods to plaintiff.—The mere fact that a defendant corporation controls ninety per cent. of the trade and has appointed a sole selling agent in this state who has refused to sell goods to the plaintiff, does not show a violation of the Anti-Monopoly Act. It is the inherent right of every person to refuse to maintain trade relations with any other person for any reason or for no reason, and what one may do of his own right, he may do through an agent. The courts of this state are powerless to compel an owner of property to sell it against his will to any particular person; and it will be presumed that control by one firm of the business of other manufacturers and producers, was lawful in the absence of an averment of an unlawful combination. *Locker v. American Tobacco Co.* (1909), 121 App. Div. 443, 106 N. Y. Supp. 115, *affd.* (1909), 195 N. Y. 565, 88 N. E. 289.

A combination of employers and employees in a building trade cannot be for the purpose of creating a monopoly "in the manufacture, production or sale in this state of any article or commodity of common use." So where a masons' builders association and brick-layers' union enter into an agreement prohibiting the sub-

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letting of interior brick work and fire-proofing, and requiring that men employed on the outside walls of a building be given preference in the performance of such inside work, such agreement is not one creating a monopoly within the inhibition of this section. General contractors cannot be said to have a monopoly when any person can be a general contractor; and members of unions cannot be said to be monopolists when any qualified brick-layer can join a union. *National Fireproofing Co. v. Mason Builders' Assn.* (1909), 169 Fed. 259.

A resolution of the New York Stock Exchange prohibiting its members from buying or selling stocks for any active member of the Consolidated Exchange, a rival organization engaged in the same business, is not illegal as in restraint of trade. If such resolution were illegal, one not a member of the Stock Exchange could not maintain an action to enjoin its enforcement. *Helm v. New York Stock Exchange* (1909), 64 Misc. 529, 118 N. Y. Supp. 591, *affd.* (1910), 138 App. Div. 96, 122 N. Y. Supp. 872.

Contracts made by other companies prior to the organization of the defendant company and thereafter assigned to the defendant company may be considered in determining the intent of the defendant to create a monopoly. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

Likewise the jury may take into consideration contracts made with other companies subsequent to the defendants' organization and assigned to it. *People v. American Ice Co. supra.*

Corporation acquiring stock in another corporation.—The provisions of section 40 of the Stock Corporation Law, authorizing the acquisition of stock in other corporations, are not affected by this act. Transactions of that nature pursuant to said section, since they do not vouchsafe to the purchasing company any feature of exclusiveness in the field of its operations and cannot confer on public service corporations powers to limit supply, either directly or by making prohibitive prices, are not within the prohibition of this section. *Matter of Consolidated Gas Co.* (1907), 56 Misc. 49, 106 N. Y. Supp. 407; *Matter of Attorney General* (1908), 124 App. Div. 401, 108 N. Y. Supp. 823; *Rafferty v. Buffalo City Gas Co.* (1899), 37 App. Div. 618, 56 N. Y. Supp. 288; *Rept. of Atty. Genl.* (1904) 560.

Such a purchase of stock, however, is violative of this act if made for the purpose of creating a monopoly in an article or commodity of common use, and destroying competition as to its supply and price. *Matter of Attorney-General* (1900), 32 Misc. 1, 66 N. Y. Supp. 129, *revd.* 55 App. Div. 245, 67 N. Y. Supp. 492; *revd.* (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

Consolidation of gas companies.—The organization of a gas company by the consolidation of six other companies effected under the provisions of chapter 367 of the Laws of 1884, and its subsequent purchase of stock of other gas and electric companies under the authority of section 40 of the Stock Corporation Law does not offend against this act because, although the power to purchase stock of other corporations conferred by section 40 of the Stock Corporation law must be exercised so as not to contravene this act, the consolidation of public lighting companies, even if effected for the purpose of preventing competition, does not create a monopoly within the meaning of the statute, for no exclusive right is thereby attained, nor can the price of gas or electricity be arbitrarily fixed by the corporation, both of these matters being within the control of the Legislature. *Matter of Attorney General* (1908), 124 App. Div. 401, 108 N. Y. Supp. 823.

The purchase of a going business, accompanied by an agreement not to engage in the same business for a limited time and within a limited district is not necessarily in and of itself a violation of the statute. Whether it is or is not a violation of the statute depends upon the accompanying circumstances of the

case. If the purchase is with the object and purpose of creating a monopoly so as to be able to control prices then it is illegal. In determining whether such agreements for the purchase of a business are with intent to create a monopoly the fact that the territory in which the seller agreed not to continue business was of much greater extent than the territory in which he was doing business and that a large number of businesses of the same kind were purchased are circumstances tending to show an intent to create a monopoly. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

A contract for the sale of a business of selling fish and its good will, limited as to time and territory and made for a valuable consideration, restraining the vendor from further prosecution of the business is not in general restraint of trade and does not tend to create a monopoly. *Booth & Co. v. Seibold* (1902), 37 Misc. 101, 74 N. Y. Supp. 776.

Hudson River blue stone.—An agreement, between the producers of nearly the whole product of a commodity known as Hudson River blue stone and of at least ninety per centum of the whole amount sold, and a company which engages to sell all the marketable stone produced by them for the next six years at prices fixed by an association composed of such producers, and to apportion the sales in specified proportions between them, no sales to be made except through the company, is void as against public policy, in that it threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced. *Cummings v. Union Blue Stone Co.* (1900), 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655.

News collecting agencies are not within the purview of the statute. *Rept. of Atty. Genl.* (1904), 531.

Sale of proprietary medicines.—An agreement between the manufacturers of proprietary medicines and an association of wholesale dealers in such articles to sell their goods at a uniform jobbing price for fixed quantities to such dealers only as would conform to the manufacturers' price list in making sales of goods, does not establish a monopoly on the part of the members of the association, where all wholesale dealers have the right to purchase goods from the manufacturers upon the same terms as the members of the association, upon undertaking to maintain the prices established by the manufacturers. *Park & Sons Co. v. Nat. Wholesale Druggists Assoc.* (1903), 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, affg. (1900), 54 App. Div. 223, 66 N. Y. Supp. 615.

Merger of street railroads is not prevented by this section for the legislature by various enactments upheld by the courts has expressly authorized the merger of such corporations under certain conditions. *Matter of Interborough Met. Co.* (1908), 125 App. Div. 804, 110 N. Y. Supp. 186. See also *Continental Securities Co. v. Interborough R. T. Co.* (1913), 207 Fed. 467.

Sale of books.—An agreement between publishers restricting the sale of books uncopyrighted as well as copyrighted, to those booksellers agreeing to sell at retail at net prices, is, so far at least as it pertains to the sale of uncopyrighted books, an unlawful restriction of trade and an attempt to interfere with the free pursuit in this state of a lawful business. *Strauss v. American Publishers' Assn.* (1904), 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, affg. (1903), 85 App. Div. 446, 83 N. Y. Supp. 271. It is also unlawful as to the sale of copyrighted books. *Straus v. Am. Publishers Assoc.* (1913), 231 U. S. 222, 58 L. ed. 192, 34 Sup. Ct. 84, revg. (1910), 199 N. Y. 548, 93 N. E. 1133.

Telegraph companies do not manufacture, produce or sell commodities within the meaning of this section. *Matter of Jackson* (1907), 57 Misc. 1, 107 N. Y. Supp.

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799. See also *Benedict v. Western Union Telegraph Co.* (1878), 9 Abb. N. C. 214.

The statute does not prevent one selling or leasing property, nor buying or leasing property to prevent competition. It is designed to prevent the owners or controllers of property entering into a combination to regulate production and maintain prices for their mutual benefit according to their respective interests. *Brooklyn Distilling Co. v. Standard Distilling Co.* (1907), 120 App. Div. 237, 105 N. Y. Supp. 264, *affd.* (1908), 193 N. Y. 551, 86 N. E. 564.

Indictment charging, in substance, that defendants organized a corporation as a medium to monopolize the sale of live and slaughtered poultry and to fix the prices thereof in certain designated sections of the city of New York, see *People v. Baff* (1917), 99 Misc. 684.

An indictment for a violation of this section of the General Business Law, after alleging that on a certain day defendants with other individuals and firms were engaged in competition with each other and others not named in the business of buying at wholesale seventy-five per cent of the live poultry bought in that part of the city of New York in which they dealt; that certain of said defendants became a domestic corporation for the pretended purposes of buying, selling and otherwise disposing of live poultry, and that said defendants became directors of and dominated the acts, agreements and business of said corporation, charged that said defendants agreed that all live poultry acquired, bought, used and kept for sale by each of them and by the other individuals and firms mentioned should be purchased by and through the corporation and that the defendants and the other individuals and firms mentioned should sell such poultry only at prices fixed and to be fixed by the said corporation and by said defendants. The indictment did not allege that defendants were in any position to influence, by persuasion or coercion, their other competitors to assent to the proposed contract, nor did it allege that defendants had any influence or control whatever over said competitors, or that the combination was ever carried out. *Held*, that the indictment was insufficient and that a demurrer thereto should be sustained. An indictment charging a violation of this section of the General Business Law must sufficiently allege either that defendants entered into a contract or arrangement by which a monopoly was created or competition restrained, or that they entered into a contract or arrangement by which a monopoly was created or competition restrained, or that they entered into a contract or arrangement whereby those results might be attained. *People v. Baff* (1917), 98 Misc. 547, 164 N. Y. Supp. 709.

Motive immaterial.—Where a defendant is charged with a violation of this section, the question of his motive, intent or good faith is immaterial. The only questions presented are whether a contract, agreement, arrangement or combination was entered into, and whether a monopoly in the manufacture, production or sale of an article or commodity in common use was or might thereby be established or maintained, or competition in the supply or price of such article was or might thereby be restrained or prevented. *People v. Morrison* (1917), 98 Misc. 555, 164 N. Y. Supp. 712.

§ 341. **Penalty.**—Every person or corporation, or any officer or agent thereof, who shall make or attempt to make or enter into any such contract, agreement, arrangement or combination, or who within this state shall do any act pursuant thereto, or in, toward or for the consummation thereof, wherever the same may have been made, is guilty of a misdemeanor, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding twenty thousand dollars, or by imprisonment for not longer

than one year, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding five thousand dollars. An indictment based on a violation of any of the provisions of this section must be found within two years after its commission. (*Amended by L. 1910, ch. 633.*)

Source.—L. 1899, ch. 690, § 2.

A person suffering special injury from an act done in furtherance of a combination entered into for the purpose of preventing competition in trade in commodities in common use has a right of action to recover the damages sustained by him. *Rourke v. Elk Drug Co.* (1902), 75 App. Div. 145, 77 N. Y. Supp. 373.

Declarations of officers and agents of the defendant corporation made in the discharge of their duties, whether verbal or written, may be considered to show whether a monopoly was intended. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

Statute of limitations.—The two year statute of limitations applies to prosecutions under this act. The conscious participation and continued act or acts in furtherance of the original illegal arrangement makes the defendant guilty, and the statute of limitations raises no bar to a conviction for acts done within the period of two years from the finding of the indictment. *People v. American Ice Co.* (1909), 120 N. Y. Supp. 443.

§ 342. Action to restrain and prevent.—The attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to restrain and prevent the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made.

Source.—L. 1899, ch. 690, § 3.

Injunctive relief can be had under this statute only at the suit of the state. *Irving v. Neal* (1913), 209 Fed. 471, 477; *Paine Lumber Co. v. Neal* (1913), 212 Fed. 259, 266; *Gill Engraving Co. v. Doerr* (1914), 214 Fed. 111, 118.

Complaint.—It is error to strike out allegations of the complaint specifying numerous contracts made by the defendant in violation of our statutes forbidding combinations in restraint of trade, as the people should be permitted to prove any violation of the law by the defendant. It seems that if the people merely allege that a defendant repeatedly violated our statutes without setting forth any specific acts, the complaint would be held insufficient on demurrer; and should the people limit their allegations to certain acts, they would be precluded from proving other specific acts at trial. Complaint examined and held that plaintiff should not be required to make it more definite and certain as to the repetition of allegations. *People v. American Ice Co.* (1910), 135 App. Div. 180, 120 N. Y. Supp. 141.

§ 343. Procedure; application for order.—Whenever the attorney-general has determined to commence an action or proceeding under this article, he may present to any justice of the supreme court, before beginning such action or proceeding, an application in writing, for an order directing the persons mentioned in the application to appear before a justice of the supreme court, or a referee designated in such order, and answer such questions as may be put to them or to any of them, and produce such

papers, documents and books concerning any alleged illegal contract, arrangement, agreement or combination in violation of this article; and it shall be the duty of the justice of the supreme court, to whom such application for the order is made, to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person is material and necessary. The provisions of the code of civil procedure, chapter nine, title three, article one, relating to the application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examinations, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made, with such preliminary injunction or stay as may appear to such justice to be proper and expedient, and shall specify the time when and place where the witnesses are required to appear, and such examination shall be held either in the city of Albany, or in the judicial district in which the witness resides, or in which the principal office within this state, of the corporation affected, is located. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him, and all must be filed in the office of the clerk of the county in which such order for examination is filed.

Source.—L. 1899, ch. 690, § 4.

The position of the Attorney-General in regard to an examination under this section, is that of an administrative, and not that of a judicial, officer, and, therefore, an alternative writ prohibiting him from proceeding with the examination will not be issued, as he cannot in this manner be prevented from performing ministerial acts. 32 Misc. 118.

Therefore a Special Term has no power to issue an alternative writ prohibiting such referee from proceeding, as the effect would be to permit one Special Term to restrain another, or to restrain a judge of the Supreme Court, a power which has been reserved to the Appellate Division alone. *Matter of Attorney-General (1900)*, 32 Misc. 1, 66 N. Y. Supp. 129, revd. (1900), 55 App. Div. 245, 67 N. Y. Supp. 492, revd. (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

The attorney general in an application for the examination of witnesses, books and papers stands in a position analogous to a person who has the right to the inspection of books and papers before the commencement of an action. *People v. American Ice Co. (1907)*, 54 Misc. 67, 105 N. Y. Supp. 650, mod. (1907), 120 App. Div. 234, 104 N. Y. Supp. 858.

Petition.—The only allegations, in addition to those alleging violations of the statute, which the Attorney-General need make in his application for the order, are that he intends to bring an action under the statute, and that he is informed and believes that the testimony of the persons mentioned in the application is material and necessary. *Matter of Attorney-General (1900)*, 32 Misc. 1, 66 N. Y. Supp. 129, revd. (1900), 55 App. Div. 245, 67 N. Y. Supp. 492, revd. (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

Discretion of justice.—The phraseology of this section that "it shall be the duty of the justice" to grant the application, and that the order "shall be granted" upon the application of the Attorney-General, does not compel the justice, to whom the application is made for the order, to grant it, and he still has discretion

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to grant or refuse it. *Matter of Davies* (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855. See also *Matter of Attorney-General* (1897), 22 App. Div. 285, 47 N. Y. Supp. 883

§ 344. **Order for examination.**—The order for such examination must be signed by the justice making it, and the service of a copy thereof, with an indorsement by the attorney-general, signed by him, to the effect that the person named therein is required to appear and be examined at the time and place, and before the justice or referee specified in such indorsement, shall be sufficient notice for the attendance of witnesses. Such indorsement may contain a clause requiring such person to produce on such examination all books, papers and documents in his possession, or under his control, relating to the subject of such examination. The order shall be served upon the person named in the indorsement aforesaid, by showing him the original order, and delivering to and leaving with him, at the same time, a copy thereof indorsed as above provided, and by paying or tendering to him the fee allowed by law to witnesses subpoenaed to attend trials of civil actions in a court of record in this state.

Source.—L. 1899, ch. 690, § 5.

Inspection of defendant's books, not limited to books of present officers; contracts of prior administration may be relevant; to show profits or unreasonableness of prices will not be allowed as being immaterial; nor will inspection of stock lists be allowed to show acquisition by defendant of stock of other corporations, as that fact will not be shown by list of stockholders. *People v. American Ice Co.* (1907), 120 App. Div. 234, 104 N. Y. Supp. 858.

Order appealable to appellate division. *People ex rel. Morse v. Nussbaum* (1900), 55 App. Div. 245, 67 N. Y. Supp. 492, *revd.* on other grounds. *In re Davies* (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

§ 345. **No person excused from answering.**—No person shall be excused from attending and testifying, or from producing any books, papers or other documents before any court, magistrate or referee, upon an investigation, proceeding or trial, pursuant to or for a violation of any of the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify, or produce evidence, documentary or otherwise. And no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial. (*Amended by L. 1910, ch. 394.*)

Source.—L. 1899, ch. 690, § 6.

Immunity of witnesses.—The provisions of this section afford a witness full and complete immunity against the consequences of his testimony. *Matter of Davies* (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, *revg.* (1900), 55 App. Div. 245, 67 N. Y. Supp. 492.

§ 346. **Powers of referee.**—A referee appointed as provided in this

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article possesses all the powers and is subject to all the duties of a referee appointed under section ten hundred and eighteen of the code of civil procedure, so far as practicable, and may punish for contempt a witness duly served as prescribed in this article for non-attendance or refusal to be sworn or to testify or to produce books, papers and documents according to the direction of the indorsement aforesaid, in the same manner, and to the same extent as a referee appointed to hear, try and determine an issue of fact or of law.

Source.—L. 1899, ch. 690, § 7.

Status of referee.—A referee, appointed under this section, is charged with the judicial duty of ruling upon the admissibility of testimony given before him, and has, upon the examination, substantially all the powers of the Supreme Court, or a judge thereof. *Matter of Attorney General* (1900), 32 Misc. 1, 66 N. Y. Supp. 129, revd. (1900), 55 App. Div. 245, 67 N. Y. Supp. 492, revd. (1901), 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855.

ARTICLE XXIII.

CONSPIRACIES TO CONTROL TRANSPORTATION.

Section 350. Conspiracies to control transportation prohibited.

351. Penalty for conspiring to control transportation.

§ 350. **Conspiracies to control transportation prohibited.**—Any corporation not organized under the laws of this state engaged in the transportation business, and transacting or conducting the said business or any part thereof in this state, or any partnership, or other association or person whatsoever, so engaged and transacting business as aforesaid, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to control the volume of transportation between this country and Europe, or to control, limit, regulate or fix the rates thereof, or who shall refuse to sell to any person, either for himself or another, on demand therefor, transportation between the United States and Europe, either eastbound or westbound, at the usual and legal rates, shall be deemed and adjudged guilty of a misdemeanor, and be subject to the other penalties hereinafter provided in this article.

Any contract or agreement in violation of any provision of this section shall be absolutely void.

Source.—L. 1899, ch. 727, §§ 1, 2.

§ 351. **Penalty for conspiring to control transportation.**—Any corporation created or organized by or under the laws of any other state or country which shall violate any provision of this article shall thereby forfeit its right and privilege thereafter, to do any business in this state, and upon proper proof thereof in any court of competent jurisdiction in this

state its rights and privileges to do business in this state shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as the agent of such foreign corporation in transacting its business in this state, has been, while acting as such agent, and in the name, behalf or interest of such corporation, violating any provision of this article shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the secretary of state, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation.

Source.—L. 1899, ch. 727, § 3.

ARTICLE XXIV.

TRADE MARKS.

Section 360. Trade marks on bottles, siphons, tins or kegs.

360-a. Definition.

361. Trade marks on other articles.

362. Unlawful use of trade marked articles.

363. Presumptive evidence of unlawful use.

364. Search warrant to discover trade marked articles unlawfully used.

365. What constitutes sale of article.

366. Trade marks heretofore filed.

367. Further provisions concerning trade marks on articles of merchandise.

§ 360. Trade marks on bottles, siphons, tins or kegs.—Any person or corporation engaged in manufacturing, bottling or selling soda waters, mineral or aerated waters, porter, ale, beer, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, white beer or other beverages or medicines, medical preparations, perfumery, oils, compounds or mixtures, in bottles, siphons, tins or kegs, with his or its name or other marks or devices branded, stamped, engraved, etched, blown, impressed or otherwise produced upon such bottles, siphons, tins or kegs, or the boxes used by him or it, may file in the office of the clerk of the county in which his or its principal place of business is situated, or if such person or corporation shall manufacture or bottle out of this state, then in any county in this state, and also in the office of the secretary of state, a description of the name, marks or devices so used by him or it, and cause such description to be printed once in each week, for three weeks successively, in a newspaper published in the county in which said notice may have been filed as aforesaid, except that in the boroughs of Manhattan and Brooklyn in the city of New York, such publications shall be made twice in each week for three weeks successively in two daily newspapers published in such boroughs, respectively, and he shall thereupon be deemed the proprietor of such name, mark or device and of every vessel or receptacle upon which it may be

branded, stamped, engraved, etched, blown, impressed or otherwise produced.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 28, and L. 1896, ch. 933, § 1.

Consolidators' note.—Trade-marks. In the original Domestic Commerce Law there was a single section (28) relating to trade-marks. L. 1896, ch. 933, passed at the same session as the Domestic Commerce Law, was an amplification of the law of trade-marks as to certain articles and treated of the same subject matter as § 28 of the Domestic Commerce Law, but was not superseded thereby. See Statutory Construction Law, § 33. The statute mentioned superseded the provisions of Domestic Commerce Law, § 28, so far as inconsistent, and has accordingly been consolidated in General Business Law. The only provision from former § 28 which has been retained is the clause at the end of § 360 reading "and he shall thereupon be deemed the proprietor of such name, mark or device and of every vessel or receptacle upon which it may be branded, stamped, engraved, etched, blown, impressed or otherwise produced." This provision was not in L. 1896, ch. 933, and being consistent with the other provisions thereof, has been preserved in Article 24. L. 1904, ch. 548, relates to trade-marks on certain articles not included in L. 1896, ch. 933, and has therefore been consolidated in this article. Because of certain differences between the provisions of these two statutes they could not be combined without a change of substance and both statutes have therefore been given at length.

References.—Offenses against trade-marks, Penal Law, § 2354. Trade-mark defined, Penal Law, § 2350. Refilling trade-marked receptacles, *Id.*, §§ 2355, 2356. Search warrant authorized, Penal Law, § 2357.

Constitutionality.—This act does not prohibit the sale by any one who has purchased, either from the manufacturer or any other person, any beverage put up by the manufacturers in bottles, marked as prescribed by the act, the act being aimed at the unlawful dealing in empty bottles as marked, after their original contents have been used. The act simply protects the manufacturer while he remains the owner of the bottle. As thus construed it is constitutional. *People v. Cannon* (1893), 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668.

The constitutionality of the first act relating to this subject (L. 1847, ch. 207) was upheld by the courts. *Mullins v. People* (1862), 24 N. Y. 399, 23 How. Pr. 289.

Object of act.—The act is aimed at the unlawful dealing in empty bottles, etc., after their original contents have been used. It simply protects the manufacturer while he remains the owner of the bottles, so long as he has not sold them or authorized any one to use or traffic in them. *People v. Cannon* (1893), 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, *affg.* (1892), 63 Hun 306, 18 N. Y. Supp. 25 (1892).

Construction.—The statute, being penal in its nature, must be construed strictly. *Prest-o-lite Co. v. American Auto Supply Co.* (1913), 181 N. Y. St. Rep. 150, 147 N. Y. Supp. 150.

The provisions of L. 1888, ch. 181, from which this section was derived, relating to issue of search warrant and the prosecution of violation, construed. *People ex rel. Fellows v. Hogan* (1890), 123 N. Y. 219, 25 N. E. 193, *affg.* 55 Hun 391 (1889), 8 N. Y. Supp. 451. These provisions have been re-enacted in the Penal Law §§ 2355-2357.

Intent need not be shown or that any person has been deceived, in order to procure injunction. *T. A. Vulcan Co. v. Myers* (1893), 139 N. Y. 364, 34 N. E. 904.

Effect of taking security for return of bottles, etc.—Where it appeared that the manufacturer took from his customers deposits as security for the return of the bottles, the same to be refunded upon their return, and kept in case they were not returned, the court held that in the absence of an agreement on the part

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of the customer to return there was a conditional sale of the bottles, that is, a sale at the election of the party receiving them, and that dealing in bottles so delivered and not returned did not render the defendant liable under the act. *People v. Cannon* (1893), 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668.

Acetylene gas dissolved in acetone is not within the protection of the statute. *Prest-o-lite Co. v. American Auto Supply Co.* (1913), 181 N. Y. St. Rep. 150, 147 N. Y. Supp. 150.

Section cited.—*Clement v. Liquors Seized, etc.* (1909), 62 Misc. 27, 115 N. Y. Supp. 162.

§ 360-a. **Definition.**—The term “syphon,” as used in this article, shall mean and include a syphon head, and all the provisions of this article shall apply to a syphon head, although the same may be detached from the bottle, in the same manner and with the same effect as if not so detached. (*Added by L. 1916, ch. 389.*)

§ 361. **Trade marks on other articles.**—Any person or corporation engaged in manufacturing, freezing, preserving or selling ice cream, confectionery, charlotte russe, cakes and jellies, with his or its name, or other marks or devices branded, stamped, engraved, stenciled, blown, impressed or otherwise produced upon the freezers, cans, blocks, moulds, trays, bricks, pans, tanks, pails, kegs, tubs, refrigerators, boxes, spoons, cutlery, glass, china, chairs, tables or signs used by him or it, may file in the office of the clerk of the county in which his or its principal place of business is located, or if such person or corporation shall manufacture or sell out of this state, then in any county in this state, and also in the office of the secretary of state, a description of the name, marks or devices, so used by him or it, and cause such description to be printed once in each week, for three weeks successively, in a newspaper published in the county in which said notice may have been filed, as aforesaid, except that in the boroughs of Manhattan and Brooklyn in the city of New York, such publication shall be made twice in each week, for three weeks successively, in two daily newspapers published in said boroughs respectively.

Source.—L. 1904, ch. 548, § 1.

References.—See notes to § 360.

§ 362. **Unlawful use of trade marked articles.**—1. It is hereby declared to be unlawful for any person or corporation to fill with soda waters, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, beer, small beer, lager beer, weiss beer, white beer, or other beverages, or with medicine, medical preparations, perfumery, oils, compounds or mixtures, any bottle, box, siphon, tin or keg so marked or distinguished as aforesaid, with or by any name, mark or device, of which a description shall have been filed and published, as provided in section three hundred and sixty, or to deface, erase, obliterate, cover up or otherwise remove or conceal, any such name, mark or device thereon, or to sell, buy, give, take or otherwise dispose of or traffic in the same without the written consent of, or unless the same shall have been purchased from the person

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or corporation whose mark or device shall be or shall have been in or upon the bottle, box, siphon, tin or keg so filled, trafficked in, used or handled as aforesaid. Any person or corporation offending against the provisions of this subdivision shall be deemed guilty of a misdemeanor, and shall be punished for the first offense by imprisonment not less than ten days nor more than one year, or by a fine of fifty cents for each and every such bottle, box, siphon, tin or keg so filled, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment, and for each subsequent offense by imprisonment not less than twenty days nor more than one year, or by a fine of not less than one dollar, nor more than five dollars, for each and every bottle, box, siphon, tin or keg so filled, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment, in the discretion of the magistrate before whom the offense shall be tried.

2. It is hereby declared to be unlawful for any person or corporation to make use of, for similar or other purposes, any such freezers, cans, blocks, moulds, trays, bricks, pans, tanks, pails, kegs, tubs, refrigerators, boxes, spoons, cutlery, glass, china, chairs, tables or signs so marked or distinguished, as aforesaid, with or by any name, mark or device, of which a description shall have been filed and published, as provided in section three hundred and sixty-one, or to deface, erase, obliterate, cover up or otherwise remove or conceal, any such name, mark or device thereon, or to sell, buy, give, take or otherwise dispose of or traffic in the same without the written consent of, or unless the same shall have been purchased from the person or corporation whose mark or device shall be or shall have been in or upon the said freezers, cans, blocks, moulds, trays, bricks, pans, tanks, pails, kegs, tubs, refrigerators, boxes, spoons, cutlery, glass, china, chairs, tables or signs trafficked in, used or handled as aforesaid. Any person or corporation offending against the provision of this subdivision, shall be deemed guilty of a misdemeanor, and shall be punished for the first offense by imprisonment not less than ten days nor more than one year, or by a fine of three dollars for each and every such article named and described in section three hundred and sixty-one, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment, and for each subsequent offense by imprisonment not less than twenty days nor more than one year, or by a fine of not less than five dollars nor more than ten dollars for each and every such article named and described in said section, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment, in the discretion of the magistrate before whom the offense shall be tried.

Source.—Subd. 1 from L. 1896, ch. 933, § 2. Subd. 2 from L. 1904, ch. 548, § 2.
Collection of bottles for return to owner.—This section does not apply to a person or corporation whose business it is to collect bottles, kegs, etc. from various public dumping grounds, assort them, and return them to the owner, and who refuses to deliver certain bottles to an owner because such owner refuses to pay for the same as per agreement between the parties. Long Island Bottlers' Union v. Seitz (1905), 180 N. Y. 243, 73 N. E. 20.

Evidence.—The plaintiff, in an action to recover a penalty under this section, must prove that the defendants were in possession of the plaintiff's bottles without his consent. *Partridge v. Doty* (1910), 121 N. Y. Supp. 586.

§ 363. Presumptive evidence of unlawful use.—1. The use by any person other than the person or corporation whose device, name or mark shall be or shall have been upon the same without such written consent or purchase as aforesaid, of any such marked or distinguished bottle, box, siphon, tin or keg, a description of the name, mark or device whereon shall have been filed and published, as herein provided, for the sale therein of soda waters, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, beer, small beer, lager beer, weiss beer, white beer or other beverages, or any article of merchandise, medicines, medical preparation, perfumery, oils, compounds, mixtures or preparations, or for the furnishing of such or similar beverages to customers or the buying, selling, using, disposing of or trafficking in any such bottles, boxes, siphons, tins or kegs by any person other than said persons or corporations having a name, mark or device thereon of such owner without such written consent, or the having by any junk dealer or dealers in second-hand articles, possession of any such bottles, boxes, siphons, tins or kegs, a description of the marks, names or devices, whereon shall have been so filed and published as aforesaid, without such written consent, shall, and is hereby declared, to be presumptive evidence of the said unlawful use or purchase of and traffic in such bottles, boxes, siphons, tins or kegs.

2. The use by any person other than the person or corporation whose device, name or mark shall be or shall have been upon the same without such written consent or purchase as aforesaid, of any such article named and described in section three hundred and sixty-one, a description of the name, mark or device whereon shall have been filed and published as herein provided, for similar or other purposes, or the buying, selling, using, disposing of, or trafficking in any such article named and described in said section, by any person other than said persons or corporations having a name, mark or device thereon of such owner, without such written consent, or the having by any junk dealer or dealers in second-hand articles, possession of any such article, named and described in said section, a description of the marks, names or devices, whereon shall have been so filed and published as aforesaid, without such written consent, shall, and is hereby declared to be presumptive evidence of the said unlawful use or purchase of and traffic in such freezers, cans, blocks, moulds, trays, bricks, pans, tanks, pails, kegs, tubs, refrigerators, boxes, spoons, cutlery, glass, china, chairs, tables or signs.

Source.—Subd. 1 from L. 1896, ch. 933, § 3. Subd. 2 from L. 1904, ch. 548, § 3.

Constitutionality.—The provision of this section declaring the possession by a junk dealer, or dealer in second-hand articles, of bottles or kegs marked as prescribed by the act shall be presumptive evidence of the unlawful use, purchase and traffic therein is constitutional. *People v. Cannon* (1893), 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668.

Possession of a bottle or syphon by person other than a junk dealer or a second hand dealer is not presumptive evidence of a violation of the law; in such cases use must be shown. *People v. Sommer* (1907), 55 Misc. 55, 106 N. Y. Supp. 190.

§ 364. Search warrant to discover trade marked articles unlawfully used.—1. Whenever any person or corporation mentioned in section three hundred and sixty or his or its agent shall make oath before any magistrate that he or it has reason to believe, and does believe, that any of his or its bottles, boxes, siphons, tins or kegs, a description of the names, marks or devices whereon has been so filed and published as aforesaid, are being unlawfully used or filled, or had, by any person or corporation manufacturing or selling soda, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, small beer, lager beer, weiss beer, white beer or other beverages or medicine, medical preparations, perfumery, oils, compounds or mixtures, or that any junk dealer or dealer in second-hand articles, vendor of bottles, or any other person or corporation has any such bottles, boxes, siphons, tins or kegs in his or its possession or secreted in any place, the said magistrate must thereupon issue a search warrant to discover and obtain the same, and may also cause to be brought before him the person in whose possession such bottles, boxes, siphons, tins or kegs may be found, and shall then inquire into the circumstances of such possession, and if such magistrate finds that such person has been guilty of a violation of subdivision one of section three hundred and sixty-two, he must impose the punishment herein prescribed, and he shall also award possession of the property taken upon such warrant to the owner thereof.

2. Whenever any person or corporation mentioned in section three hundred and sixty-one, or his or its agent, shall make oath before any magistrate, that he or it has reason to believe, and does believe, that any of his or its freezers, cans, blocks, moulds, trays, bricks, pans, tanks, pails, kegs, tubs, refrigerators, boxes, spoons, cutlery, glass, china, chairs, tables or signs, a description of the names, marks or devices whereon has been so filed and published as aforesaid, are being unlawfully used for similar or other purposes, or that any junk dealer or dealers in second-hand articles, or any other person or corporation, has any such article as named and described herein, in his or its possession, or secreted in any place, the said magistrate must thereupon issue a search warrant to discover and obtain the same, and may also cause to be brought before him the person in whose possession such articles as named and described herein may be found, and shall then inquire into the circumstances of such possession, and if such magistrate finds that such person has been guilty of a violation of subdivision two of section three hundred and sixty-two, he must impose the punishment herein prescribed, and he shall also award possession of the property taken upon such warrant to the owner thereof.

Source.—Subd. 1 from L. 1896, ch. 933, § 4. Subd. 2 from L. 1904, ch. 548, § 4.

Reference.—See notes to § 360.

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The mandatory requirements of this section apply only where the magistrate takes jurisdiction under it, and do not prevent him from sending the case to a Court of Special Sessions for trial as a misdemeanor under the Code of Criminal Procedure. *People ex. rel. Fellows v. Hogan* (1890), 123 N. Y. 219, 25 N. E. 193.

§ 365. What constitutes sale of article.—The requiring, taking or accepting of any deposit, for any purpose, upon any bottle, siphon, tin, keg, freezer, can, block, mould, tray, brick, pan, tank, pail, keg, tub, refrigerator, box, spoon, cutlery, glass, china, chair, table or sign, shall not be deemed or constitute a sale of such property, either optional or otherwise, in any proceeding under this article.

Source.—L. 1896, ch. 933, § 5; L. 1904, ch. 548, § 5.

§ 366. Trade marks heretofore filed.—Any person or corporation that has heretofore filed in the offices mentioned in sections three hundred and sixty or three hundred and sixty-one, a description of the name or names, marks or devices upon his or its property, therein mentioned, and has caused the same to be published according to the law existing at the time of such filing and publication, shall not be required to again file and publish such description to be entitled to the benefits of this article.

Source.—L. 1896, ch. 933, § 6; L. 1904, ch. 548, § 6.

The purpose of this section is to give relief to owners of trade-marks which by successive amendments were added to the protected list, but who had prior to such amendments filed their trade-marks without at the time having the benefit of existing laws and is applicable only to the kinds of merchandise mentioned in sections 360 and 361. *Prest-o-lite Co. v. American Auto Supply Co.* (1913), 181 N. Y. St. Rep. 150, 147 N. Y. Supp. 150.

§ 367. Further provisions concerning trade-marks on articles of merchandise.—Any person or corporation engaged in manufacturing, packing, bottling or selling any article of merchandise, put up by him for sale in any bottle, vessel, box, package or other receptacle with his name, trade-mark, label, or private mark appearing in any way thereon, or branded, stamped, affixed, blown or impressed thereon, may file in the office of the secretary of state, and in the office of the county clerk of the county where the same is manufactured, packed, bottled or put up for sale, or where his, its or their principal place of business is situated, or if such person or corporation shall manufacture, pack or bottle outside of this state, then in any county of this state, and also in the office of the secretary of state, a description, specimen or facsimile of the name, trade-mark, label or other private mark so appearing thereon or so branded, stamped, affixed, blown, impressed or otherwise marked thereupon, and he shall thereupon be deemed the proprietor of such name, trade-mark, label or other private mark. The secretary of state shall deliver to such person or corporation so filing the same, a certificate under his seal of the record of such label, trade-mark or other private mark. Any person or corporation so filing said description, specimen or facsimile may publish the same once a week for at least three weeks successively in a newspaper published in said

county, except in New York and Kings counties, where such publication shall be for the same length of time daily in two newspapers therein. Such a certificate granted by the secretary of state under this act and proof of publication as aforesaid shall be prima facie evidence of the ownership and use of the trade-mark and label by the persons therein named, in any actions under this statute. Such certificate shall be prima facie evidence of the ownership and use of any label or trade-mark therein described by the persons therein named in any prosecution or action under any of the statutes of this state, where proof of such ownership and use is necessary, and in any action or proceeding brought for the purpose of recovering damages for the violation of said trade-mark or of preventing infringement thereof. This statute, however, shall not be construed as preventing the proof of any such label or trade-mark and the use thereof in any other lawful manner in use prior to the passage of this act. The secretary of state shall not record, register, or file any label, trade-mark or other private mark identical with or so similar to any other label, trade-mark or other private mark theretofore filed or registered as above provided as would be calculated to deceive, unless it shall be proven to his satisfaction that the person or corporation lastly applying for the registry of such label, trade-mark or other private mark shall be entitled thereto, and the rightful owner thereof by prior adoption; in which case the date of the adoption shall determine the ownership and shall be proven by affidavits of persons conversant with such dates. In case the secretary of state becomes satisfied, after hearing the said affidavits, that the person or corporation last applying for registry is entitled by priority of adoption to register such label, trade-mark or other private mark, he shall revoke the first registry thereof and re-register the same in the name of said persons last applying therefor. The supreme court may also, in an action brought for that purpose by any person aggrieved thereby against any person who has already filed or registered any such label, trade-mark or other private mark, direct the revocation of any such registration where it shall determine that the person who has already registered the same is not the rightful owner of any such label, trade-mark or other private mark. No person other than such proprietor of such label, trade-mark or other private mark which has been filed in the office of the secretary of state and in the office of the county clerk, as aforesaid, shall sell, keep or offer for sale in, from, or out of, or fill, place or put into, any vessel, box, package, bottle or receptacle on which any such names, labels or marks in any manner appear, and while so branded, stamped, labeled, blown, impressed or marked, any article or substance other than the original contents placed therein by the proprietor of the label, trade-mark or other private marks thereon, or sell, keep or offer for sale any article or substance in, from or out of, or fill, or place or put any article or substance into any vessel, box, package, bottle or receptacle on which said label and trade-mark in any manner appears or which shall bear or have branded,

stamped, labeled, blown, impressed or otherwise marked thereon, any imitation or counterfeit of any such label, trade-mark or other private mark so filed in the office of the secretary of state and county clerk as aforesaid. No person other than such proprietor in such cases where filing and publication is made as aforesaid, shall remove, deface or obliterate any device, brand, stamp, mark, name, trade-mark or other private marks impressed, stamped or blown into the substance of which any such vessel or receptacle is composed, without the written permission of such proprietor or unless there has been a sale to such person of such vessel or receptacle exclusive of the contents thereof by such proprietor. No person other than such proprietor shall, without his permission, use, traffic in, purchase, sell, dispose of, convert, mutilate, destroy or wilfully or unreasonably refuse to return or deliver to such proprietor on demand, any such vessel or receptacle belonging to such proprietor, which is branded, stamped, or marked by having any such registered design, device, name or mark blown or impressed into the substance of which the vessel or receptacle is composed or sell or dispose of any such vessel or receptacle without obliterating or defacing such label, trade-mark or other private mark if such obliterating or defacing can be done without substantial injury to the vessel or receptacle on which it appears or to which it is affixed providing filing and publication has been made as aforesaid. Nothing herein contained shall be construed as preventing the traffic in any bottles or other receptacles without contents, with or without obliteration or defacement of the trade-mark upon it, when such trade-mark can be obliterated or defaced without substantial injury to the bottle or receptacle, the intention of this section being to protect the owners of trade-marks and labels against imitation and refilling of all packages and receptacles while bearing such trade-marks. Each act of refilling, each sale, each imitation, each counterfeit and each offering for sale shall be construed as constituting a separate and distinct violation of this act. Any person violating any provisions of this section shall forfeit to such proprietor one hundred dollars for each such violation. Written permission of such proprietor to do the specific act complained of shall be a complete defense to any action therefor under this section. Nothing in this act shall prevent, * lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if this act had not been passed, and nothing herein contained shall prevent or avoid or defeat any prosecution under any of the existing penal or other statutes of this state. It is not intended hereby to repeal any of the existing penal or civil statutes or remedies relating to trade-marks, labels, bottles or packages. (*Added by L. 1909, ch. 475.*)

Object of act.—It seems, that the Legislature, by this section has not attempted to confer trademark rights, but merely to more effectively regulate existing common law trade mark rights and to afford an additional remedy for a viola-

* So in original.

L. 1909, ch. 25.

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tion thereof. *Prest-O-Lite Co. v. Ray* (1914), 162 App. Div. 62, 147 N. Y. Supp. 138.

Construction.—As this is a penal statute it must be strictly construed and the plaintiff must show that he has complied with each and every requirement thereof in order to claim its protection and enable him to recover the penalty therein provided. *Haslinghin's v. Hencken, Haaren & Co.* (1913), 177 N. Y. St. Rep. 1094, 143 N. Y. Supp. 1094.

Refilling bottles bearing trade-mark; action to recover penalty; pleading.—In an action to recover a penalty for the violation prescribed by this section for filling any bottle of the kind described therein with, or selling or offering to sell therefrom, any article or substance other than the original contents, the complaint need not allege a publication of the description, specimen or *facsimile* of the trade-mark or label or other private mark as provided in said section. *Jameson & Son v. Reilly* (1915), 90 Misc. 318, 153 N. Y. Supp. 225.

Section is not retroactive.—*Prest-o-lite Co. v. American Auto Supply Co.* (1913), 181 N. Y. St. Rep. 150, 147 N. Y. Supp. 150.

Generic terms not proper subject for trade-mark. *Koehler v. Sanders* (1890), 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576.

A licensee, like the owner of a patent, loses with the expiration of the patent his exclusive right to the use as a trade mark of a name which he applied to the patented article and permitted it to become known by during the life of the patent. Hence a licensee who, having used the name *Prest-O-Lite* both as a generic name and as a trade-mark, registers the same under this section after the expiration of the patent, is not entitled to recover a penalty under the provisions of this section. *Prest-O-Lite Co. v. Ray* (1914), 162 App. Div. 62, 147 N. Y. Supp. 138.

Descriptive term to be prohibited must give accurate and distinct knowledge of article. *Keasbey v. Brooklyn Chemical Works* (1894), 142 N. Y. 467, 37 N. E. 40 Am. St. Rep. 623.

Fanciful names are proper trade-marks, if not generic or descriptive of the article, its qualities, ingredients, etc. *Waterman v. Shipman* (1891), 130 N. Y. 301, 29 N. E. 111.

Packages of peculiar form and color as trade-mark. *Fischer v. Blank* (1893), 138 N. Y. 244, 33 N. E. 1040.

Imitation of wrapper.—An action cannot be maintained to restrain, as an infringement of a trade mark, the use by another of wrappers or forms of packages similar to those used by the plaintiff, where it appears that the brands, marks and names displayed upon each are amply sufficient to distinguish them in the general market and that nothing has been imitated which could legally be appropriated as a trademark. *Brown v. Doscher* (1895), 147 N. Y. 647, 42 N. E. 268.

Publication of trademark.—In New York county the trademark must be published daily in two newspapers and therefore proof that the trademark was published for the required period in one newspaper is insufficient. *Haslinghin's v. Hencken, Haaren & Co.* (1913), 177 N. Y. St. Rep. 1094, 143 N. Y. Supp. 1094.

"Prest-O-Lite."—Company owning said name held to have a trade mark therein which may be registered and protected under this section. *Prest-O-Lite Co. v. Ray* (1917), 220 N. Y. 522, 116 N. E. 350, revg. (1914), 162 App. Div. 62, 147 N. Y. Supp. 138.

ARTICLE XXV.

INTEREST AND USURY.

- Section 370. Rate of interest.
- 371. Usury forbidden.
 - 372. Recovery of excess.
 - 373. Usurious contracts void.
 - 374. Corporations prohibited from interposing defense of usury.
 - 375. Transfer of cause of action for usury.
 - 376. Return of excess a bar to further penalties.
 - 377. Borrower bringing an action need not offer to repay.
 - 378. How interest calculated.
 - 379. Interest permitted on advances on collateral security.
 - 380. Brokerage on loans.
 - 381. Recovery of excess.
 - 382. Restitution a bar to further penalties.

§ 370. **Rate of interest.**—The rate of interest upon the loan or forbearance of any money, goods or things in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time.

Source.—R. S., pt. 2, ch. 4, tit. 3, § 1, as amended by L. 1879, ch. 538, § 1.

Consolidators' note.—The words "except as otherwise provided by law" have been inserted to avoid conflict with other provisions of this chapter relating to interest.

Law of place where contract is made, as to rate of interest, to govern. *Fanning v. Consequa* (1820), 17 Johns. 511, 8 Am. Dec. 442; *Cartwright v. Greene* (1866), 47 Barb. 9; *Berrien v. Wright* (1857), 26 Barb. 208; *Cope v. Wheeler* (1869), 41 N. Y. 303; *Davis v. Garr* (1851), 6 N. Y. 124; *Dickinson v. Edwards* (1879), 77 N. Y. 573; *Wayne Co. Sav. Bk. v. Low* (1880), 81 N. Y. 566; *Clayes v. Hooker* (1875), 4 Hun 231; *Thorn v. Alvord*, 32 Misc. 456, 66 N. Y. Supp. 587 (1900), *affd.* (1900), 54 App. Div. 638, 67 N. Y. Supp. 1147; *Troy Carriage Co. v. Simson*, 15 Misc. 424, 37 N. Y. Supp. 846 (1896), *affd.* (1896), 12 App. Div. 626, 43 N. Y. Supp. 1166; *Manhattan Life Ins. Co. v. Johnson*, 115 App. Div. 429, 101 N. Y. Supp. 65 (1906), *affd.* (1907), 188 N. Y. 108, 80 N. E. 658.

State law has no extraterritorial effect. *Western Trans. Co. v. Kilderhouse* (1882), 87 N. Y. 430.

A corporation created by a statute of New York can contract for a rate of interest higher than the legal rate in New York but within the limit allowed in another state where the contract was made. *U. S. Mortgage Co. v. Sperry* (1891), 138 U. S. 313, 34 L. Ed. 969, 11 Sup. Ct. 321.

Prima facie the place of payment of a note is the place of performance; however a different intent of the parties may be inferred from the fact that the rate of interest mentioned in the contract was legal at the place of making but excessive at the place of payment; so held in the case of a note made in Oregon with interest at 8 per cent., but payable in New York. *New England Mortgage Security Co. v. Vader* (1886), 28 Fed. 265.

The rate of interest on a judgment obtained prior to the passage of the act is thereafter reduced to conform to the new rate; the duty to pay interest on a judgment is one created by statute and not by agreement of the parties, that is upon a contract, and hence the change of rate involves no impairment of the obligation of contract; nor is the judgment creditor deprived of his property without

due process of law. *Morley v. L. S. & M. S. Ry. Co.* (1892), 146 U. S. 162, 36 L. Ed. 925, 13 Sup. Ct. 54, affg. *O'Brien v. Young* (1884), 95 N. Y. 428; *Prouty v. L. S. & M. S. Ry. Co.* (1884), 95 N. Y. 667.

Rate after maturity of contract.—By the decided weight of authority, where one contracts to pay a principal sum at a future date with interest, the interest prior to the maturity is payable by virtue of the contract, and thereafter as damages for breach of the contract. After the maturity of such a contract the interest is to be computed as damages according to the rate prescribed by the law, and not according to that prescribed in the contract if that be more or less. *O'Brien v. Young* (1884), 95 N. Y. 428; *Hamilton v. Van Rensselaer* (1871), 43 N. Y. 244. *Ferris v. Hard* (1892), 135 N. Y. 365, 32 N. E. 129; *Pryor v. City of Buffalo* (1909), 197 N. Y. 123, 90 N. E. 423; *Sands v. Gillerman* (1913), 159 App. Div. 37, 144 N. Y. Supp. 337; *Savage v. Beecher* (1912), 139 N. Y. Supp. 173; *Zeller v. Leiter* (1906), 114 App. Div. 148, 155, 99 N. Y. Supp. 624, revd. on other grounds (1907), 189 N. Y. 361, 82 N. E. 158. See also *Genet v. Kissam* (1886), 53 N. Y. Super (21 J. & S.) 43. Contra, *Elmira Iron and Steel Rolling Mill Co. v. City of Elmira* (1893), 5 Misc. 194, 25 N. Y. Supp. 657; *Andrews v. Keeler* (1879), 19 Hun 87; *Sullivan v. Fosdick* (1877), 10 Hun 173.

See also *Patteson v. Graham* (1888), 14 Daly 497, 1 N. Y. Supp. 2.

As interest after a mortgage debt becomes due can only be recovered as damages at the rate prescribed by law, the plaintiff in a foreclosure action begun soon after this act went into effect was held to be entitled to seven per cent on all sums unpaid up to the time the legal rate was reduced to six per cent, and from that time at that rate. *Ferris v. Hard* (1892), 135 N. Y. 354, 32 N. E. 129.

But when the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal or until the contract is merged in a judgment. *O'Brien v. Young* (1884), 95 N. Y. 428, 47 Am. Rep. 64; *The City Real Estate Co. v. MacFarland* (1910), 67 Misc. 286, 122 N. Y. Supp. 477.

Thus where a mortgage for one year provided for interest at the rate of seven per cent., the then legal rate, until paid it was held that such rate continued until the mortgage was merged in a judgment even though in the meantime the enactment of this section had changed the legal rate to six per cent. *Wilcox v. Van Voorhis* (1891), 58 Hun 575, 12 N. Y. Supp. 617.

When a mortgage, executed before the passage of this act, stipulated that the rate of interest should be seven per cent. until paid it was held that after entering judgment of foreclosure the mortgages were merged therein and thereafter the plaintiff was entitled to interest not by virtue of the mortgage, but of the judgment and so the interest should be at the legal rate, although six per cent. *Taylor v. Wing* (1881), 84 N. Y. 471.

Foreign judgment.—In an action on a foreign judgment for a certain sum with interest thereon at the legal rate in that state it was held that the plaintiff was entitled to recover, as damages, interest upon the judgment at the legal rate in this state and not at the rate specified in the foreign judgment. *Wells Fargo & Co. v. Davis* (1887), 105 N. Y. 670, 12 N. E. 42.

Interest as damages.—When interest is allowed, not by virtue of any contract to pay it, but simply as damages because of default in the discharge of an obligation the legal rate must govern. Thus, in an action to require the defendant to declare and pay dividends on certain preferred and guaranteed stock, it appeared that the dividends were due and payable prior to Jan. 1, 1880, when the act fixing the rate of interest at six per cent. went into effect, it was held that the plaintiff was entitled to interest at seven per cent. up to that date, and six per cent. thereafter. *Sanders v. Lake Shore & Michigan Southern Ry. Co.* (1883), 94 N. Y. 641.

Evidence as to meaning of term "legal interest."—Where a contract specifies for "interest at the legal rate" evidence that the parties meant a different rate than six per cent. is incompetent. *Levy v. Shellsey* (1900), 30 Misc. 789, 63 N. Y. Supp. 150.

Interest accrued before change of rate.—In computing interest upon a balance for moneys loaned before the passage of this act it has been held that seven per cent. should be the rate up to Jan. 1, 1880, the date the act went into effect, and six per cent. thereafter. *Reese v. Ruthrford* (1882), 90 N. S. 644.

Interest on judgment.—Where a statute gives interest on a judgment for causing death by negligence the rate of interest is the legal rate at the time the judgment was rendered. *Salter v. Utica & Black River R. R. Co.* (1881), 86 N. Y. 401.

Assignment as security for loan.—Assignments, transfers and a mortgage executed by a remainderman of his interest under a will and in a trust estate to an insurance company as security for a loan examined, and held, to be usurious and void and that they should be cancelled and that said company has no valid or enforceable claim by reason thereof. *Brown v. Robinson* (1916), 173 App. Div. 583, 160 N. Y. Supp. 287.

§ 371. **Usury forbidden.**—No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.

Source.—R. S., pt. 2, ch. 4, tit. 3, § 2.

References.—Usury, a misdemeanor, Penal Code, § 2400. Interest chargeable by banks, Banking Law, §§ 114, 115; by trust companies, Id. §§ 200, 201; by personal loan companies, Id. § 345; by personal loan brokers, Id. § 368. Rate of interest chargeable by pawnbrokers, General Business Law, § 46.

History of usury laws reviewed. See *Dunham v. Gould* (1819), 16 Johns. 367, 8 Am. Dec. 323; *Livingston v. Harris* (1833), 11 Wend. 329; *Henry v. Bank of Salina* (1843), 5 Hill, 523, 527-537; *Curtis v. Teller* (1913), 157 App. Div. 804, 143 N. Y. Supp. 188, *affd.* (1916), 217 N. Y. 649, 112 N. E. 1056.

Usury must be founded upon a loan or forbearance of money, and if neither of these elements exists, there can be no usury, however unconscionable the contract may be. *Orviss v. Curtiss* (1899), 157 N. Y. 657, 52 N. E. 690.

Application to private bankers.—The statutes relating to usury do not apply to discounts or loans made by private bankers. *Matter of Thornburgh* (1911), 72 Misc. 619, 132 N. Y. Supp. 268. *In re Samuel Wilde's Sons* (1904), 133 Fed. 562.

What law governs.—The question whether a contract is void for usury is to be determined by the law of the place where made, even though the contract is usurious by the law of the place where the loan is payable. *Shelden v. Haxtun* (1883), 91 N. Y. 124; *Whitehead v. Heidenheimer* (1901), 57 App. Div. 590, 68 N. Y. Supp. 704; *Jacks v. Nichols* (1851), 5 N. Y. 178. Compare *Troy Carriage Co. v. Simson* (1895), 15 Misc. 424, 37 N. Y. Supp. 846; *affd.* (1896), 12 App. Div. 626, 43 N. Y. Supp. 1166. If a loan is not usurious in the place where it is made the fact that in the place where it is payable the rate of interest charged is above the legal rate does not affect the validity of the contract. *Wayne County Savings Bank v. Low* (1880), 81 N. Y. 566; *Thorn v. Alvord* (1900), 32 Misc. 456, 66 N. Y. Supp. 587, *affd.* (1900), 54 App. Div. 638, 67 N. Y. Supp. 1147.

A State may limit the extent to which it will permit its citizens to be imposed upon in the matter of interest, but if its citizens will, either personally or through agents, go outside the State and obtain loans at excessive interest, it is not the duty of the courts to relieve them from their liability. Thus a resident of this State may authorize an agent in the State of Maine, where there is no limit upon

the rate of interest to be charged on loans, to execute a note in his name in that State and the note so made is a valid obligation, although, if executed in this State, it would be void for usury. *Thompson v. Erie Railroad Co.* (1911), 147 App. Div. 8, 131 N. Y. Supp. 627, *revd.* on other grounds in (1912), 207 N. Y. 171, 100 N. E. 791.

Promissory notes signed in one state but sent to another state to be there negotiated in order to pay a subscription to the stock of a corporation have their inception in the latter state and the question of usury is to be determined by the law of that state. *Smith v. Dixon* (1912), 150 App. Div. 571, 134 N. Y. Supp. 1097.

Where a promissory note is made in this State, by a resident thereof, bearing date here, by its terms payable at some place in the State, with no rate of interest specified, and no intention of the maker existing that it will be taken elsewhere for discount, if it is first negotiated in another State, at a rate of interest lawful there, but greater than that allowed by the usury laws of this State, it is invalid. *Dickinson v. Edwards* (1879), 77 N. Y. 573; see also *Clayes v. Hooker* (1875), 4 Hun 231.

A mortgage upon lands in this state given to secure the payment of promissory notes executed and payable in a foreign state, is enforceable, although tainted with usury under the laws of this state if valid under the laws of the state where the transaction took place. *Manhattan Life Insurance Co. v. Johnson* (1907), 188 N. Y. 108, 80 N. E. 658, 9 L. R. A. (N. S.) 1142, *affg.* (1906), 115 App. Div. 429, 101 N. Y. Supp. 65.

Knowledge and intent, when essential elements See *Powell v. Jones* (1864), 44 Barb. 521; *Porter v. Mount* (1865), 45 Barb. 422; *Bank of Salina v. Alvord* (1865), 31 N. Y. 473; *Woodruff v. Hurson* (1860), 32 Barb. 557; *Hall v. Earnest* (1861), 36 Barb. 585; *Schoop v. Clark* (1864), 4 Abb. Ct. App. Dec. 235; *Smith v. Paton* (1864), 31 N. Y. 66; *Eastman v. Shaw* (1875), 65 N. Y. 522; *Bliven v. Lydecker* (1889), 55 Hun 171, 7 N. Y. Supp. 867, *revd.* (1891), 130 N. Y. 102, 28 N. E. 625; *Booth v. Swezey* (1853), 8 N. Y. 276; *Fiedler v. Darrin* (1872), 50 N. Y. 437.

There must be a mutual agreement between the parties. *Morton v. Thurber* (1831), 35 N. Y. 550; *Gray v. Green* (1879), 77 N. Y. 615; *People v. Hubbard* (1894), 10 Misc. 104, 31 N. Y. Supp. 114.

Usurious contracts, what constitutes. See *Merrills v. Law* (1828), 9 Cow. 65; *revd.* (1829), 6 Wend. 268; *Pomeroy v. Ainsworth* (1856), 22 Barb. 118; *Crane v. Price* (1866), 35 N. Y. 494; *Brackett v. Barney* (1862), 28 N. Y. 333; *Righter v. Stall* (1846), 3 Sandf. ch. 608; *Bull v. Rice* (1851), 5 N. Y. 315; *Spencer v. Tilden* (1825), 5 Cow. 144; *Brennan v. Glennon* (1899), 44 App. Div. 107, 60 N. Y. Supp. 643; *Brooks v. Avery* (1850), 4 N. Y. 225; *Thomas v. Fish* (1842), 9 Paige 478; *Fiedler v. Darlin* (1870), 59 Barb. 651, *revd.* (1872), 50 N. Y. 437; *Corning v. Pond* (1883), 29 Hun 129; *Maas v. Chatfield* (1882), 90 N. Y. 303; *Sickles v. Flanagan* (1879), 79 N. Y. 224; *White v. Turner* (1874), 1 Hun 623, 4 T. & C. 693; *Fellows v. Longyor* (1883), 91 N. Y. 324; *Brooks v. Avery* (1850), 4 N. Y. 225; *Jacks v. Nichols* (1851), 5 N. Y. 178; *Schermerhorn v. Talman* (1856), 14 N. Y. 93; *Wyeth v. Braniff* (1881), 84 N. Y. 627; *New York Life Insurance & Trust Co. v. Beebe* (1852), 7 N. Y. 364; *Smith v. Marvin* (1863), 27 N. Y. 137; *Stockwell v. Holmes* (1865), 33 N. Y. 53; *Beals v. Benjamin* (1865), 33 N. Y. 61; *Newell v. Doty* (1865), 33 N. Y. 83; *Rosa v. Butterfield* (1865), 33 N. Y. 665; *Knickerbocker Life Ins. Co. v. Nelson* (1879), 78 N. Y. 137; *Birdsall v. Patterson* (1872), 51 N. Y. 43; *Payne v. Freer* (1883), 91 N. Y. 43; *Scheidig v. Bemis* (1890), 58 Hun 606 *mem.*, 12 N. Y. Supp. 47; *Terwilliger v. Beecher* (1890), 34 N. Y. St. Rep. 380, 11 N. Y. Supp. 834; *Phillips v. Mason* (1893), 21 N. Y. Supp. 842, 66 Hun 580; *Milliken v. Golden*

(1893), 73 Hun 212, 25 N. Y. Supp. 885; *Flagg v. Fisk* (1904), 93 App. Div. 169, 87 N. Y. Supp. 530, *affd.* (1904), 179 N. Y. 590, 72 N. E. 1141; *Edgerly v. Blackburn* (1910), 140 App. Div. 419, 125 N. Y. Supp. 353; *Merwin v. Robertson* (1913), 154 App. Div. 823, 139 N. Y. Supp. 723; *Robertson v. Merwin* (1913), 154 App. Div. 723, 139 N. Y. Supp. 726; *Armstrong v. Middaugh* (1911), 74 Misc. 45, 133 N. Y. Supp. 647; *De Moltke-Huitfeldt v. Garner & Co.*, 145 App. Div. 766 (1911), 130 N. Y. Supp. 558; *Kilpatrick v. Germania Life Ins. Co.* (1904), 95 App. Div. 287, 88 N. Y. Supp. 628, *revd.* (1905), 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574; *Connolly v. Keenan* (1904), 42 Misc. 589, 87 N. Y. Supp. 630; *Willson v. Fisher* (1912), 75 Misc. 382, 135 N. Y. Supp. 532, *affd.* (1913), 155 App. Div. 877, 139 N. Y. Supp. 1150; *Roux v. Rothschild* (1902), 37 Misc. 435, 75 N. Y. Supp. 763, *affd.* (1903), 78 App. Div. 637, 79 N. Y. Supp. 1145; *Sweney v. Peaslee* (1891), 42 N. Y. St. Rep. 485, 17 N. Y. Supp. 225.

Where, in an action on defendant's written guaranty that if plaintiff would loan S. sixty dollars they would pay in full any judgment recovered therefor, the undisputed proof shows that S. obtained from plaintiff a loan of forty dollars for four months upon his promise to pay back sixty dollars, and that on making the loan plaintiff exacted of S. a confession of judgment for sixty dollars and fifteen dollars costs and ten dollars attorney's fees, and also required him to give the guaranty in suit, the debt so guaranteed was void for usury. The obligation of defendants, as sureties, to pay such debt was also void for usury; and a judgment in favor of plaintiff will be reversed and the complaint dismissed, with costs. *Henry & Co. v. Fry* (1912), 78 Misc. 130, 137 N. Y. Supp. 894.

Loan of corporate stock; receipt of compensation in excess of legal rate of interest.—Action to have declared usurious and void the transfer of shares of stock which plaintiffs allege was a mere pretense of a sale thereof and designed to cover a usurious loan from the defendant. *Held*, on all the evidence, that the transaction was not a sale, but was in fact a loan for which the defendant was to receive as compensation an amount in excess of the legal rate of interest. *Todd v. Brown* (1917), 177 App. Div. 397.

Condition of loan.—See *Valentine v. Conner* (1869), 40 N. Y. 248; *Matthews v. Coe* (1872), 49 N. Y. 57; *Clark v. Sheehan* (1872), 47 N. Y. 188; *Sumner v. People* (1864), 29 N. Y. 337; *Murray v. Barney* (1861), 34 Barb. 336; *Knick Life Ins. Co. v. Nelson* (1879), 7 Abb. N. C. 170, 78 N. Y. 137; *John Hancock Mut. Life Ins. Co. v. Nichols* (1878), 55 How. Pr. 393.

Purchase of mortgage at discount.—It is well settled that the purchase in good faith of a valid existing mortgage at a discount is not violative of the statute, the transaction being not a loan but a purchase. *Dunham v. Cudliff* (1883), 94 N. Y. 129; *Union Dime Savings Institution v. Wilmot* (1883), 94 N. Y. 221; *Siewert v. Hamel* (1883), 91 N. Y. 199; *Cohen v. Waldron* (1896), 17 Misc. 639, 40 N. Y. Supp. 31. It is equally well settled that, where the mortgagee had advanced nothing and the mortgage was not enforceable in his hands, it had no inception, was not a valid mortgage and could not be the subject of sale and the transfer of it to one at such a discount from its face as would with the interest payable under its terms exceed the legal rate is violative of this act, although the transferee acted in good faith, without notice that the mortgage had no previous inception and believed that he was purchasing a valid existing mortgage. *Miller v. Zeimer* (1888), 111 N. Y. 441, 18 N. E. 716; *Tiedeman v. Ackerman* (1878), 16 Hun 307, *affd.* (1881), 84 N. Y. 677; *Verity v. Sternberger* (1901), 62 App. Div. 112, 70 N. Y. Supp. 894, *affd.* (1902), 172 N. Y. 633, 65 N. E. 1123; *Schanz v. Sotscheck* (1915), 167 App. Div. 202, 152 N. Y. Supp. 851.

In a suit for the foreclosure of one of a series of seven mortgages, given to secure the payment of \$1,250 each, the defendants set up as a defense that the mortgage was usurious in its inception, and, therefore, void. They alleged that

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the plaintiff, acting as the agent of one R., entered into an agreement to loan the sum of \$1,250 upon each of seven parcels of land on condition that the defendants would pay a bonus of twenty per cent. upon such loans, and claimed that the transaction involved a provision that the mortgages should be made to one H., attorney and agent of defendant, who was to transfer the same to R., who has since conveyed the same to the plaintiff. It was conceded that the mortgages were made to H., and that the defendant executed an estoppel certificate to induce R. to accept an assignment or to purchase the mortgage, and for the benefit and protection of the present and of any and all subsequent holders of said mortgage. Evidence examined, and held, that the defendants, having failed to establish an existing agency between R. and the plaintiff, there is no foundation for the defense of usury. R., being an innocent purchaser of the mortgage, could rely upon the certificate of estoppel, notwithstanding the rate of discount, and the plaintiff, having procured a good title from R., is protected in the present suit by the certificate of estoppel. *Rider v. Gallo* (1912), 153 App. Div. 334, 137 N. Y. Supp. 1015.

Sale of note for less than face value.—Where a person executes a promissory note and delivers it to an agent to sell for a sum greatly below its face value, and it is thus sold, it is invalid in its inception because of usury. But where such a note is a valid obligation in its inception it may subsequently be purchased at less than its face value, although the price may be a circumstance bearing upon the *bona fides* of the purchaser. *Sabine v. Paine* (1915), 166 App. Div. 9, 151 N. Y. Supp. 735; See also *Sabine v. Paine* (1912), 148 App. Div. 730, 132 N. Y. Supp. 813; *Eastman v. Shaw* (1875), 65 N. Y. 522; *Cowenhoven v. Pfluger* (1897), 22 App. Div. 464, 47 N. Y. Supp. 1122; *Edelstein v. Mechlowitz* (1915), 92 Misc. 170, 155 N. Y. Supp. 258; *Chase National Bank v. Faurot* (1893), 72 Hun 373, 25 N. Y. Supp. 447, *affd.* (1896), 149 N. Y. 552, 44 N. E. 164, 35 L. R. A. 605; *Sweet v. Chapman* (1876), 7 Hun 576; *Sutherland v. Woodruff* (1882), 26 Hun 411.

Sale of accommodation paper is a loan and is usurious if discount is greater than legal rate of interest. *Claffin v. Boorum* (1890), 122 N. Y. 385, 25 N. E. 360. Lack of knowledge of nature of paper does not excuse lender. *Whedon v. Hogan* (1894), 8 Misc. 323, 28 N. Y. Supp. 554; *Strickland v. Henry* (1901), 66 App. Div. 23, 73 N. Y. Supp. 12; *Simpson v. Hepter* (1904), 42 Misc. 482, 87 N. Y. Supp. 243; *French v. Hoffmire* (1897), 19 Misc. 714, 43 N. Y. Supp. 496.

And see *Flour City Nat. Bk. v. Miller* (1896), 4 App. Div. 585, 38 N. Y. Supp. 503; *French v. Hoffmire* (1897), 19 Misc. 714, 43 N. Y. Supp. 496; *Forgotston v. McKeon* (1897), 14 App. Div. 342, 43 N. Y. Supp. 939.

Discount of paper at a greater than legal rate of interest is usurious. *Joy v. Diefendorf* (1891), 130 N. Y. 6, N. E. 602; *Newell v. Doty* (1865), 33 N. Y. 83; *Freeport Bank v. Hagemeyer* (1895), 91 Hun 194, 36 N. Y. Supp. 214, but the banking law, § 55 (now 74) modifies this act so far as it relates to paper discounted by a bank. *Schlesinger v. Gilhooly* (1907), 189 N. Y. 1, 81 N. E. 619.

Compensation and commissions to lender, when usurious. *Dey v. Dunham* (1816), 2 Johns. Ch. 182, *revd.* (1818), 15 Johns. 555; *Fanning v. Dunham* (1821), 5 Johns. Ch. 122; *Nourse v. Prime* (1823), 7 Johns. Ch. 69; *Holford v. Blatchford* (1844), 2 Sandf. Ch. 149; *Bank of U. S. v. Davis* (1842), 2 Hill, 451; *Seymour v. Marvin* (1851), 11 Barb. 80; *Hine v. Handy* (1874), 1 Johns. Ch. 6; *Thurston v. Cornell* (1868), 38 N. Y. 281; *Van Buren v. Stokes* (1874), 1 Hun 434, 3 T. & C. 511; *Van Tassell v. Wood* (1879), 76 N. Y. 614; *Nat. Bank of Gloversville v. Wells* (1880), 79 N. Y. 498; *Van Patten v. Ulrich* (1891), 37 N. Y. St. Rep. 348, 13 N. Y. Supp. 940; *Palmer v. Jones* (1893), 69 Hun 240, 23 N. Y. Supp. 584; *Tyng v. Commercial Warehouse Co.* (1874), 58 N. Y. 308; *Bennet v. Ginsberg* (1910), 141 App. Div. 66, 125 N. Y. Supp. 650; *Empire Trust Co. v. Coleman* (1914), 85 Misc. 312, 147 N. Y. Supp. 740, *mod.* (1915), 167 App. Div. 912, 151 N. Y. Supp. 1114.

A demand note for \$5,500 of which \$500 is compensation for the loan secured by a pledge of certificates of stock is not void for usury; it does not show what part thereof comprises the compensation and what part the loan. *Wright v. Toombly* (1910), 137 App. Div. 401, 121 N. Y. Supp. 721, *affd.* (1912), 204 N. Y. 661, 97 N. E. 1118.

A contract for a loan, providing for legal interest, and in addition a five per cent. commission to be paid the lender for certain services, it appearing that the actual performance of such services was not contemplated, is usurious. *In re Fishel* (1912), 198 Fed. 464.

A contract between a commission merchant and a dealer in produce, by which the former agrees to advance money at the legal rate of interest to enable the dealer to purchase or carry his produce, and is also to receive a percentage upon the money advanced as a commission for the care, management and sale of the property, is not *per se* usurious. *Matthews v. Coe* (1877), 70 N. Y. 239; See also *Spain v. Talcott* (1915), 165 App. Div. 815, 152 N. Y. Supp. 611.

Where, therefore, it does not appear that the commission charged was unusual, or unreasonable, or in any way that the lender took advantage of the necessities of the borrower, a finding of a referee that such a contract is usurious, is unsupported by the evidence and is a legal error. *Matthews v. Coe* (1877), 70 N. Y. 239.

Acceptance of gift by lender. *Woodruff v. Hurson* (1860), 32 Barb. 557; *Standish v. Parmely* (1873), 1 T. & C. 40, *affd.* (1874), in 56 N. Y. 640; *Madison University v. White* (1881), 25 Hun 490; *Smith v. Prentiss* (1874), 2 Hun 161, 4 T. & C. 680; *Lincoln Nat. Bk. v. Kirk* (1879), 18 Misc. 45, 41 N. Y. Supp. 13; *Hamilton v. Brennan* (1895), 90 Hun 340, 35 N. Y. Supp. 805, *affd.* (1897), 154 N. Y. 738, 49 N. E. 1097.

Guaranty of return of securities.—An instrument in which the defendant guaranteed that the principal would return certain securities on a specified day and imposed upon the principal no other legal obligation, is not security given for "the loan or forbearance of money"; it is a security given to protect a loan and is discharged by the return of the securities. The fact that it might have been discharged by the payment of money at the principal's option does not increase the defendant's legal obligation and does not expand the bond so as to add another term thereto. Hence the instrument does not fall within the terms of the statute. *Klein v. Title Guarantee & Surety Co.* (1909), 166 Fed. 356.

Acceptance of bonus.—*Vilas v. McBride* (1891), 62 Hun 324, 17 N. Y. Supp. 171, *affd.* (1892), 136 N. Y. 634, 32 N. E. 1014. For loan on mortgage. *Millikin v. Golden* (1893), 73 Hun 212, 25 N. Y. Supp. 885.

Exactions by agents.—The fact that an agent, intrusted with money of his principal to invest, exacts a bonus for himself, without the knowledge or assent of his principal, as a condition of making a loan, does not establish usury. The principal is not liable for such an unauthorized act of the agent, in the absence of proof that he received a portion of the bonus or in some form reaped a benefit or advantage from the same. *Van Wyck v. Watters* (1880), 81 N. Y. 352; *Farmers' Loan & Trust Co. v. Clowes* (1850), 3 N. Y. 470; *Bell v. Day* (1865), 32 N. Y. 165; *Condit v. Baldwin* (1860), 21 N. Y. 219; *Guardian Mut. Life Ins. Co. v. Kashaw* (1876), 66 N. Y. 544; *Estevez v. Purdy* (1876), 66 N. Y. 446; *Stillman v. Northup* (1888), 109 N. Y. 473; 17 N. E. 379; *Fellows v. Longyor* (1883), 91 N. Y. 324; *Phillips v. Mackellar* (1883), 92 N. Y. 34; *O'Brien v. Ferguson* (1885), 37 Hun 368; *Baldwin v. Doying* (1889), 114 N. Y. 452, 21 N. E. 1007; *Commercial Bank v. Cameron* (1894), 79 Hun 63, 29 N. Y. Supp. 505; *Schweitzer v. Hickok* (1913), 156 App. Div. 906, 141 N. Y. Supp. 15; *Flanagan v. Shaw* (1902), 74 App. Div. 508, 512, 77 N. Y. Supp. 1070, *affd.* (1903), 174 N. Y. 530, 66 N. E. 1108; *McWhirter v. Longstreet* (1903), 39 Misc. 831, 81 N. Y. Supp. 334; *Brown v. Jones* (1915), 89 Misc. 538, 152 N. Y. Supp. 571; *Ferguson v. Blen* (1906), 51 Misc. 673, 101 N. Y. Supp. 100;

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Terminal Bank v. Dubroff (1910), 66 Misc. 100, 120 N. Y. Supp. 609; *Ludington v. Kirk* (1896), 17 Misc. 129, 39 N. Y. Supp. 419; *Dunlap v. Troy* (1897), 19 Misc. 627, 44 N. Y. Supp. 388; *Bliss v. Sherrill* (1900), 52 App. Div. 613, 64 N. Y. Supp. 809. And see *S. C.* (1897), 24 App. Div. 280, 49 N. Y. Supp. 561; *Friedman v. Bruner* (1898), 25 Misc. 474, 54 N. Y. Supp. 997; *Silverman v. Katz* (1910), 120 N. Y. Supp. 790; *Jones v. Gray* (1912), 139 N. Y. Supp. 158.

Where a principal knowingly shares in the unlawful gains of the agent the transaction is void. *Braine v. Rosswog* (1897), 13 App. Div. 249, 42 N. Y. Supp. 1098.

When an agent, authorized to lend moneys of his principal but not to take usury, lends such moneys at a usurious rate, and both the sum lent and the usury exacted are secured by the same obligation, which the principal, knowing that it is for the larger amount than the sum loaned, without explanation accepts and has the benefit of, it is an adoption and ratification by him of the act of the agent, and neither the principal nor his assignees can enforce the obligation. *Bliven v. Lydecker* (1891), 130 N. Y. 102, 28 N. E. 625, revg (1889), 55 Hun 171, 7 N. Y. Supp. 867; *Schwarz v. Sweitzer* (1911), 202 N. Y. 8, 94 N. E. 1090.

Interest in advance; not usury. *N. Y. Firemen's Ins. Co. v. Struges* (1824), 2 Cow. 664; *Marvine v. Hymers* (1855), 12 N. Y. 223; *Mowry v. Bishop* (1835), 5 Paige 98 (1835); *Bloomer v. McInerney* (1883), 30 Hun 201; *Bevier v. Covell* (1881), 87 N. Y. 50; *Mosher v. Randall* (1873), 52 N. Y. 649.

Interest after maturity.—A note or other contract for the payment of money is not usurious and void for providing for the payment of more than statutory interest after maturity. *Green v. Brown* (1898), 22 Misc. 279, 49 N. Y. Supp. 163.

A note given for interest upon arrears of interest is not usurious. *Stewart v. Petree* (1874), 55 N. Y. 621; *Goodrich v. Clute* (1888), 20 N. Y. St. Rep. 662, 3 N. Y. Supp. 102, affd. (1889), 117 N. Y. 633, 22 N. E. 1129.

Payment of mortgage tax by a mortgagor, under an agreement with the mortgagee making such payment a condition of the loan, does not make the mortgage usurious. *Seamen's Bank for Savings v. Fell* (1915), 166 App. Div. 271, 151 N. Y. Supp. 600; *Lassman v. Jacobson* (1914), 125 Minn. 218; *Moore v. Lindsay* (1908), 146 N. W. 350; 61 Misc. 176, 114 N. Y. Supp. 684.

An agreement made by a retiring partner with his successors under which they were to pay him \$4,000 beyond legal interest for the right to borrow of him up to \$50,000 is usurious. *Gilbert v. Warren* (1897), 19 App. Div. 403, 46 N. Y. Supp. 489.

Partnership contract with guaranty as to profits.—The defense of usury is not applicable to an agreement between two parties which imports the formation of a partnership, such as a joint venture in the purchase and sale of stocks, is not converted from a contract in the nature of partnership into a loan of money by the fact that one party guarantees the other against loss on the capital advanced by him and that his profits shall amount to a certain sum. *Orvis v. Curtiss* (1899), 157 N. Y. 657, 52 N. E. 690.

Allowance of the use of an apartment, as well as legal interest, for the loan of money makes the loan usurious. *Reich v. Cochran* (1905), 105 App. Div. 542, 94 N. Y. Supp. 404.

Upon a sale of credit made in good faith the vendor may reserve or secure to himself, more than the legal rate of interest without rendering the agreement usurious. *Leavitt v. De Launay* (1850), 4 N. Y. 363; *Dry Dock Bank v. American Life Ins. & Trust Co.* (1850), 3 N. Y. 344; *Elwell v. Chamberlin* (1864), 31 N. Y. 611; *Gilbert v. Warren* (1900), 56 App. Div. 289, 67 N. Y. Supp. 978, affd. (1902), 171 N. Y. 665, 64 N. E. 1121.

Unsolicited gratuitous payments of ten and one-half per cent. interest on a note which simply provides for the payment of interest without specifying the rate,

do not render it void for usury. *Bosworth v. Kinghorn* (1904), 94 App. Div. 187, 87 N. Y. Supp. 983, *affd.* (1904), 179 N. Y. 590, 72 N. E. 1139.

Stipulation for contingent benefit.—When a lender stipulates for a contingent benefit beyond the legal rate of interest, such as an interest in the profit of the borrower's business, and has a right, in any event, to demand repayment of the principal sum with the legal interest thereon, the contract is in violation of this section. *Browne v. Vredenburgh* (1870), 43 N. Y. 195; *Hungerford Brass & C. Co. v. Brigham* (1905), 47 Misc. 240; 95 N. Y. Supp. 867; *Cleveland v. Loder* (1839), 7 Paige 557.

Where there is no certain agreement to pay excessive interest, the agreement is not usurious. *Lord v. Cronin* (1896), 9 App. Div. 9, 40 N. Y. Supp. 1097, *affd.* (1897), 154 N. Y. 172, 47 N. E. 1088.

Rights of bona fide purchaser of usurious security.—The innocent purchaser of a usurious security, when the purchase was induced by fraud, may enforce the security against the maker if he is privy to the fraud to the extent of the money paid by such purchaser, or may rescind and recover back that sum, with interest, the policy of the usury laws requires a limitation to that amount, and he cannot in any form of action recover more. *Miller v. Zeimer* (1888), 111 N. Y. 441, 18 N. E. 716; *Ahern v. Goodspeed* (1878), 72 N. Y. 108.

Sale of property at an exorbitant price.—Where, upon application to one for a loan of money, he declines, but offers to, and does nominally sell to the applicant, upon a credit, property at an exorbitant price, which he knows the latter does not want, and can only use as a substitute for, and as a means of raising the money, the transaction will be considered not as a *bona fide* sale but as a usurious loan. *Quackenbos v. Sayer* (1875), 62 N. Y. 344.

An exchange of notes, or other obligations, for a premium greater than the legal rate of interest, where the transaction is not a mere disguise for usury, is not prohibited by the statute. *Dry Dock Bank v. American Life & Trust Co.* (1850), 3 N. Y. 344. Where two persons exchange with each other notes of equal amounts, for the purpose of raising money by a sale of the notes, each note is a valid consideration for the other, and a sale of either, at a discount greater than the legal interest rate, does not render it usurious in the hands of the purchaser. *Cobb v. Titus* (1854), 10 N. Y. 198.

Payment for indorsement.—Where an indorser of a note makes no advance upon it, and has no interest in it, the fact of his making a charge for his indorsement will not make the note usurious in the hands of a person who receives it from the maker in the usual course of business, and pays value for it without any knowledge of the transaction between the maker and endorser. *Kitchel v. Schenck* (1864), 29 N. Y. 515. See also *Van Duzer v. Howe* (1860), 21 N. Y. 531; *Gannon v. Fergotson* (1895), 67 N. Y. St. Rep. 835, 34 N. Y. Supp. 34.

A loan of goods or chose in action, unless intended as a mere cover for a loan of money is not within the statute; nor is a loan of stock or grain to be returned in kind; nor a loan of money produced by the sale of shares of stock, where the agreement is that the borrower shall replace the stock. *Dry Dock Bank v. American Life & Trust Co.* (1850), 3 N. Y. 344.

Advances on check.—Where an advance is made in one place, upon a check drawn upon a bank in another, no question of usury can arise out of the transaction, as there is no loan or forbearance of any money for any time whatever. *Crocker v. Colwell* (1871), 46 N. Y. 212.

Payment for exchange of securities.—Where a mortgagee requested the mortgagor to reduce the mortgage \$1500 and the mortgagor offered \$700 in money and the mortgage of a third person for \$800 which the mortgagee refused to accept until he had been paid \$15 extra it was held that there was no usury as there was a

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mere exchange of securities and not a loan or forbearance of money. *Meaker v. Fiero* (1895), 145 N. Y. 165, 39 N. E. 714.

Difference in exchange.—Usury cannot be predicated of an advantage obtained by the lender by means of difference of exchange between the place of the loan and the place of payment, where both are within the state. *Oliver Lee & Co.'s Bank v. Walbridge* (1859), 19 N. Y. 134; *Eagle Bank v. Rigney* (1865), 33 N. Y. 613.

But where, upon repeated renewals, of such loans by giving new notes payable at the same place the borrower is required to pay such difference of exchange such exaction constitutes usury. *Price v. Lyons Bank* (1865), 33 N. Y. 55.

Employment of lender at a salary which he does nothing to earn may be a device to conceal usury. *Grannis v. Stevens* (1916), 216 N. Y. 583, 111 N. E. 263, affg. (1913) 157 App. Div. 561, 142 N. Y. Supp. 835.

Usurious transfer of interest in vested remainder to secure loan. *Hartley v. Eagle Insurance Co.* (1915), 167 App. Div. 230, 152 N. Y. Supp. 686.

Assignment of legacy.—In a suit to obtain a decree adjudging an assignment of plaintiff's interest in his father's estate usurious and void, it appeared that the plaintiff had a legacy of \$5,000 in his father's estate due in five years, and in order to receive a loan of \$2,000 he assigned this legacy to the defendant and also took out and assigned to defendant a policy of life insurance for \$5,000, on which he paid the premium for five years as security. The defendant claimed that the transaction was a purchase and that as there was no loan there could be no usury. Evidence examined, and *held*, that the assignments were prepared to avoid the statute, and that a judgment for the defendant should be reversed. *Otten v. Freund* (1912), 150 App. Div. 434, 135 N. Y. Supp. 59.

Upon the assignment of a legacy of \$2,000 the assignor gave his promissory note for \$1,980, which contained no obligation to pay interest, and at the same time a check for \$2,000 drawn to his order indorsed to the assignee was paid in cash from which a "discount" of \$300 for the assignee was retained by his agent and subsequently paid to the assignee. The assignment was declared to be made as collateral security for the note which was described as payable on demand without interest at six per cent. and contained words of defeasance "upon payment of the said promissory note, with accrued interest," and by said assignment the assignee was given power to enforce payment of the legacy and to retain therefrom "a sufficient sum to pay the said promissory note, with the interest thereon." The legatee received in exchange for the assignment, note and check \$1,275. It was held, that, the lender having testified to receiving notice that his bank account was credited with \$300 two or three days after the charge of \$2,000, the transaction must be held to constitute an usurious loan, and the legacy should be paid to the legatee. *Matter of Baker* (1912), 77 Misc. 90, 137 N. Y. Supp. 530. See also *Hagaman v. Reinach* (1905), 48 Misc. 206, 96 N. Y. Supp. 719; *Witzlar v. Wood* (1911), 143 App. Div. 311, 128 N. Y. Supp. 501; *Mercantile Trust Co. v. Gimbernath* (1912), 134 App. Div. 410, 119 N. Y. Supp. 103.

Payment of cost of having title of mortgaged property examined.—Under the general usury laws of the state a requirement that the borrower shall pay the cost of having the title of mortgaged property examined and the other expenses attendant on the loan does not render the loan usurious. Where, however, payment is exacted from the borrower under the guise of defraying the expenses of a loan which is in reality a mere cover for usury the transaction is illegal. *London Realty Co. v. Riordan* (1913), 207 N. Y. 264, 100 N. E. 800.

Wage assignment.—Where a money lender advanced \$125 on condition that the person to whom it was advanced should repay \$190 at the rate of \$20 each month to be deducted from his wages, which he assigned to the lender, it was held that the transaction constituted a usurious loan, and not a *bona fide* sale of the wages. *Wilmarth v. Heine* (1910), 137 App. Div. 526, 121 N. Y. Supp. 677.

Agreement to pay cost of collection including a reasonable attorney's fee, does not constitute usury in the absence of proof of corrupt intent. *International Motor Co. v. Palmer* (1915), 92 Misc. 214, 155 N. Y. Supp. 357. Exorbitant collection charges do not constitute usury. *Hagamah v. Reinach* (1905), 48 Misc. 206, 96 N. Y. Supp. 719.

Payment for cost of prosecution.—Where an action was commenced and property of the defendant attached and the defendant agreed to settle by paying his indebtedness and the costs and expenses of the proceedings and the plaintiff insisted on the payment of \$500 claimed to have been paid as counsel fees whereupon the claim was allowed and bonds given to include the \$500 it was held that the question of usury could not be raised on the record as there was no finding that the \$500 was paid as consideration for forbearance and that it was the plaintiff's intent to exact usurious interest. *Haughwout v. Garrison* (1877), 69 N. Y. 339.

§ 372. Recovery of excess.—Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery.

If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made.

Source.—R. S., pt. 2, ch. 4, tit. 3, §§ 3, 4.

Common-law right to recover excess of interest not taken away by this section. *Wheaton v. Hibbard* (1822), 20 Johns. 290; *Palmer v. Lord* (1822), 6 Johns. Ch. 95. But see *Palen v. Johnson* (1866), 46 Barb. 21.

Right passes to assignee. *Wheelock v. Lee* (1876), 64 N. Y. 242.

Limitation of action.—Right terminates within one year. See *Palen v. Johnson* (1872), 50 N. Y. 49; *Peyser v. Myers* (1890), 56 Hun 175, 9 N. Y. Supp. 229.

The provisions of this section need not be expressly pleaded as a statute of limitation. The question as to whether the action was brought in time may be raised by demurrer to a counterclaim demanding judgment for the excess of legal interest paid. *Wood v. Scudder* (1913), 155 App. Div. 254, 140 N. Y. Supp. 284.

Where a bond and mortgage has been given as collateral security for the payment of a loan, and certificates of indebtedness of a cemetery association have been transferred as a consideration for the loan itself and in excess of the lawful rate of interest, an action by the borrower to recover such certificates must be brought within one year from the time the same were delivered, as required by this section. The provision of said section that the borrower may, within one year maintain an action to recover "the amount of the money so paid or value delivered," is a limitation, not merely of the remedy, but of the right of the borrower to recover excess of interest, whether represented by money paid or property delivered. All right of action terminates as to the borrower at the end of one year. *Gillieran v. Colby* (1914), 164 App. Div. 608, 150 N. Y. Supp. 326.

Where the summons, in an action under this section, to recover back money paid in excess of the legal rate of interest for a loan of money, though delivered for

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service to the sheriff within a year after the cause of action accrued, was not served on defendant until after the expiration of said year, the action must fail. *Landeker v. Property Security Co.* (1913), 79 Misc. 157, 140 N. Y. Supp. 745, *affd.* (1913), 156 App. Div. 938, 141 N. Y. Supp. 1128.

Remedy where usurious interest has been paid; sale of valueless property to cover exaction of usurious interest.—Where, in an action upon a promissory note, it appears that the defendant has paid the plaintiff interest or commissions in excess of legal interest as consideration for making or extending loans, the defendant cannot offset or counterclaim the amount thereof; his exclusive remedy is an action to recover the penalty provided by law for taking illegal interest or commissions. But where in such an action it appears that the plaintiff as a condition of renewing loans to the defendant insisted upon the latter's purchasing at an exorbitant price valueless stock which was retained by the plaintiff; that the purchase price was included in a note in renewal of which the note in suit was given, and that the sale was never ratified, the defendant is entitled to have the price of such stock which had not been actually paid credited on the note or eliminated from it. *Carnegie Trust Co. v. Chapman* (1912), 153 App. Div. 783, 138 N. Y. Supp. 715.

§ 373. Usurious contracts void.—All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled.

Source.—First par. R. S., pt. 2, ch. 4, tit. 3, § 5, as amended by L. 1837, ch. 430; second par. L. 1837, ch. 430, § 5.

Application.—The provision of this section that all bonds, bills, notes, etc., taken in violation of the statute against usury, shall be declared void, applies only to instruments given or property delivered as collateral security for the payment of a loan, and does not relate to the recovery of the excess of interest paid in money or property. *Gilliran v. Colby* (1914), 164 App. Div. 608, 150 N. Y. Supp. 326.

Repealed as to banks.—The provisions of this section have been repealed by implication under § 55 (now 74) of the banking law when usurious notes have been given or usurious interest received by a national bank, state bank or private banker. *Schlesinger v. Kelley* (1906), 114 App. Div. 546, 99 N. Y. Supp. 1083. In *re Samuel Wilde's Sons* (1904), 133 Fed. 562.

This section still remains in force as to individuals and corporations except so far as they are modified or superseded by the banking law; but the precise extent of such modification is a question of some difficulty; and it will not be held, where the bank had full knowledge that a usurious rate of interest was to be charged upon negotiable paper discounted by it, that the bank will be protected and allowed to collect thereon. *Schlesinger v. Lehmaier* (1908), 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, *revg.* (1907), 117 App. Div. 428, 102 N. Y. Supp. 630.

Effect of usury; security wholly void. *Jackson ex dem. Skinner v. Packard* (1831), 6 Wend. 415; *Vickery v. Dickson* (1861), 35 Barb. 96; *Thompson v. Van Vechten* (1868), 27 N. Y. 568.

Usury affects all subsequent continuations and renewals of debt. *Steele v. Whipple* (1839), 21 Wend. 103; *Dowe v. Schutt* (1846), 2 Denio 621; *Jacks v. Nichols* (1851), 5 N. Y. 178; *Hawks v. Weaver* (1865), 46 Barb. 164; *Standish v. Parmeley* (1873), 1 T. & C. 40, *affd.* (1874), 56 N. Y. 640; *Treadwell v. Archer* (1879), 76 N. Y. 196; *Nat. Bank of Auburn v. Lewis* (1878), 75 N. Y. 516, *revd. on rearg.* (1880), 81 N. Y. 15; *Birdsall v. Patterson* (1872), 51 N. Y. 43; *Levey v. Allien* (1893), 72 Hun 321, 25 N. Y. Supp. 352; *Union Bk. of Rochester v. Gilbert* (1895), 83 Hun 417, 31 N. Y. Supp. 945; *Feldman v. McGraw* (1896), 1 App. Div. 574, 37 N. Y. Supp. 434; *McConkey v. Petterson* (1897), 15 App. Div. 77, 44 N. Y. Supp. 286; *Botsford v. Bean* (1899), 44 App. Div. 190, 60 N. Y. Supp. 735; *Price v. Lyons Bank* (1865), 33 N. Y. 55; *Cope v. Wheeler* (1869), 41 N. Y. 303; *Clafin v. Boorum* (1890), 122 N. Y. 385, 25 N. E. 360; *Ralli v. Pearsall* (1902), 69 App. Div. 254, 74 N. Y. Supp. 620. But if the usurious obligation be transferred to an innocent holder and he receive directly from the debtor a new one in its stead, such new obligation cannot be impeached for usury in the original. *Jackson ex dem. Bartlett v. Henry* (1813), 10 Johns. 185; *Powell v. Waters* (1826), 8 Con. 669; *Kent v. Walton* (1831), 7 Wend. 256; *Holmes v. Williams* (1843), 10 Paige 326; *Aldrich v. Reynolds* (1845), 1 Barb. Ch. 43; *Smedberg v. Simpson* (1848), 4 Super (2 Sandf.) 85; *Sherwood v. Archer* (1877), 10 Hun 73, *revd.* (1879), 76 N. Y. 196; *Kilner v. O'Brien* (1878), 14 Hun 414.

Where the consideration for a \$1,500 mortgage, executed by husband and wife, is in part the sum of \$500 cash loaned to them, and in part the assignment to the husband of a previous usurious mortgage for \$1,000 given by the wife to the mortgagee, upon her own lands, before her marriage the \$1,500 mortgage is void for usury and cannot be enforced. *Cope v. Wheeler* (1869), 41 N. Y. 303.

Subsequent agreement for usury does not affect original debt. *Pearsall v. King-land* (1838), 3 Edw. 195; *Carson v. Ingalls* (1861), 33 Barb. 657; *Lesley v. Johnson* (1864), 41 Barb. 359; *Crane v. Hubbell* (1839), 7 Paige 413; *Judd v. Seaver* (1841), 8 Paige 548; *Pratt v. Elkins* (1880), 80 N. Y. 198; *Emmons v. Barnes* (1874), 55 N. Y. 643; *Jacobsen v. Bradley* (1888), 49 Hun 152, 1 N. Y. Supp. 676; *Matter of Consalus* (1884), 95 N. Y. 340; *Lyon v. Simpson* (1883), 12 Daly 56; *Allison v. Schmitz* (1883), 31 Hun 106, *affd.* (1885), 98 N. Y. 657; *Froese v. Prosnitz* (1890), 34 N. Y. St. Rep. 9, 12 N. Y. Supp. 88; *Cook v. Barnes* (1867), 36 N. Y. 520; *Kellogg v. Adams* (1868), 39 N. Y. 28; *Hagaman v. Reinach* (1905), 48 Misc. 206, 96 N. Y. Supp. 719; *Jones v. Payton* (1914), 181 N. Y. St. Rep. 20, 147 N. Y. Supp. 20; *Froese v. Prosnitz* (1890), 34 N. Y. St. Rep. 9, 12 N. Y. Supp. 88.

A mortgage security avoided for usury revives a good debt, and the satisfaction of the good debt will be set aside and the cancelled debt enforced. *Gerwig v. Sitterly* (1874), 56 N. Y. 214; *Underhill v. Crennan* (1881), 25 Hun 569.

An obligation, valid in its inception, is not invalidated by an usurious agreement for the extension of the time of payment, but the sum paid on the agreement for forbearance will in equity be applied as payment. *Real Estate Trust Co. v. Keech* (1877), 69 N. Y. 248.

Collateral securities, effect of usury upon. See *Mason v. Lord* (1861), 40 N. Y. 476; *Warner v. Gouverneur* (1847), 1 Barb. 36; *Schroepel v. Corning* (1851), 6 N. Y. 107; *Bell v. Lent* (1840), 24 Wend. 230.

Right to equitable relief.—The mere fact that a party has made an agreement or given a security which is void for usury, is not sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only when, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title

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to land, or some other necessity for the interposition of a court of equity is shown. *Allerton v. Belden* (1872), 49 N. Y. 373. See also *Minturn v. Farmers' Loan and Trust Co.* (1850), 3 N. Y. 498; *Weiland v. Forgotson* (1899), 44 App. Div. 54, 60 N. Y. Supp. 483.

The provisions of this section do not authorize a suit in equity to have a past due note adjudged to be usurious, illegal and void. *Reiner v. Galinger* (1912), 151 App. Div. 711, 136 N. Y. Supp. 205.

An action in equity lies to cancel a chattel mortgage tainted with usury where the mortgagee has taken possession of the property pledged as security for the loan and thus avoided bringing the instrument before the court, thereby depriving the mortgagor both of his property and an opportunity to establish at law the illegality of the transaction. *Hager v. Arland* (1913), 81 Misc. 421, 143 N. Y. Supp. 388.

Where certain promissory notes usurious in their inception were made by plaintiff to the order of one of defendants who for value and before maturity and without notice to the transferee of any infirmity in the instruments transferred them with certain jewelry pledged as security for their payment to the other defendant who threatened to sell the jewelry, plaintiff is entitled to maintain an action under section 373 of the General Business Law to have the notes adjudged void and to have them surrendered to the plaintiff together with said jewelry. *Crusins v. Siegman* (1913), 81 Misc. 367, 142 N. Y. Supp. 348.

Estoppel to set up usury.—When securities appearing on their face to be valid and subsisting obligations are purchased on the faith of representations on the part of the parties thereto that they are what they appear, and that there is no defense, the parties are estopped from claiming that they had in fact no inception until thus purchased and so that they are usurious. *Union Dime Savings Inst. v. Wilnot* (1883), 94 N. Y. 221. See also *Weyh v. Boylan* (1881), 85 N. Y. 394; *Stoll v. Reel* (1895), 11 Misc. 461, 32 N. Y. Supp. 737; *Luddington v. Kirk* (1896), 17 Misc. 129, 39 N. Y. Supp. 419; *Hungerford Brass & C. Co. v. Brigham* (1905), 47 Misc. 240, 95 N. Y. Supp. 867.

To estop parties to a note, their representations in respect to its consideration and validity must be outside the face of the note. If such statements appear in the instrument they stand or fall with it. *Schnitzer v. Husted* (1892), 44 N. Y. St. Rep. 783, 13 N. Y. Supp. 156. The maker of a note is not estopped from setting up usury by a statement made by him in writing prior to the transfer that the signature to the note was all right. *Whedon v. Hogan* (1894), 8 Misc. 323, 28 N. Y. Supp. 554. An indorser of a promissory note is not estopped from setting up usury as a defense thereto by a certificate or affidavit made by him, to the effect that the note is business paper, given for a full consideration and subject to no defense of usury or otherwise, where it appears that when the note was transferred to the holder, he had knowledge that it was indorsed for the accommodation of the maker, and had its inception when so transferred. *Lewis v. Barton* (1887), 106 N. Y. 70, 12 N. E. 437. See also *Payne v. Burnham* (1875), 62 N. Y. 69.

A mortgagor, defending a suit of foreclosure on the ground of usury, is not estopped from taking that defense by her affidavit stating that the bond and mortgage were valid legal obligations at the time of the assignment of the mortgage to the plaintiff, if, in fact, it appear that the original mortgagee was merely acting as a dummy for the plaintiff, who had full knowledge of the usury before the transfer. *Merwin v. Romanelli* (1910), 141 App. Div. 711, 126 N. Y. Supp. 549.

An estoppel certificate or affidavit protects the purchaser only to the amount of the money advanced upon the faith of it. *Miller v. Zeimer* (1888), 111 N. Y. 441, 10 N. E. 716; *Schanz v. Sotscheck* (1915), 167 App. Div. 202, 152 N. Y. Supp. 851; *Gilbert v. Real Estate Co.* (1913), 155 App. Div. 411, 140 N. Y. Supp. 354; *Cross v.*

Smith (1895), 85 Hun 49, 32 N. Y. Supp. 671; Fleischmann v. Stern (1881), 24 Hun 265, *affd.* (1882), 90 N. Y. 110.

For other cases dealing with estoppel to set up usury, see *Rider v. Gallo* (1912), 153 App. Div. 334, 137 N. Y. Supp. 1015; *Verity v. Steinberger* (1901), 62 App. Div. 112, 70 N. Y. Supp. 894, *affd.* (1902), 172 N. Y. 633, 65 N. E. 1123; *Tiedeman v. Ackerman* (1878), 16 Hun 307, *affd.* (1881), 84 N. Y. 677; *Dinkelspiel v. Franklin* (1876), 7 Hun 339; *Vilas v. McBride* (1891), 62 Hun 324, 17 N. Y. Supp. 171, *affd.* (1892), 136 N. Y. 634, 32 N. E. 1014; *Schanz v. Sotscheck* (1914), 86 Misc. 121, 149 N. Y. Supp. 145, *mod.* (1915), 167 App. Div. 202, 152 N. Y. Supp. 851.

Bona fide holders.—Where a note, usurious in its inception, passes into the hands of a *bona fide* holder for value, and the maker makes a payment thereon and takes it up and gives a new note for the balance due in place thereof, the latter note is valid. *Armstrong v. Middaugh* (1911), 74 Misc. 45, 133 N. Y. Supp. 647.

Under section 96 of the Negotiable Instruments Law the defense of usury is not available in an action on a promissory note brought by a *bona fide* holder in due course for value and before maturity. *Oeser v. Behrend* (1915), 89 Misc. 391, 151 N. Y. Supp. 873; *Klar v. Kostluk* (1909), 65 Misc. 199, 119 N. Y. Supp. 683; *Emanuel v. Mesicki* (1914), 183 N. Y. St. Rep. 905, 149 N. Y. Supp. 905.

Promissory notes void for usury as between the original parties are nevertheless valid and enforceable when discounted by a state bank for value before maturity in the due course of business, without notice of their usurious inception. *Schlesinger v. Gilhooly* (1907), 189 N. Y. 1, 81 N. E. 619.

Extension of term of mortgage.—A contract to extend the time of payment of a mortgage debt, made between the holder of the mortgage and one who purchased the premises subject to it, but without assuming it, is usurious where as a condition of granting such extension the holder of the mortgage requires the owner to assume the mortgage debt and pay a sum above legal interest for such extension or forbearance. *Ganz v. Lancaster* (1902), 169 N. Y. 357, 62 N. E. 413, 58 L. R. A. 151.

Where there is a usurious agreement to extend the term of a mortgage the mortgagor cannot claim the benefit of the extension and yet seek to defeat the foreclosure, by asking that the usurious consideration paid therefor shall be applied in payment of the interest. *Church v. Maloy* (1877), 70 N. Y. 63.

Innocent purchaser of usurious mortgage not protected. *Miller v. Zeimer* (1888), 111 N. Y. 441, 18 N. E. 716. See also *Gray v. Green* (1879), 77 N. Y. 615.

Where a usurious security is taken for a valid debt the avoidance of the security because of the usury, revives the debt. *Gerwig v. Setterly* (1874), 56 N. Y. 214. See also *Winsted Bank v. Webb* (1868), 39 N. Y. 325.

Bottomry.—An essential characteristic of bottomry is that the money is lent at the risk of the lender during the voyage and the repayment thereof, with interest agreed upon, depends upon the successful termination of the voyage. Therefore when, by the terms of the contract the borrower assigns to the lender as collateral security for the loan, policies of insurance upon the vessel, and upon the freight, and besides gives a bill of sale of the vessel, it is not bottomry and if a greater interest than the legal rate is reserved the contract is usurious and void. *Braynard v. Hoppock* (1865), 32 N. Y. 571.

Purging transaction of usury.—A usurious contract and security may be so far purged of usury by the subsequent acts of the parties as to become valid and enforceable, but this can only be done by cancelling the security and giving in its place a new obligation for the sum which should be paid, excluding all usury. *Carr v. Taylor* (1900), 30 Misc. 617, 62 N. Y. Supp. 849. See also *Jacobsen v. Bradley* (1888), 49 Hun 152, 1 N. Y. Supp. 676.

Who may raise question of usury.—The question of usury is personal and can only be raised by persons having a direct interest in having the contract avoided

or bound by the contract to pay the sum borrowed, or by their sureties, liens, devisees, or personal representatives. *Williams v. Tilt* (1867), 36 N. Y. 319; *Ohio and Mississippi R. R. Co. v. Kasson* (1867), 37 N. Y. 218; *Billington v. Wagoner* (1865), 33 N. Y. 31; *Biedler v. Malcolm* (1907), 121 App. Div. 145, 105 N. Y. Supp. 642; *Thompson v. Interborough R. T. Co.* (1905), 49 Misc. 102, 96 N. Y. Supp. 416; *Union C. & I Co. v. Union S. Y. & M. Co.* (1905), 46 Misc. 431, 92 N. Y. Supp. 269; *Loos v. McCormack* (1905), 46 Misc. 144, 93 N. Y. Supp. 1088, *affd.* (1905), 107 App. Div. 8, 95 N. Y. Supp. 1141; *Chapins v. Mathot* (1895), 91 Hun 565, 36 N. Y. Supp. 835, *affd.* (1898), 155 N. Y. 641, 49 N. E. 1094; *Kelley v. Sprague* (1890), 13 N. Y. Supp. 64, 58 Hun 611, *affd.* (1891), 128 N. Y. 582, 28 N. E. 250.

A trustee in bankruptcy can interpose the defense of usury in opposition to a claim filed against the bankrupt estate. *In re Samuel Wilde's Sons* (1904), 133 Fed. 562; *Matter of Kellogg* (1903), 121 Fed. 333, 57 C. C. A. 547.

Any party having a lien on a chattel may avoid for usury a mortgage claiming priority. *Thompson v. Van Vechten* (1863), 27 N. Y. 568. But persons who accept a lien upon, or interest in, the equity of redemption of mortgaged premises, as mortgagees or purchasers, expressly subject to the lien of the prior mortgage, cannot avail themselves of usury in such mortgage, in defense to a suit for its foreclosure. *Sands v. Church* (1852), 6 N. Y. 347.

The usurer is not allowed to show that an obligation, which he had taken in satisfaction of a prior demand, is usurious and therefore void, in order to avoid the effect of such obligation as a satisfaction of the prior demand. *La Farge v. Herter* (1853), 9 N. Y. 241.

A usurious agreement between the first indorsee of a note and one who discounts the same for his benefit will constitute no defense to an action by the last indorsee, against him, upon his contract of indorsement. *Morford v. Davis* (1864), 28 N. Y. 481.

The maker of a promissory note, tainted with usury, may by bill in equity, assert the usury and defeat the note as a set-off, notwithstanding an account between him, and the holders thereof, embracing such note, has been rendered, and has become an account stated. But while it stands a stated account as between him and the holders of the note, the assignee of the maker is concluded by it, and cannot assail the note for usury when it is claimed as a set-off. *Bullard v. Raynor* (1864), 30 N. Y. 197.

A purchaser of land encumbered by an usurious mortgage may set up the usury in defense to a bill of foreclosure, unless by the terms of the purchase, he took the equity of redemption merely, subject to the payment of the mortgage. *Brooks v. Avery* (1850), 4 N. Y. 225. See also *Berdan v. Sedgwick* (1871), 44 N. Y. 626.

The defense of usury is available not only to parties, but also to privies to a contract of guaranty, in an action brought upon a note given as a substitute for, or in renewal of, the guaranty, but where the defendants, although aware of the existence of the defense, fail to plead it, it must be considered to have been waived by them. *Laux v. Gildersleeve* (1897), 23 App. Div. 352, 48 N. Y. Supp. 301.

Waiver.—The right to set up usury may be waived by the borrower, and such waiver will cut off the rights of those in privity with him. *Chapuis v. Mathot* (1895), 91 Hun 565, 36 N. Y. Supp. 835, *affd.* (1898), 155 N. Y. 641, 49 N. E. 1094.

But where a person in legal privity with the borrower has acquired rights in or under an alleged usurious instrument before the borrower has waived its invalidity, the subsequent waiver of the borrower cannot have any effect in divesting such person of the rights which he has acquired. *Chapuis v. Mathot* (1895), 91 Hun 565, 36 N. Y. Supp. 835, *affd.* (1898), 155 N. Y. 641, 49 N. E. 1094.

Usurious loan by agent.—*Brown v. Jones* (1915), 89 Misc. 538, 152 N. Y. Supp. 571.

Pleading.—A defendant cannot take advantage of the defense of usury unless all the facts which constitute the usury complained of are pleaded. *Whitehead v. Heidenheimer* (1901), 57 App. Div. 590, 68 N. Y. Supp. 704; *Morford v. Davis* (1864), 28 N. Y. 481; *Cutler v. Wright* (1860), 82 N. Y. 472; *Tillotson v. Nye* (1895), 88 Hun 101, 34 N. Y. Supp. 606; *Haywood v. Jones* (1877), 10 Hun 500; *Arrher v. Shea* (1878), 14 Hun 493; *Chapuis v. Mathot* (1895), 91 Hun 565, 36 N. Y. Supp. 835, *affd.* (1898), 155 N. Y. 641, 49 N. E. 1094. Compare *Arnold v. Angell* (1875), 62 N. Y. 508.

Whenever usury is pleaded as a defense the usurious agreement must be proved as laid; whoever desires the aid of the statutes against usury through the interference of the court, must make out his title to relief by allegations as well as proof. *Long Island Bank v. Boynton* (1887), 105 N. Y. 656, 11 N. E. 837.

Sufficiency of pleading. *Chapuis v. Mathot* (1895), 91 Hun 565, 36 N. Y. Supp. 835, *affd.* (1898), 155 N. Y. 641, 49 N. E. 1094; *Myers v. Wheeler* (1897), 24 App. Div. 327, 48 N. Y. Supp. 611, *affd.* (1899), 161 N. Y. 637, 57 N. E. 1118; *Loew v. McInerney* (1913), 159 App. Div. 513, 144 N. Y. Supp. 546.

Where, in a suit for the foreclosure of a mortgage, the defendant pleads usury as a defense, and alleges that a certain firm agreed to obtain a loan upon his bond and mortgage for \$12,000 at six per cent. interest upon his paying a bonus of \$1,800, which was also to cover the expenses connected with the loan, which did not exceed \$200; that the mortgage was subsequently executed, and he received \$10,200 from the firm; that the bond and mortgage were made payable to a mere dummy of the firm who did not advance the money, and who subsequently assigned the same to the plaintiff, who took it with full knowledge of all the facts, the answer should not be dismissed. *Schanz v. Sotscheck* (1914), 160 App. Div. 798, 145 N. Y. Supp. 778.

Evidence.—The defense of usury must be established by a preponderance of evidence sufficiently strong to rebut the presumption of its absence which obtains in an innocent transaction. *Empire Trust Co. v. Coleman* (1914), 85 Misc. 312, 147 N. Y. Supp. 740, *affd.* (1915), 167 App. Div. 912, 151 N. Y. Supp. 1114.

A demand for interest at an usurious rate, made several months after the loan and acquiesced in by the payment of the usurious interest, amounts to an acknowledgment by both parties that the original securities were given under an agreement that they should bear interest at the usurious rate. *Smith v. Hathorn* (1882), 88 N. Y. 211.

In an action where the defense is usury, evidence that the plaintiff had loaned money at other times, prior to the transaction in question at usurious rates of interest, is inadmissible. *Ross v. Ackerman* (1871), 46 N. Y. 210.

In the absence of any direct evidence of a usurious agreement, proof of subsequent payments of interest, in excess of the lawful rate, is not conclusive on the question of usury. *Smith v. Hathorn* (1881), 25 Hun 159, *revd.* (1882), 88 N. Y. 211.

Sufficiency of evidence. *Culver v. Pullman* (1891), 35 N. Y. St. Rep. 849, 12 N. Y. Supp. 663; *Davis v. Myers* (1895), 86 Hun 237, 33 N. Y. Supp. 352; *Faulkner v. McNeill* (1894), 78 Hun 505, 29 N. Y. Supp. 551; *Silverman v. Katz* (1910), 120 N. Y. Supp. 790.

Parol evidence of usury.—The written agreement made by the parties is not conclusive on the question as to whether the contract was usurious, and parol evidence may be given to show that the transaction is tainted with usury, notwithstanding the fact that the writing would indicate that it was lawful. *Von Haus v. Soule* (1911), 146 App. Div. 731, 131 N. Y. Supp. 512; *Mudgett v. Goler* (1879), 18 Hun 302; *Campbell v. Connable* (1906), 98 N. Y. Supp. 231.

See generally, *Hall v. Eagle Insurance Co.* (1912), 151 App. Div. 815, 136 N. Y. Supp. 774, *affd.* (1914), 211 N. Y. 507, 105 N. E. 1085.

Burden of proof.—The burden of proving usury by a fair preponderance of evidence rests upon a defendant who sets up that defense. *Ferguson v. Bien* (1905), 47 Misc. 618, 94 N. Y. Supp. 459; *Brown v. Jones* (1915), 89 Misc. 538, 152 N. Y. Supp. 571; *Haughwout v. Garrison* (1877), 69 N. Y. 339; *Silverman v. Katz* (1910), 120 N. Y. Supp. 790. *In re Samuel Wilde's Sons* (1904), 133 Fed. 562.

Judgment.—Where the defense of usury is raised and the finding on that question is in favor of the defendant judgment should be given for the defendant and not for the plaintiff less a deduction for the amount of the usurious interest. *Machimowitz v. Fine* (1909), 119 N. Y. Supp. 666.

Where the defense of usury has been interposed, and a verdict has been rendered in favor of the plaintiff, it is not competent for the court, where the payments, which it is alleged constituted the usury, have not been set up in the form of a counterclaim, to hold that the amount of the plaintiff's claim should be reduced by the aggregate amount of such payments. *Pixley v. Ingram* (1889), 53 Hun 93, 6 N. Y. Supp. 360.

§ 374. Corporations prohibited from interposing defense of usury.—No corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations, and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships.

Source.—L. 1850, ch. 172, §§ 1, 2.

Retroactive in operation.—*Southern Life Insurance & Trust Co. v. Packer* (1858), 17 N. Y. 51.

Application.—The fact that negotiable paper is transferred by a corporation, to secure advances at a rate of interest exceeding the legal rate does not tend to impeach the good faith of the transferee, such a contract not being illegal. This section operated *pro tanto* as a repeal of the statutes prohibiting usury, so far as they were applicable to stipulations for a rate of interest exceeding the legal rate, where a corporation is the borrower. *Belmont Branch Bank v. Hoge* (1866), 35 N. Y. 65.

Sureties, guarantors and indorsers.—This section includes the collateral contracts of individuals as sureties, guarantors or indorsers for corporations. *Hubbard v. Tod* (1898), 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. 14; *Rosa v. Butterfield* (1865), 33 N. Y. 665; *Union National Bank v. Wheeler* (1875), 60 N. Y. 612; *Stewart v. Bramhall* (1878), 74 N. Y. 85; *First National Bank v. Morris* (1874), 1 Hun 680; *Ludington v. Kirk* (1896), 17 Misc. 129, 39 N. Y. Supp. 419; *Weinreb v. Coleman Stable Co.* (1911), 70 Misc. 535, 127 N. Y. Supp. 343.

Corporation succeeding to rights of person who could plead usury.—The provisions of this section only prevent the avoidance by a corporation of its own contract upon the ground of usury. They do not apply to a case where the corporation succeeds to the rights of a party who might avail himself of the provisions of the usury laws. Where, therefore, property is pledged to secure a usurious loan, a corporation succeeding to the rights of a party who might avail himself of the rights of the pledgor is not prohibited from demanding and recovering the property pledged. *Merchants Ex. N. Bank v. Commercial Warehouse Company* (1872), 49 N. Y. 635.

Action to set aside obligations.—Neither a corporation nor a stockholder thereof can maintain a suit to set aside any of its obligations as usurious. *MacQuoid v. Queens Estate* (1911), 143 App. Div. 134, 127 N. Y. Supp. 867.

An action for surrender of securities pledged by a corporation as collateral for

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a usurious loan cannot be maintained by the corporation as it cannot be allowed to accomplish by indirection what it could not do directly. *Isle of Wight Company v. Smith* (1889), 51 Hun 562, 4 N. Y. Supp. 73.

Foreign contracts.—This section is applicable to contracts made in foreign countries and alleged to be usurious by the laws of such countries. *Curtis v. Leavitt* (1857), 15 N. Y. 1, 230, 296.

Foreign corporations, prosecuting in this state, are within the act. *Southern Life Insurance & Trust Co. v. Packer* (1858), 17 N. Y. 51.

A corporation organized by executors in order to continue the business of a testator cannot plead the defense of usury. *DeMoltke-Huitfeldt v. Garner & Co.* (1911), 145 App. Div. 766, 130 N. Y. Supp. 558.

Section cited.—*Portland Bank v. Evansville* (1885), 25 Fed. Rep. 389; *Frazier v. Trow's P. & B. Company* (1881), 24 Hun 281, *affd.* (1882), 90 N. Y. 678.

§ 375. Transfer of cause of action for usury.—A cause of action to cancel, or otherwise affect, an instrument executed, or an act done, as security for a usurious loan or forbearance, can be transferred, where the instrument or act creates a specific charge upon property, which is also transferred in disaffirmance thereof, and not otherwise; but, in that case, the transferee does not succeed to the right, conferred by statute upon the borrower, to procure relief, without paying, or offering to pay, any part of the sum or thing loaned.

Source.—Code Civ. Pro. § 1911.

§ 376. Return of excess a bar to further penalties.—Every person who shall repay or return the money, goods or other thing so taken, accepted or received, or the value thereof, shall be acquitted and discharged from any other or further forfeiture, penalty or punishment, which he may have incurred, by taking or receiving the money, goods or other thing so repaid, or returned, as aforesaid.

Source.—R. S., pt. 2, ch. 4, tit. 3, § 7.

Application of section. *Curtiss v. Teller* (1913), 157 App. Div. 804, 143 N. Y. Supp. 188, *affd.* (1916), 217 N. Y. 649, 112 N. E. 1056.

Surrender of usurious premium.—The provisions of this section, which gives immunity from forfeiture only upon the repayment or return of the bonus exacted, requires actual and unconditional surrender of the usurious premium. One who proposes restitution only in the event that the usurious contract shall be established can obtain no relief. An offer by the assignee of a legacy without prejudice to adjust the matter by payment of a sum reached by subtracting from the usurious premium the amount of interest unpaid on the loan does not avoid the forfeiture under said section. *Matter of Baker* (1912), 77 Misc. 90, 137 N. Y. Supp. 530.

Return of excessive interest taken by loan association.—The fact that the manager and an employee of a loan association, subsequent to their indictment for usury in violation of section 314 of the Banking Law and prior to the trial, returned to the complainant all the excess interest charged above the legal rate, does not constitute a defense, under section 376 of the General Business Law, as said section is not applicable. *People v. Young* (1912), 153 App. Div. 567, 138 N. Y. Supp. 50, *affd.* (1913), 207 N. Y. 522, 101 N. E. 451.

§ 377. Borrower bringing an action need not offer to repay.—Whenever any borrower of money, goods or things in action, shall begin an

action for the recovery of the money, goods or things in action taken in violation of the foregoing provisions of this article, it shall not be necessary for him to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief to the borrower in any case of usurious loans forbidden by the foregoing provisions of this article.

Source.—L. 1837, ch. 430, § 4.

Confined to borrower.—The courts, in construing this section, have given a strict meaning to the term "borrower," and have held that it designates only the party who is bound by the original contract to pay the loan. *Hubbard v. Tod* (1898), 171 U. S. 474; *Post v. Bank of Utica* (1844), 7 Hill 391; *Wheelock v. Lee* (1876), 64 N. Y. 242; *Buckingham v. Corning* (1883), 91 N. Y. 525; *Marsh v. House* (1878), 13 Hun 126; *Alden v. Dlossy* (1878), 16 Hun 311. See also *Vilas & Bacon v. Jones & Piercy* (1848), 1 N. Y. 274.

The term "borrower" does not embrace the grantee of property covered by an usurious incumbrance. *Schermerhorn v. Talman* (1856), 14 N. Y. 93; *O'Brien v. Ferguson* (1885), 37 Hun 368.

A mortgagee of real estate which is subject to the lien of a prior judgment, confessed by the mortgagor upon a usurious consideration, is not a "borrower." *Rexford v. Widger* (1848), 2 N. Y. 131.

An assignee in bankruptcy cannot maintain an action to compel a lender to deliver up collaterals turned out by the bankrupt to secure an usurious loan or to have an obligation given by him therefor declared void without paying or offering to pay the sum loaned. He is not a "borrower" within the meaning of this section. *Wheelock v. Lee* (1876), 64 N. Y. 242. See also *Wright v. Clapp* (1882), 28 Hun 7.

An accommodation endorser of a note discounted at a usurious rate of interest, who did not act toward procuring the loan except to endorse the note is not a borrower. *Allerton v. Belden* (1872), 49 N. Y. 373.

Part of obligation valid.—Where a mortgage has been given to secure the payment of several promissory notes, a part of which are usurious, and a part of which are *bona fide*, although the mortgage is void, a court of equity will require the complainant to do equity by paying or tendering payment of the valid notes covered by the mortgage, before it will entertain a suit to cause the mortgage to be delivered up and canceled. *Williams v. Fitzhugh* (1868), 37 N. Y. 444.

Acceptance of plaintiff's offer to pay principal and legal interest.—In an action brought to have securities given to secure a usurious loan declared void, the offer of the plaintiffs in their complaint to pay the principal sum with lawful interest, must be accepted by the defendant, if at all, before judgment, and cannot be enforced by motion on the part of the defendant, or after judgment has been entered against him in the action. *Browne v. Vredenburg* (1870), 43 N. Y. 195.

A prayer for affirmative relief, within the meaning of this section, is not shown by a petition in bankruptcy for an order directing the trustee to surrender the proceeds of accounts to petitioner under a collateral loan contract, and an answer pleading usury, and asking that the petition be denied and the trustee be declared entitled to the proceeds. *In re Fishel* (1912), 198 Fed. 464.

§ 378. **How interest calculated.**—Whenever, in any statute, act, deed, written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is or shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be

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calculated at the rate mentioned, by the year, in the same manner as if the words "per annum" or "by the year" had been added to such rate.

Source.—R. S., pt. 2, ch. 4, tit. 3, § 10.

§ 379. Interest permitted on advances on collateral security.—In any case hereafter in which advances of money, repayable on demand, to an amount not less than five thousand dollars, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon in writing, by the parties to such transaction.

Source.—L. 1882, ch. 237, § 1.

Reference.—See Banking L. §§ 115, 201.

The effect of this section is to repeal the usury statutes so far as they apply to demand loans of \$5000 and upwards, secured by the pledge of negotiable instruments. *Hawley v. Kountze* (1896), 6 App. Div. 217, 39 N. Y. Supp. 897.

A demand note for \$5,500, of which \$500 is compensation for the loan, secured by the pledge of certificates of stock, is not void for usury even though it does not show what part thereof comprised the compensation and what part the loan. *Wright v. Toomey* (1910), 137 App. Div. 401, 121 N. Y. Supp. 721.

Written contract not necessary. In *re Wilde's Sons* (1904), 133 Fed. Rep. 562.

§ 380. Brokerage on loans.—No person shall, directly or indirectly, take or receive more than fifty cents for a brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars, and in that proportion for a greater or less sum, except loans on real estate security; nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance, or for any counter bond, bill, note or other security concerning the same.

Source.—R. S., pt. 1, ch. 20, tit. 19, § 1, as amended by L. 1895, ch. 467.

Effect of statute is not to render contract wholly void. *Buchanan v. Tilden* (1897), 18 App. Div. 123, 45 N. Y. Supp. 417.

Length of time loan is to run does not affect commission. *Corp. v. Brown* (1848) (2 Sandf.) 293; *Broad v. Hoffman* (1848), 6 Barb. 177; *Cook v. Phillips* (1874), 4 Super., 56 N. Y. 310.

Computation is upon the value of the currency called for by contract. *Brown v. Post* (1868), 29 Super. (6 Robt.) 111.

Promise to pay illegal compensation does not affect broker's right to recover legal compensation. *Vanderpoel v. Kearns* (1853), 2 E. D. Smith, 170.

Charge for guaranteeing payment of note as inducement for loan.—Under the provision of this section; and section 381, which provides for the recovery of any excess over the lawful rate, one who merely guarantees the payment of a note so as to induce another to make a loan may charge any amount for his credit provided the transaction is not a cover for usury, or the collection of unlawful brokerage fees. *Grannis v. Temple* (1914), 84 Misc. 415, 146 N. Y. Supp. 239.

§ 381. Recovery of excess.—Every person who shall pay, deliver or deposit any money, property or thing in action, over and above the rate aforesaid, and his personal representatives may, within one year after such

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payment, delivery or deposit, sue for and recover the same of the person so taking or receiving such money, property or thing in action, or of his personal representatives.

In case such suit shall not be brought within the time above prescribed, in good faith, or in case it shall be discontinued, or wilfully delayed, then the overseers of the poor of the city or town where the offense was committed, may, within one year after such neglect, discontinuance or delay, sue for and recover the money, property or thing in action, so received, delivered or deposited, from the person receiving the same, or his personal representatives, for the use of the poor of the county.

Source.—R. S., pt. 1, ch. 20, tit. 19, §§ 2, 3.

Action for recovery may be commenced before contract is fully performed. *Woodward v. Stearns* (1871), 10 Abb. Pr. N. S. 395.

§ 382. Restitution a bar to further penalties.—Upon the repayment and return of the money, property or other thing so illegally received, with the payment of the costs of such suit, the person making such return shall be acquitted and discharged from any other punishment, forfeiture or penalty, which he may have incurred by reason of having so illegally received such money, property or other thing so returned.

Source.—R. S., pt. 1, ch. 20, tit. 19, § 5.

ARTICLE XXV-A.

(Article added by L. 1911, ch. 825.)

SALE OF COAL, COKE AND CHARCOAL.

Section 383. Coal, coke and charcoal to be sold by weight.

384. Delivery tickets.

385. Proviso as to delivery of entire cargo or carload of coal.

386. Sizes of markings of bags and baskets.

387. How coal, coke or charcoal may be reweighed.

388. Seller shall not refuse to allow coal, coke or charcoal to be reweighed.

389. Penalties.

389-a. Application of article.

§ 383. Coal, coke and charcoal to be sold by weight.—Coal, coke and charcoal shall be sold by weight except as hereinafter provided. A person, firm or corporation shall not attempt to sell or deliver less than two thousand pounds by weight to the ton of coal, coke or charcoal, or a proper proportion thereof in quantities less than a ton, and such coal, coke or charcoal shall be duly weighed on scales that have been tested and sealed by the official charged with such testing; provided, however, that in all cases thirty pounds to the ton shall be allowed for the variation in scales and wastage. (*Added by L. 1911, ch. 825.*)

Source.—New.

§ 384. Delivery tickets.—No person, firm or corporation delivering

coal, coke or charcoal shall deliver or cause to be delivered any quantity or quantities of coal, coke or charcoal, without each such delivery being accompanied by a delivery ticket, and a duplicate thereof, on each of which shall be in ink, or other indelible substance, distinctly expressed in pounds the quantity or quantities of coal, coke or charcoal contained in the cart or wagon or other vehicle used in such delivery, with the name of the purchaser thereof and the name of the dealer from whom purchased. One of such tickets shall be delivered to the purchaser specified thereon, and the other of such tickets shall be retained by the seller. (*Added by L. 1911, ch. 825.*)

Source.—New.

Construction and application.—This section admits of no reasonable interpretation except that every sale of coal, coke or charcoal shall be accompanied by a delivery ticket and duplicate thereof, one of which shall be delivered to the purchaser. Where an employee of a foreign corporation engaged in mining and shipping coal, on presentation of an order, obtained a ton of coal from defendant and no delivery ticket was given to the corporation as required by the statute, defendant was properly convicted of a violation thereof, though it intended and subsequently did deliver such ticket to its customer to whom the coal was delivered by the corporation's employee. *People v. D. L. & W. R. Co.* (1913), 81 Misc. 253, 143 N. Y. Supp. 159.

Where, upon a charge of violating section 384 of the General Business Law, by delivering coal without a delivery ticket and duplicate thereof, having on each in ink or other indelible substance distinctly expressed in pounds the quantity of coal contained in the cart or wagon used in such delivery, with the name of the purchaser and of the dealer from whom purchased, defendant, who did not take the witness stand, was convicted upon testimony insufficient to overcome the presumption of innocence and to connect him with the delivery of the coal, a statement of the prosecuting attorney, that defendant had the right to testify that the tickets put in evidence and which did not comply with the statute were not his, was prejudicial error which was not rendered harmless by an instruction to the jury to disregard it. *People v. Smith* (1914), 84 Misc. 348, 147 N. Y. Supp. 541.

§ 385. Proviso as to delivery of entire cargo or carload of coal.—The preceding section shall not apply to coal delivered by the entire cargo direct from the vessel containing the same to one destination and accepted by the purchaser on the original bill of lading as proof of weight, or from a full car loaded with coal; but with every such delivery of an entire cargo or carload of coal there shall be delivered to the purchaser thereof by the consignor, one of the original bills of lading or shipping notices issued to or by the person, firm or corporation by whom the coal was loaded into the vessel or car from which such coal is delivered to the purchaser of the entire cargo or carload thereof, on each of which bills of lading there shall be in ink or other indelible substance distinctly expressed the date and place of loading such cargo or car and the number of pounds contained therein. (*Added by L. 1911, ch. 825.*)

Source.—New.

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§ 386. **Sizes of markings of bags and baskets.**—Baskets or bags used for the delivery of coal, coke or charcoal, shall be of such capacity as to hold stricken full approximately one hundred pounds of anthracite coal; but baskets or bags of other sizes used for delivery may be used if the amount of anthracite coal they will contain stricken full is indelibly marked on the outside thereof in solid roman capital letters at least three inches in height. When the coal, coke or charcoal is sold in quantities less than one hundred pounds in baskets or bags or pails, the provisions of section three hundred and eighty-four shall not apply, but such baskets, bags or pails shall have the weight of the contents plainly marked on the outside side thereof in solid roman capital letters at least one inch in height; but charcoal or coke in quantities less than one hundred pounds may be sold by standard dry measure, and in such cases the bag, basket or pail shall have plainly marked on the outside side thereof the capacity in terms of standard dry measure in solid roman capital letters at least one inch in height. (*Added by L. 1911, ch. 825.*)

Source.—New.

§ 387. **How coal, coke or charcoal may be reweighed.**—A weights and measures official of the state, of the city or of the county who finds any quantity of coke, coal or charcoal ready for delivery, may in his discretion direct the person in charge of the goods to convey the same without delay to scales designated by such official, who shall there determine the quantity of the goods and shall determine their weight with the weight of the vehicle in which they are carried and shall direct said person to return to such scales forthwith upon unloading the goods, and upon such return the official shall reweigh the vehicle in a manner similar to that in which it was weighed with the goods. The scale designated by the official as aforesaid may be any scale which has been duly tested and sealed and shall be such scales as are in his judgment the most convenient of those available. (*Added by L. 1911, ch. 825.*)

Source.—New.

§ 388. **Seller shall not refuse to allow coal, coke or charcoal to be reweighed.**—No seller of coal, coke or charcoal shall refuse to permit a weights and measures official to weigh the coal, coke or charcoal purchased from him to be reweighed at the request of the purchaser or at the request of the weights and measures official. No driver or any other person in charge of the vehicle containing coal, coke or charcoal or from which coal, coke or charcoal has been delivered shall refuse to take the same at the request of the purchaser or of the weights and measures official to scales as aforesaid for the purpose of having the same weighed, but when there is a charge for weighing such charge shall be paid by the one making the request. (*Added by L. 1911, ch. 825.*)

Source.—New.

§§ 389, 389-a, 390.

Miscellaneous.

L. 1909, ch. 25.

§ 389. Penalties.—A violator of any of the preceding sections shall be guilty of a misdemeanor and shall upon conviction be liable to a fine of not over fifty dollars for the first offense and not over one hundred dollars or two months' imprisonment, or both, for the second and each subsequent offense. (*Added by L. 1911, ch. 825.*)

Source.—New.

§ 389-a. Application of article.—This article shall not apply to the city of New York. (*Added by L. 1911, ch. 825.*)

Source.—New.,

ARTICLE XXVI.

MISCELLANEOUS.

Section 390. Marking canned goods.

391. Penalties for marketing small fruit packages or baskets or selling fruit therein.

392. Repacking fruit and farm produce.

392-a. Marking mattresses.

393. Marking ginseng.

394. Marking thread.

395. Marking oyster kegs and cans.

396. Fees and charges for elevators and warehouses.

397. Sale of agricultural products on commission.

398. Bills of lading to be issued by vessels transporting merchandise within the state.

§ 390. Marking canned goods.—No packer or dealer in hermetically sealed, canned or preserved fruits, vegetables or other articles of food within this state, excepting canned or condensed milk or cream, shall sell or offer the same for sale for consumption within this state, unless the cans or jars containing the same shall have plainly printed upon a label thereupon, with a mark or term clearly indicating the grade or quality of the articles contained therein, the name, address and place of business of the person or corporation canning or packing them, or the name of the wholesale dealer in the state selling or offering the same for sale, and the name of the state, county and city, town or village where packed, preceded by the words "packed at."

If containing soaked goods or goods put up from products dried or cured before canning, there shall also be printed upon the face of such label in good legible type, one-half of an inch in height and three-eighths of an inch in width, the word "soaked."

Goods imported from foreign countries of foreign manufacture shall not be subject to the provisions of this section.

Any person violating any of the provisions of this section shall forfeit to the city, village or town where the violation occurs, the sum of fifty dollars, if a retail dealer, and the sum of five hundred dollars, if a wholesale dealer or packer.

L. 1909, ch. 25.

Miscellaneous.

§§ 391, 392.

Provided, however, that nothing in this section shall apply to hermetically sealed or canned or preserved foods in containers which are labeled in accordance with the provisions of the agricultural law and also with the provisions of the act of congress of June thirtieth, nineteen hundred and six, relating to misbranded and adulterated foods. (*Amended by L. 1915, ch. 371.*)

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 30; originally revised from L. 1885, ch. 269.

References.—Violation of section a misdemeanor, Penal Law, § 1748, subd. 5. False labels, Penal Law, § 435. Adulterations generally, Public Health Law, §§ 40-50; of food products, Agricultural Law, §§ 200, 201. Enforcement of law relative to adulteration of food products, Farms and Markets Law, § 100.

§ 391. Penalties for marketing small fruit packages or baskets or selling fruit therein.—Any person in this state who sells or offers for sale fruit packages that are of less than the standard sizes and capacity as defined in section five, or any person who sells or offers for sale fruit in packages that are of less size or capacity than those defined in section five, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of competent jurisdiction shall be fined not less than five dollars and not more than twenty-five dollars, for each violation and each sale shall constitute a separate violation, but a variation of not more than seven per centum shall not be deemed a violation under this section. (*Amended by L. 1909, ch. 414.*)

Source.—L. 1899, ch. 509, §§ 2, 3.

Constitutionality.—The provision of this section prohibiting the manufacture of berry boxes under size without being stamped "short" applies to boxes for sale outside the state and is constitutional. Rept. of Atty. Genl. (1909), 835.

Each individual fruit box should be marked "short" when not up to the standard weight. It is not sufficient for a commission merchant or wholesaler to mark the outside of a crate with the word "short." Rept. of Atty. Genl. (1909), 834.

§ 392. Repacking fruit and farm produce.—A person, firm or association who purchases fruit or farm produce in barrels, boxes or other packages, and empties, or causes to be emptied, such barrels, boxes or other packages, and repacks, or causes to be repacked therein the same or other fruit or farm produce, shall, before any such repacked barrel, box or other package is sold, or offered or exposed for sale, erase or otherwise obliterate the name of the grower or producer, if found thereon. Every such person, firm or association selling, or offering or exposing for sale fruit or farm produce which has been emptied from and repacked in the barrels, boxes or other packages in which they were purchased, without erasing or otherwise obliterating the name of the grower or producer of such fruit or farm produce, if found thereon, as above provided, shall be subjected to a penalty of fifty dollars for each barrel, box or other package of fruit or farm produce so sold, offered or exposed for sale.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 45, as added by L. 1904, ch. 309.

§ 392-a.

Miscellaneous.

L. 1909, ch. 25.

§ 392-a. **Marking mattresses.**—No person shall manufacture, sell, offer or expose for sale, deliver or have in his possession with intent to sell or deliver in this state any mattresses, pillow, cushion, muff bed, down quilt or bag containing hair, down or feathers unless the same be branded or labeled as follows: Upon each such mattress, pillow, cushion, muff bed, down quilt or bag there shall be securely fixed a banneret, paper or cloth tag which, if attached to the article itself, shall be sewed thereon upon which there shall be legibly printed in the English language a statement of the kind of material used in the manufacture of such mattress, pillow, cushion, muff bed or down quilt, and, if the material used in such mattress, pillow, cushion, muff bed or down quilt has been previously used in the manufacture of such articles, or about the person, it shall be branded second-hand. If such mattress, pillow, cushion, muff bed, quilt or bag be enclosed in a bale, box or crate, the receptacle shall bear a tag stating that the contents of the package is branded or labeled as required by this section. It shall be unlawful for any person to remove, conceal or deface any such brand or label. No person shall use, either in whole or in part, in the manufacture of any mattress, pillow, cushion or muff bed, down quilt, or bag, any material which has been used in or has formed a part of any mattress, pillow, cushion, muff bed, down quilt or bag used in or about a public or private hospital or in or about any person having an infectious or contagious disease. If on inspection the commissioner of labor shall find in any factory, or other places, materials for the manufacture of mattresses, pillows, muff beds, down quilts or bags, or if he shall find such mattresses, pillows, cushions, muff beds, down quilts or bags offered or intended for sale, the materials for making of which are made of materials that have been used in a hospital or by persons having an infectious or contagious disease, he shall, after first making and filing in the public records of his office a written order stating the reason therefor, at once and without further notice order the removal and destruction of such mattresses, pillows, cushions, muff beds, down quilts or bags, or of the materials intended for the manufacture of such mattresses, pillows, cushions, muff beds, down quilts or bags and affix to such mattresses, pillows, cushions, muff beds, down quilts or bags, or materials, labels or conspicuous signs bearing the word "unclean." No one but the commissioner of labor shall remove any such label or sign and he may refuse to remove it until such factory or other place be properly cleaned and disinfected. It shall be the duty of the state commissioner of labor whenever he has reason to believe that any person is violating or has violated any of the provisions of this section to cause an investigation to be made and for that purpose he or his duly accredited representative shall have authority at all reasonable times to enter into any building, or other place, where such business is being conducted for the purpose of making such examination, and if evidence of such violation is obtained, shall place before the attorney-general any information he may have in relation thereto. The attorney-

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general shall thereupon, or the district attorney of the county in which the alleged violation occurs, if so directed by the attorney-general, institute the proper legal proceedings for the punishment of any such violation. The commissioner of labor may in a proper case through the attorney-general sue for and obtain an injunction restraining any person from manufacturing or selling an article in violation of this section. Any person who shall violate the provisions of this section shall be liable to a penalty of fifty dollars for each violation thereof, which penalties shall be cumulative and may be recovered by the attorney-general and more than one penalty may be included in the same action. (*Added by L. 1913, ch. 503.*)

Penal Law, § 444, makes violation a misdemeanor.

Renovation of hospital mattresses.—A manufacturer is not prohibited from renovating mattresses for a hospital because he uses materials formerly contained in mattresses used in the institution. The markers required to be attached to mattresses must state the kind of material used, such as hair, down or feathers. In addition thereto it must be marked second hand, if the materials had previously been used in the manufacture of such articles. The law does not provide for the marking of mattresses renovated for a hospital after use therein. Rept. of Atty. Genl. (1913), Vol. 2, p. 682.

§ 393. **Marketing ginseng.**—No person shall sell, offer or expose for sale in this state, any ginseng roots or seeds foreign to the United States, or ginseng roots or seeds raised from stock imported from any country outside the United States, except in packages to which shall be securely affixed a label, stating in plain English language, the name of such foreign country in which the roots or seeds were originally grown.

Source.—Domestic Commerce L. (L. 1896, ch. 376), as added by L. 1904, ch. 309.

Reference.—Breaking into ginseng garden, burglary, Penal Law, § 400.

§ 394. **Marking thread.**—Every person or firm engaged in the manufacture of sewing, darning, crochet, or embroidery thread of cotton, linen or silk, or in putting up such thread on spools or in balls, skeins, tubes, bobbins, cones or other packages, shall before the same is offered for sale, affix to or impress upon each spool, ball, skein, tube, bobbin, cone or other package of thread so manufactured or put up, a label or stamp designating its weight in pounds and ounces or length in yards; provided, that where from the shape or size of the package it is impossible so to affix such label or stamp, the same shall be affixed to the box in which such packages are put up. If any such person or firm shall neglect to affix to, or impress upon, any such spool, ball, skein, tube, bobbin, cone, package or box such label or stamp, or shall, with intent to deceive, affix to or impress upon any such spool, ball, skein, tube, bobbin, cone package or box a label or stamp specifying that it contains a number of yards or a quantity of thread greater by five per centum or more than it does in fact contain, then such person or firm shall forfeit the sum of twenty dollars for each spool, ball, skein, tube, bobbin, cone, package or box, which, without such label or stamp, or falsely so labeled or stamped, shall be sold, or be delivered to any person to be

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sold, said sum of twenty dollars for each violation of this section to be recovered in an action by any person or firm who will sue for the same, one-half whereof shall be paid to the state treasurer.

Any person or firm knowingly selling any sewing, darning, crochet or embroidery thread of cotton, linen or silk either without a label or stamp specifying the quantity or length thereof, or with a label and stamp falsely stating such quantity or length, shall forfeit the sum of twenty dollars for each spool, ball, skein, tube, bobbin, cone, package or box so sold without label or incorrectly labeled, said sum of twenty dollars for each violation of this section to be recovered in an action by any person or firm who will sue for the same, one-half whereof shall be paid to the state treasurer.

Source.—Domestic Commerce L. (L. 1896, ch. 376) §§ 42, 43, as added by L. 1903, ch. 619.

§ 395. **Marking oyster kegs and cans.**—Every person engaged in putting up oysters for sale in kegs or cans, or offering them for sale in kegs or cans, not previously marked or branded, shall mark or brand such kegs or cans with the true quantity of oysters in pints, quarts or gallons, which they may respectively hold, and not more than one-quarter of such quantity shall be liquid.

Every person violating any provision of this section shall forfeit to the city, village or town where the violation occurs, the sum of one hundred dollars for every such violation.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 31; originally revised from L. 1849, ch. 372, as amended by L. 1859, ch. 72.

Reference.—False labels, Penal Law, § 435.

§ 396. **Fees and charges for elevators and warehouses.**—The maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in any city having a population of one hundred and thirty thousand or over, shall not exceed five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships and canal boats shall only be required to pay the charge of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading; and in any case the fee charged for the use of a shovel operated by steam or any other mechanical power, in connection with any floating or stationary elevator, shall not exceed the sum of one dollar and fifty cents for each one thousand bushels elevated. For every violation of any provision of this section, the person committing such violation shall forfeit to the people of the state the sum of two hundred and fifty dollars. A person injured by a violation of this section may recover any damages sustained from the person violating the same.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 32; originally revised from L. 1888, ch. 581.

Consolidators' note.—Word "article" changed to "section" as it is evident that the

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Miscellaneous.

§§ 397, 398.

intention was to have the penal provision apply to a violation of the section and not of the article.

Reference.—Excessive charge a misdemeanor, Penal Law, § 432.

Constitutional.—*People v. Budd* (1889), 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559; *Budd v. New York* (1892), 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. 468. In the latter case all the earlier supreme court cases are considered, especially *Munn v. Illinois* (1876), 94 U. S. 113, 24 L. Ed. 77. The police power of the state to regulate private business fully considered, *Id.* Doctrine of *Budd v. New York* affirmed as to N. Dakota act. *Brass v. Stoesser* (1894), 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857.

The business of elevating grain is a business charged with a public interest, and being such is subject to be controlled by public legislation for the common good through the exercise of its police power by the state; it is not an interference with interstate commerce, for it affects elevators entirely within the waters of the state; the charges fixed by the statute are not unreasonable and do not deprive of property without due process of law; the fact that only elevator owners in cities of more than 130,000 population are affected does not deny equal protection of the laws, for it operates equally on all owners in such places. (Contra, see dissenting opinion.) *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. 468 (1892), affg. *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559.

"Actual cost" excludes any charge beyond the sum specified for the use of machinery in shoveling, and the ordinary expense of operating it, and confines the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. *People v. Budd* (1889), 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559.

§ 397. Sale of agricultural products on commission.—Any person doing business in this state as a commission merchant, or who receives from any person of this state agricultural products or farm produce raised in this state to sell on commission, shall, immediately on the receipt of such goods, send to the consignor a statement in writing, showing what property has been received. When any such person or commission merchant shall have sold twenty-five per centum of such property received by him, he shall, when requested, immediately render a true statement to the consignor, showing what portion of such consignment has been sold and the price received therefor.

Source.—Domestic Corporations L. (L. 1896, ch. 376) § 39; originally revised from L. 1892, ch. 656, §§ 1, 2.

Reference.—Violation, a misdemeanor, Penal Law, § 433.

§ 398. Bills of lading to be issued by vessels transporting merchandise within the state.—It shall be the duty of the owner, master or agent of any vessel transporting merchandise or property between ports of this state to issue to shippers of any lawful merchandise a bill of lading or shipping document or to sign a bill of lading or shipping document when presented by the shipper or his agent, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master or agent of the vessel for transportation, and

§§ 400, 401.	Laws repealed.	L. 1909, ch. 25.
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such document shall be prima facie evidence of the receipt of the merchandise therein described.

Source.—Domestic Commerce L. (L. 1896, ch. 376) § 41, as added by L. 1898, ch. 157.

ARTICLE XXVII.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 400. Laws repealed.

401. When to take effect.

§ 400. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 401. When to take effect.—This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Revised Statutes	Part 1,	LAWS OF	CHAPTER	SECTION
chapter 17,	All	1785	54	All
Revised Statutes	Part 1,	1785	56	All
chapter 19, title 2,	All	1785	68	5
Revised Statutes	Part 1,	(8th Sess.)		
chapter 20, title 19, article 1,	All	1785	76	2
Revised Statutes	Part 1,	1785	80	12-14
chapter 20, title 19, article 3, § 9		1786	29	2
Revised Statutes	Part 2,	1786	54	1-4
chapter 4, title 3, sections 1-8, 10		1786	61	1-6
LAWS OF	CHAPTER	SECTION		
1778	10	All	1787	81
1778	34	All	1788	13
(1st Sess.)			1788	50
1778	42	All	1788	53
1778	2	All	1788	55
(2d Sess.)			1788	56
1779	21	All	1788	58
(3d Sess.)			1788	72
1780	43	All	1790	33
1780	2	All	1791	27
1781	31	All	1792	29
1781	39	All	1792	62
1781	52	1	1795	37
1783	18	All	1796	42
1783	27	All	1797	66
1784	4	All	1797	94
1784	10	All	1799	61
(7th Sess.)			1799	88
1784	25	All	(22d Sess.)	
(7th Sess.)			1800	93
1784	40	All	1800	97
(7th Sess.)			1800	129
1784	53	All	1801	45
(7th Sess.)			1801	59
1784	65	44	1801	63
(7th Sess.)			1801	116
1784	7	All	1801	130
(8th Sess.)			1801	138
1784	17	20	1801	158
(8th Sess.)			1801	167
1785	34	All	1802	19
(8th Sess.)			1802	90
1785	35	All	1802	117
(8th Sess.)			1803	101
			1804	1

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Laws repealed.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1804	65	All	1822	117	All
1804	93	All	1822	157	All
1804	99	All	1822	164	All
1804	101	All	1822	228	All
1805	44	All	1823	58	All
1805	61	All	1823	105	All
1806	81	3, 4	1823	197	5
1807	66	All	1823	220	All
1807	180	All	1824	47	All
1808	29	2	1825	125	All
1808	59	All	1825	137	All
1808	63	All	1825	148	All
1808	186	All	1825	175	All
1808	217	All	1825	194	All
1809	5	All	1825	282	All
1809	8	1-4	1825	315	All
1809	56	All	1826	54	All
1809	80	1-6	1826	126	All
1809	164	16	1826	250	All
1810	56	All	1826	307	All
1810	160	All	1827	27	All
1810	172	All	1827	37	All
1811	89	All	1827	235	11
1811	107	All	1827	297	All
1812	230	All	1828	261	All
R. L. 1813	26	All	1828	267	1
R. L. 1813	9	All	1828	16	All
R. L. 1813	22	All	(2d Meet.)		
R. L. 1813	27	All	1828	20	15,
R. L. 1813	28	All	¶ 12 (2d Meet.)		
R. L. 1813	30	All	1828	21	1,
R. L. 1813	36	All	¶ 24, 52, 71, 73, 98, 134, 142, 148-		
R. L. 1813	38	All	153, 171, 203, 206, 209, 224, 237, 239,		
R. L. 1813	70	All	242, 270, 278, 295, 300, 315, 318, 332,		
1814	4	All	341, 345, 352, 353, 362, 381, 404, 433,		
1814	116	All	435, 441, 452, 454, 496, 526, 540, 541		
1814	131	All	(2d Meet.)		
1814	231	All	1829	51	All
1814	263	All	1829	297	All
1814	96	All	1829	362	All
1814	13	All	1830	300	All
1814	57	All	1830	310	All
1817	144	All	1831	34	All
1817	222	All	1831	97	All
1817	233	All	1831	232	All
1817	240	All	1831	315	All
1818	275	All	1831	316	All
1818	70	All	1832	113	All
1818	159	All	1832	289	All
1818	192	1,	1832	300	All
pt. ch. 1818	extending provisions of L. 1815,		1832	310	All
1818	263, §§ 5, 6		1833	118	All
1818	235	All	1833	233	All
1818	12	All	1833	261	All
1818	119	All	1833	265	All
1820	230	All	1833	267	All
1820	54	All	1833	310	All
1820	59	All	1834	56	All
1821	153	All	1835	62	All
1821	12	All	1835	92	All
1821	42	All	1835	238	All
1821	161	1	1835	282	All
1821	187	All	1836	266	All
1821	240	10-13	1836	374	All
1822	80	All	1836	475	All
1822	91	All	1837	297	All

Laws repealed.			L. 1909, ch. 25.		
LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1837	300	All	1879	538	All
1837	430	1, 4, 5, 7	1880	72	All
1838	52	All	1880	386	All
1840	69	All	1882	64	All
1840	70	All	1882	237	All
1840	323	All	1882	292	All
1840	345	All	1883	227	All
1841	280	All	1883	310	All
1842	264	All	1883	339	All
1842	314	All	1884	94	All
1843	86	All	1884	363	All
1843	128	All	1885	269	All
1843	197	All	1885	467	All
1843	202	All	1885	468	All
1843	212	All	1886	417	All
1844	70	All	1887	337	All
1844	276	All	1887	377	All
1846	20	All	1887	401	All
1846	62	All	1887	533	All
1846	237	All	1887	720	All
1847	207	All	1888	181	All
1847	242	All	1888	581	All
1849	372	All	1889	239	All
1849	399	All	1890	25	All
1850	62	All	1890	240	All
1850	172	All	1890	437	All
1850	307	All	1892	284	All
1851	121	All	1892	656	All
1851	134	All	1893	256	All
except § 33			1893	391	All
1853	138	All	1893	716	All
1853	311	All	1894	601	All
1854	326	All	1895	467	All
1855	421	All	1895	633	All
1855	523	All	1895	953	All
1857	560	All	1896	267	All
1857	725	All	1896	312	All
1859	72	All	1896	371	All
1860	20	All	1896	376	All
1860	117	All	1896	588	All
1860	155	All	1896	933	All
1862	178	All	1896	977	All
1863	77	All	1897	305	All
1864	131	All	1897	383	All
1864	276	All	1898	157	All
1865	295	All	1898	422	All
1865	666	All	1899	264	All
1865	773	All	1899	317	All
1866	547	All	1899	318	All
1866	658	All	1899	509	All
1866	872	All	1899	659	All
1867	375	6	1899	690	All
1867	549	All	1899	727	All
1867	677	2, 3	1900	543	All
1868	106	All	1901	313	All
1871	515	All	1901	362	All
1871	702	All	1902	337	All
1871	802	All	1902	482	All
1874	532	All	1902	608	All
1875	175	All	1903	308	All
1875	573	All	1903	366	All
1878	222	All	1903	538	All
1878	287	All	1903	619	All
1879	217	All	1904	286	All
1879	324	All	1904	309	All
1879	388	All	1904	432	All

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Consolidators' notes.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1904	548	All	1907	185	All
1904	556	All	1907	475	All
1904	749	All	1907	557	All
1905	162	All	1907	732	All
1906	327	All	1908	479	All
1906	328	All	Code of Civil Procedure		1911
1906	528	All			

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

- R. S., pt. 1, ch. 17, tit. 2, art. 1, § 30.—L. 1832, ch. 300, § 2, in terms repeals pt. 1, ch. 17, tit. 1, § 30; in fact § 30 of tit. 2, was intended, which deals with inspection of flour the subject matter of the repealing act, while § 30 of tit. 1 deals with auctions.
- R. S., pt. 1, ch. 20, tit. 19, art. 1.—Consolidated in General Business Law as follows: Sections 2, 3 as § 381. Section 5 as § 382. Section 1 was amended "to read as follows" by L. 1895, ch. 467, § 318, and § 4 is omitted as obsolete.
- R. S., pt. 2, ch. 4, tit. 3, §§ 1-9, 10.—Relating to brokerage for procuring loans. Consolidated in General Business Law, as follows: Section 2 as § 371. Sections 3, 4 as § 372. Section 7 as § 376. Section 10 as § 378. Section 1 was amended "to read as follows" by L. 1879, ch. 538, § 1. Section 5 amended "to read as follows" by L. 1837, ch. 430, § 1. Section 6 omitted as obsolete and § 8 repealed by L. 1837, ch. 430, § 9, because inconsistent with the provisions of section 4 of said act.
- L. 1778, ch. 43.—Temporarily suspends L. 1778, ch. 34, first session, which was repealed in second session.
- L. 1780, ch. 43.—Provides for general limitation of prices. Obsolete.
- L. 1781, ch. 24.—Temporary and obsolete.
- L. 1781, ch. 39.—Prohibits hawking and peddling. Obsolete and temporary.
- L. 1783, ch. 18.—Revives and continues last above act to Feb. 1, 1784. Temporary and obsolete.
- L. 1783, ch. 27.—Provisionally grants certain duties to the United States on foreign merchandise imported into this state. Obsolete.
- L. 1784, ch. 25.—Regulates weights and measures. Obsolete and partially repealed by L. 1804, ch. 1, § 8.
- L. 1784, ch. 53.—Authorizes Congress to adopt regulations respecting British trade. Obsolete.
- L. 1784, ch. 65.—Amends L. 1784, seventh session, ch. 10, § 12, now repealed. Obsolete.
- L. 1784, ch. 17, § 20.—Amends L. 1784, seventh session, ch. 10, § 30, which is repealed. Temporary and obsolete.
- L. 1785, ch. 35.—Regulates exportation of flour. Obsolete and partially repealed.
- L. 1785, ch. 56.—Vests in United States power to prohibit imports and exports. Obsolete.
- L. 1785, ch. 76, § 2.—Explanatory of L. 1784, eighth session, ch. 7, § 1, which was repealed by L. 1787, ch. 81, § 9. Obsolete.
- L. 1785, ch. 80, §§ 12-14.—Regulates auctions. Obsolete.
- L. 1786, ch. 54.—Establishes copyrights. Obsolete.
- L. 1786, ch. 61, §§ 1-6.—Grants to the United States certain imposts and duties on goods imported into this state. Obsolete.
- L. 1787, ch. 81.—Imposes import duties. Obsolete.
- L. 1788, ch. 56.—Regulates culling of staves and headings. Obsolete and partially repealed by L. 1800, ch. 129, § 5, L. 1823, ch. 58, § 12, and L. 1881, ch. 537, § 1.
- L. 1788, ch. 58.—Supplemental to L. 1785, ch. 35, regulating exportation of flour. Obsolete.
- L. 1788, ch. 72.—Supplemental to L. 1787, ch. 81, recommended for repeal above.
- L. 1789, ch. 27.—Obsolete. Amends L. 1784, ch. 4, already recommended for repeal.
- L. 1796, ch. 42.—Temporary and obsolete. Increases compensation of measures of grain and inspectors of flour. Const., art. 5, § 8, abolishes all offices for weighing, measuring, culling or inspecting any merchandise, etc.
- L. 1797, ch. 66.—Temporary and obsolete. Continues L. 1796, ch. 42, until April 1, 1798. See also Const., art. 5, § 8.
- L. 1801, ch. 130.—Provides for inspection of flour and meal. Obsolete. Partially repealed by L. 1821, ch. 240, § 12, and L. 1881, ch. 537, § 1. Abrogated by Const., art. 5, § 8.

Consolidators' notes.

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L. 1801, ch. 158.—Provides for inspection of sole leather. Obsolete and partially repealed by L. 1881, ch. 537, § 1. Abrogated by Const., art. 5, § 8.

L. 1802, ch. 90.—Amends L. 1801, ch. 63, recommended for repeal above. Obsolete.

L. 1806, ch. 81, §§ 3, 4.—Temporary and obsolete.

L. 1809, ch. 5.—Temporary and obsolete. Revives and continues L. 1804, ch. 65, until March 1, 1812.

L. 1809, ch. 8, §§ 2-4.—Section 2 revives and amends L. 1801, ch. 130. Obsolete and partially repealed by L. 1813, ch. 202. Abrogated by Const., art. 5, § 8.

L. 1809, ch. 56.—Extends L. 1808, ch. 186, which has been repealed. Temporary and obsolete.

L. 1809, ch. 164, § 16.—Amends L. 1808, ch. 186, § 2, which has been repealed.

L. 1810, ch. 56.—Section 1 repealed by L. 1813, ch. 202. Section 2 obsolete.

L. 1810, ch. 160.—Act to encourage manufacture of woolen cloth. Obsolete.

L. 1811, ch. 107.—Amends L. 1810, ch. 160, recommended for repeal above. Temporary and obsolete.

L. 1812, ch. 230.—Encourages manufacture of woolen cloth. Obsolete and temporary.

R. L., 1813, ch. 28.—Regulates repacking and inspection of beef and pork. Obsolete. All but § 26 repealed, and should be made complete. Abrogated by Const., art. 5, § 8.

L. 1814, ch. 4.—Extends to March 15, 1814, L. 1812, ch. 230, recommended for repeal above. Temporary and obsolete.

L. 1815, ch. 263.—All but §§ 2 and 5 have been repealed and these sections are obsolete.

L. 1818, ch. 192.—That part of § 1 which extends the provisions of L. 1815, ch. 263, §§ 5, 6, recommended for repeal above, should be repealed. Obsolete.

L. 1826, ch. 307.—Provides for purchase of standard weights and measures for assistant state sealer. Temporary and obsolete.

L. 1828, ch. 20, § 15, subd. 12.—Inserts certain words in L. 1828, ch. 261, § 1 (1st meet.), and R. S., pt. 1, ch. 17, both of which have been heretofore repealed.

L. 1829, ch. 51.—Supplementary to R. S., pt. 1, ch. 5, tit. 1, § 1, subd. 4, relating to inspectors of lumber. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1829, ch. 362.—Provides for gauging and re-gauging beer in New York and Brooklyn. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1830, ch. 300.—Regulates inspection of sole leather. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1831, ch. 34.—Supplementary to R. S., pt. 1, ch. 19, tit. 2, § 23. Ch. 19 was repealed by L. 1851, ch. 134, § 35.

L. 1831, ch. 97.—Amends provisions of R. S. respecting inspection of domestic distilled spirits. Obsolete and substantially repealed by L. 1881, ch. 537. Abrogated by Const., art. 5, § 8.

L. 1831, ch. 232.—Regulates inspection of green hides and skins. Partially repealed by L. 1881, ch. 537. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1831, ch. 316.—Applies R. S., pt. 1, ch. 17, tit. 1, § 6, to city of Albany. Ch. 17 was repealed by L. 1896, ch. 376, § 110.

L. 1832, ch. 113.—Relates to inspection of sole leather in Ontario, Genesee and Erie counties. Unnecessary and obsolete. Abrogated by Const., art. 5, § 8.

L. 1832, ch. 300.—Amends R. S., pt. 1, ch. 17, tit. 2. Ch. 17 was repealed by L. 1896, ch. 376, § 110. Obsolete and partially repealed by L. 1881, ch. 537, § 1.

L. 1833, ch. 118.—Obsolete. Abrogated by Const., art. 5, § 8.

L. 1833, ch. 233.—Provides for measurers of wood in Suffolk county. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1833, ch. 265.—Relates to inspection of green hides and skins. Obsolete and partially repealed. Abrogated by Const., art. 5, § 8.

L. 1833, ch. 267.—Relates to inspection of green hides in Rochester. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1833, ch. 310.—Amends R. S., pt. 1, ch. 17, tit. 2, art. 9, § 159. Ch. 17 was repealed by L. 1896, ch. 376, § 110.

L. 1834, ch. 56.—Provides for inspection of leaf tobacco in New York. Partially repealed by L. 1843, ch. 202, and L. 1881, ch. 537. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1836, ch. 266.—Relates to packing of flour for whale fisheries. Partially repealed by L. 1881, ch. 537. Obsolete.

L. 1837, ch. 297.—Extends provisions of R. S., pt. 1, ch. 17, tit. 1, § 6, in regard to sales at public auction, to the city of Troy. Said ch. 17 was repealed by L. 1896, ch. 376, § 110, rendering statute cited without effect.

L. 1909, ch. 25.

Consolidators' notes.

L. 1837, ch. 300.—Provides for the sale of unclaimed baggage by common carriers. Section 1 was amended by L. 1901, ch. 313, § 4, "to read as follows." Remainder consolidated in General Business Law as follows:

Section 2 in § 281. Section 3 in § 282. Section 4 in § 283. Section 5 in § 284. L. 1837, ch. 430.—This statute relates to usury. Consolidated in General Business Law as follows:

Section 1 in § 373. Section 4 in § 377. Section 5 in § 373. Sections 6-8 were repealed as appears in schedule.

L. 1840, ch. 69.—Relates to inspection of unslacked lime in Warren county. Local and obsolete. Abrogated by Const., art. 5, § 8.

L. 1840, ch. 323.—Requires reports from inspectors, weighers and measurers. Obsolete. Abrogated by Const., art. 5, § 8, which abolished office of inspector. R. S., pt. 1, ch. 17, amended by second section, has been repealed.

L. 1840, ch. 345.—Relates to measurers, weighmasters and harbormasters in New York, Brooklyn and Williamsburgh. Abrogated by Const., art. 5, § 8.

L. 1842, ch. 364.—Amends R. S., pt. 1, ch. 17, which has been repealed. Abrogated by Const., art. 5, § 8.

L. 1842, ch. 314.—Applies to city of Utica and town of Salina, L. 1831, ch. 232, and L. 1833, ch. 265, recommended for repeal above. Abrogated by Const., art. 5, § 8.

L. 1843, ch. 128.—Relates to inspection of sole leather. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1843, ch. 212.—Relates to inspection of green hides and skins. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1844, ch. 70.—Temporary. Covered generally by "old" Domestic Commerce Law, § 11.

L. 1844, ch. 276.—Act to amend the several acts relating to inspection of beef and pork, etc. Has been partially repealed. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1846, ch. 237.—Relates to inspectors of hops, fish and oil. Obsolete. Abrogated by Const., art. 5, § 8.

L. 1850, ch. 172.—Consolidated in General Business Law, § 374.

L. 1851, ch. 121.—Amendatory of L. 1850, ch. 62, which applied the provisions of R. S., pt. 1, ch. 17, tit. 1, § 42, to the city of Albany. The latter having been repealed, statute cited is obsolete.

L. 1855, ch. 523.—Regulating disposition of unclaimed express packages. Consolidated in General Business Law as follows: Sections 1, 2 as § 285. Section 3 as § 286. Section 4 as § 287.

L. 1868, ch. 658.—In regard to liability of inn keepers. Consolidated in General Business Law as follows:

Section 1 in § 202. Section 2 in § 203.

L. 1869, ch. 822.—That part of § 2 which amends L. 1867, ch. 969, should be repealed. L. 1867, ch. 969, was repealed by L. 1875, ch. 472.

L. 1871, ch. 515.—Relates to auctioneers in New York and Brooklyn. Superseded by §§ 1984, 1992, 1993 of L. 1882, ch. 410. Obsolete.

L. 1871, ch. 702.—Consolidated in General Business Law, § 333.

L. 1879, ch. 388.—Amends L. 1867, ch. 549, which was repealed by L. 1886, ch. 593, § 1, subd. 42. Subject covered by L. 1895, ch. 953, which has been incorporated in the General Business Law, art. 15. Obsolete.

L. 1879, ch. 538.—Amends R. S., pt. 2, ch. 4, tit. 3, § 1, and is consolidated in General Business Law, as § 370.

L. 1882, ch. 64.—Sections 2, 3 consolidated in General Business Law, §§ 309, 310. Section 1 was amended "to read as follows" by L. 1893, ch. 256, § 1. Sections 4, 5 are dependent.

L. 1882, ch. 237.—Relates to compensation for advances of money on collateral security. Consolidated in General Business Law as § 379.

L. 1883, ch. 227.—Hotel keeper's liability. Consolidated in General Business Law as follows.

Section 2 in § 201. Section 3 in § 206. Sections 4, 5 are dependent and obsolete.

L. 1883, ch. 339.—Regulates business of pawnbroking. Consolidated in General Business Law as follows:

Sections 1-4 in §§ 40-43. Section 2 in §§ 41, 52. Sections 3, 4 in §§ 42, 43. Sections 6, 7 in §§ 45, 46. Section 10 in § 50. Section 11 in §§ 47, 51.

Sections 5, 8, 9, 12, 13 have been amended "to read as follows."

L. 1884, ch. 363.—Consolidated in General Business Law, § 52.

L. 1885, ch. 467.—Provides for a trade mark on bottles, is amendatory of L. 1847, ch. 207, as amended by L. 1860, ch. 117, both of which acts were repealed by L.

1886, ch. 593, § 1, ¶¶ 22-35, leaving L. 1885, ch. 467, and L. 1885, ch. 468, which amended the same. Both are recommended for repeal because superseded by L. 1896, ch. 933.

L. 1885, ch. 468.—See note to L. 1885, ch. 467.

L. 1890, ch. 240.—Consolidated in General Business Law, §§ 48, 49.

L. 1893, ch. 256.—Consolidated in General Business Law, § 308.

L. 1893, ch. 391.—According to its title this act relates to the sale of coal in cities with a population of between eight hundred thousand and one million two hundred thousand inhabitants. The first two sections of the body of the act are in terms general in application. The last two sections are limited to the cities mentioned in the title of the act. L. 1888, ch. 539 is an act relating to the sale of coal in cities of one million two hundred thousand population, or over. L. 1897, ch. 197 is an act relating to the sale of coal in cities of the first and second classes. The statute of 1897 expressly repealed L. 1888, ch. 539 but did not repeal L. 1893, ch. 391. The provisions of L. 1893, ch. 391, § 1 are covered by the first sentence of the old General City Law, § 150, which sentence has been transferred to General Business Law, § 4. The provisions of L. 1893, ch. 391, § 2 are in effect covered by Penal Code, § 580 (2411). The provisions of L. 1893, ch. 391, §§ 3, 4 were superseded by L. 1897, ch. 197, which act is now contained in General City Law, §§ 150-161.

L. 1895, ch. 467.—Amendatory of R. S., pt. 1, ch. 20, tit. 19, art. 1, § 1, and consolidated in General Business Law, § 380.

L. 1895, ch. 953.—Regulates the cutting of ice in Hudson river, consolidated in General Business Law as follows:

Section 1 in § 260. Section 3 in § 262. Section 4a (added by L. 1899, ch. 264, § 3), in § 263.

Section 2 is amended "to read as follows," as appears in the schedule.

L. 1896, ch. 312.—Consolidated in General Business Law as follows:

Section 1 as § 80. Section 2 as § 81. Section 4 as § 82.

Section 3 omitted as temporary.

L. 1896, ch. 376.—This statute, which is the "old" Domestic Commerce Law, is recommended for repeal because its live provisions have been incorporated in the General Business Law.

L. 1896, ch. 588.—Requires hotel keepers to keep a register of guests. Consolidated in General Business Law, § 204.

L. 1896, ch. 933.—Sections 1-6 consolidated in General Business Law, §§ 360, 362-366. Balance of act dependent.

L. 1896, ch. 977.—Amends L. 1887, ch. 401, and L. 1890, ch. 25, both of which were repealed by the Domestic Commerce Law. The act is recommended for repeal for the reasons cited in note 9.

L. 1897, ch. 305.—Consolidated in General Business Law, § 200.

L. 1898, ch. 157.—Consolidated in General Business Law, § 398.

L. 1898, ch. 422.—Sections 3, 4 consolidated in General Business Law, §§ 72, 73. Sections 1, 2, 5 have been amended "to read as follows," as appears in schedule. Section 6 is dependent.

L. 1899, ch. 264.—Section 1 amends the title of L. 1895, ch. 953, and has served its purpose. Section 3 consolidated in General Business Law, § 263. Section 4 is dependent.

L. 1899, ch. 318.—Consolidated in General Business Law, § 74.

L. 1899, ch. 509.—Consolidated in General Business Law, §§ 5 and 391.

L. 1899, ch. 690.—Consolidated in General Business Law as follows:

Sections 1-7, respectively, in §§ 340-346.

L. 1899, ch. 727.—Consolidated in General Business Law, §§ 350, 351.

L. 1901, ch. 313.—Providing for the sale of unclaimed baggage by hotel, inn and boarding house keepers. Consolidated in General Business Law as follows:

Section 1 in § 207. Sections 2, 3 in § 208.

Section 4, which amended L. 1837, ch. 300, § 1, "to read as follows," is consolidated therewith in § 280.

L. 1901, ch. 362.—Consolidated in General Business Law, §§ 70, 71, 75.

L. 1902, ch. 337.—Consolidated in General Business Law, § 9.

L. 1902, ch. 483.—Consolidated in General Business Law, art. 17.

L. 1903, ch. 308.—Sections 1-4 consolidated in General Business Law, §§ 60-63. Section 5 was amended "to read as follows" by L. 1906, ch. 528.

L. 1903, ch. 366.—Consolidated in General Business Law, § 396.

L. 1903, ch. 538.—Consolidated in General Business Law, § 44.

L. 1903, ch. 619.—Consolidated in General Business Law, § 394.

L. 1904, ch. 286.—Consolidated in General Business Law, § 393.

L. 1909, ch. 25.Consolidators' notes.

L. 1904, ch. 309.—Consolidated in General Business Law, § 392.

L. 1904, ch. 548.—Consolidated in General Business Law, §§ 361-366.

L. 1904, ch. 749.—Consolidated in General Business Law, § 261.

L. 1905, ch. 163.—Consolidated in General Business Law, § 32.

L. 1906, ch. 327.—Amends L. 1904, ch. 432.—Consolidated in General Business Law, §§ 170-179.

L. 1906, ch. 328.—Consolidated in General Business Law, §§ 180-189.

L. 1906, ch. 528.—Consolidated in General Business Law, § 64.

L. 1907, ch. 185.—Consolidated in General Business Law, §§ 150-154.

L. 1907, ch. 475.—Consolidated in General Business Law, §§ 330-332.

L. 1907, ch. 557.—Consolidated in General Business Law, §§ 320-323. Section 5, which repeals inconsistent legislation, has been omitted. This statute, which fixes the standard of purity, illuminating power and pressure of gas in cities of the second class, became a law June 27, 1907, and took effect immediately. By § 5 it repeals "all acts or parts of acts so far as inconsistent with the provisions of this act." The Public Service Commissions Law L. 1907, ch. 429) which took effect July 1, 1907, by § 66, subd. 3, gives to the Public Service Commissions the power "to fix the standard of illuminating power and purity of gas, not less than that prescribed by law * * *." For the reason that the power given to the Public Service Commissions is general as to all cities, while the statute consolidated in General Business Law is restricted to cities of the second class, the repeal by § 5 of the statute consolidated has not been considered as broad enough to constitute a repeal of the cited part of Public Service Commissions Law so far as it relates to cities of the second class, and it has been regarded as a limitation only.

L. 1907, ch. 732.—Consolidated in General Business Law, §§ 90-143, except § 60, which repeals inconsistent legislation; § 61, which provides when act took effect, and § 62, which names the act.

GENERAL CITY LAW.

L. 1909, ch. 26.—“An act in relation to cities, constituting chapter twenty-one of the consolidated laws.”

[In effect February 17, 1909.]

CHAPTERS XXI OF THE CONSOLIDATED LAWS.

GENERAL CITY LAW.

- Article 1. Short title (§ 1).
 2. General provisions (§§ 2-19).
 2-a. Powers of cities (§§ 19-24).
 3. Hearing on city bills (§§ 30-35).
 4. Plumbing and drainage (§§ 40-57).
 4-a. Supervision and regulation of plastering (§§ 60-68).
 5. Bridges (§§ 70-80).
 6. Police matrons (§§ 90-97).
 7. Lodging houses (§§ 110-115).
 8. Licensing of dogs in third class cities (§§ 120-129-c). [*Repealed by L. 1917, ch. 800.*]
 9. Contracts for supply of gas (§§ 130-132).
 10. Hospitals for treatment of pulmonary tuberculosis (§§ 140-142).
 11. Protection of purchasers of coal (§ 161).
 11-a. Art commission (§§ 165-167).
 12. Laws repealed; when to take effect (§§ 170, 171).

ARTICLE I.

SHORT TITLE.

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the “General City Law.”

Source.—Gen. City L. (L. 1900, ch. 327) § 1

References.—As to classification of cities into first, second and third classes, Constitution, Art. XII, § 2. As to provisions relating generally to cities of second class, see Second Class Cities Law. As to police platoons in cities of first and second class, see Cities (L. 1911, ch. 360), p. 1029 ante; optional form of government act, relating to adoption of certain forms of government, see Cities (L. 1914, ch. 444) p. 1032, ante. The provisions of the General Municipal Law apply to cities, generally, unless otherwise indicated.

ARTICLE II.

GENERAL PROVISIONS.

- Section 2. Term of office of city supervisors.
3. City officers not to be interested in contracts.
 4. Removal of appointive officers in cities of the third class.
 5. Certain parades and processions forbidden; penalty.
 6. Swearing witnesses.
 7. Summoning witnesses.
 8. Attachment for witness in contempt; proceedings thereon.
 9. Licenses for retailing goods on boats.
 10. Licenses to adult blind persons.
 11. Use of soft coal in public institutions.
 12. Money for Memorial day in cities of the third class.
 13. Moneys; how expended.
 - 13-a. Moneys for maintaining the conference of mayors and other city officials of the state of New York and any of its activities.
 - 13-b. Publicity fund.
 14. Permits for erection of booths and arches.
 15. Firemen moving from one city to another.
 16. Term of service; how reckoned.
 17. Operation of crematories for disposal of garbage.
 18. License to operate moving picture apparatus.
 - 18-a. Preceding section inapplicable to miniature picture apparatus.
 19. Special lighting districts.

§ 2. Term of office of city supervisors.—The term of office of each supervisor hereafter elected in a city shall, notwithstanding the provisions of such city charter, be two years, and a supervisor shall only be elected in such city each second year thereafter, except to fill vacancies.

Source.—Gen. City. L. (L. 1900, ch. 327) § 2; originally revised from L. 1893, ch. 344, § 2.

References.—Laws providing for election of supervisors to be general, Constitution, Art. III, § 18. Boards of supervisors in counties, to be composed of such members to be elected for the terms provided by law, Id. Art. III, § 26. The supervisors of the towns and cities to be the board of supervisors of a county, County Law, § 10; general powers of a board of supervisors, Id. § 12.

§ 3. City officers not to be interested in contracts.—No member of the common council of any city shall, during the period for which he was elected, be capable of holding under the appointment or election of the common council any office the emoluments of which are paid from the city treasury, or paid by fees or compensation directed to be paid by any act or ordinance of the common council, nor shall the mayor or any alderman, school commissioner or other public officer of any city be directly or indirectly interested either as principal, surety or otherwise, in any contract, the expense or consideration whereof is payable out of the city treasury, but this section shall not affect the right to any fees or emoluments belonging to any office. An officer of any city who violates any provision

of this section shall be guilty of a misdemeanor and on conviction thereof his office shall be vacant.

Source.—Gen. City L. (L. 1900, ch. 327) § 3; originally revised from L. 1899, ch. 237, which added § 28 to the Gen. Municipal Law.

References.—Misdemeanor for public officer to be interested in contract, Penal Law, § 1868. Taxpayers actions against city officers, General Municipal Law, § 51. See similar provision as to village officers, Village Law, § 332; as to school officers, Education Law, § 285.

Purpose.—The purpose of the inhibition contained in this section is to prevent favoritism. Official action should not be influenced by improper motives and municipal officers acting in behalf of the municipality should not have a personal interest in determining who shall be awarded a contract or be affected in any way in their official action towards a favorite among the bidders. *Malloy v. City of New Rochelle* (1910) 198 N. Y. 402, 92 N. E. 94, 30 L. R. A. (N. S.) 126, affg. (1908), 123 App. Div. 642, 108 N. Y. Supp. 120. See *Rept. of Atty. Genl.* (1912) 452; (1913) 324.

The object of the provision that an officer should not be directly or indirectly interested in a contract which he, or a board of which he is a member is authorized to make on behalf of the municipality, is to prevent favoritism, and results from an effort to prevent official action being influenced by improper motives. *Molloy v. City of New Rochelle* (1910), 198 N. Y. 402, 92 N. E. 94, 30 L. R. A. (N. S.) 126, affg. (1908), 123 App. Div. 642, 108 N. Y. Supp. 120.

The employment of a city assessor as a sewer inspector, paid by the city, is contrary to the provisions of this section. (*Opinion of State Comptroller* (1916), 10 State Dept. Rep. 529.

Member of municipal assembly offered as surety.—Held, that this section was not intended to repeal section 1533 of the Greater New York Charter; that a bid for removing snow and ice from the city streets is not made void by the fact that a proposed surety is a member of the municipal assembly but is merely irregular and the above section of the charter confers upon the comptroller of said city discretion to waive irregularities. *Matter of Clamp* (1900), 33 Misc. 250, 68 N. Y. Supp. 345.

Taxpayers' action to restrain payment of salary.—A complaint in a taxpayers' action which seeks to restrain the payment of salary to a city judge on the ground that he was appointed as such during the term of his office as alderman in violation of this section, was held good on demurrer as such action was not primarily to determine the title to an office. *Forman v. Bostwick* (1910), 139 App. Div. 333, 123 N. Y. Supp. 1048, distinguishing *Greene v. Knox* (1903), 175 N. Y. 432, 67 N. E. 910.

Any interest of a city official, direct or indirect, in a contract made by the city, is prohibited by law, and renders the contract illegal. This applies to the following cases:

1. Where competitive bidding is required, and the lowest bidders are city officials, or interested in the business concerns offering the lowest bids.
 2. Where a member of a commission or other city official contracts with or furnishes supplies to the municipality through another commission or through the common council.
 3. Where a city official furnishes supplies as a sub-contractor.
 4. Where a corporation in which a city official is stockholder, furnishes supplies to the city.
 5. Where a city official purchases supplies or services for the municipality from a person, firm or corporation by which he is employed at fixed wages or salary.
- It does not apply, however to the cases of local physicians who are also city

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physicians. They are not prohibited from receiving fees provided for in the Public Health Law for reporting vital statistics. In this case there is no contract; the service rendered is enforced by penalties and must be performed. Rept. of Atty. Genl. (1912), Vol. 2, p. 452.

Ineligibility of alderman to salaried office.—A person who, elected alderman of a city for a term of two years from the first day of January, 1909, resigns said office December 24, 1909, is ineligible for the office of city judge on January 1, 1910. *Forman v. Bostwick* (1910), 139 App. Div. 333, 123 N. Y. Supp. 1048.

§ 4. Annual financial reports to secretary of state.—*Repealed by L. 1910, ch. 217.*

Note.—The above section as repealed has been superseded by General Municipal L. §§ 30-38.

§ 4. Removal of appointive officers in cities of the third class.—No officer heretofore or hereafter appointed by the mayor of a city of the third class, or nominated and appointed by such mayor by or with the consent of the common council of such city, shall be removed or suspended from office without the approval of such mayor, such approval to be in writing and filed with the city clerk. (*Added by L. 1913, ch. 770, in effect May 27, 1913.*)

§ 5. Certain parades and processions forbidden; penalty.—All processions or parades occupying or marching on any street of any city to the exclusion or interruption of other citizens in their individual right and use thereof, excepting the National Guard and the police and fire departments, and the associations of veteran soldiers, are forbidden, unless written notice of the object, time and route of such procession or parade be given by the chief officer thereof, not less than six hours previous to its forming or marching, to the police authorities of such city; and such police authorities may designate to such procession or parade how much of the street in width it can occupy with especial reference to crowded thoroughfares through which such procession may move; and, when so designated, the chief officer of such procession or parade shall be responsible that the designation is obeyed; and it shall be the duty of the police authorities to furnish such escort as may be necessary to protect persons and property and maintain the public peace and order. A person wilfully violating any provision of this section shall be guilty of a misdemeanor, punishable by a fine not exceeding twenty dollars or imprisonment not exceeding ten days, or both.

Source.—Gen. City L. (L. 1900, ch. 327) § 4; originally revised from L. 1872, ch. 590, § 2, as amended by L. 1886, ch. 543, and § 4.

References.—Same subject, N. Y. City. See Greater N. Y. charter § 1457. Military parades by unauthorized bodies unlawful, Military Law, § 241. Village ordinances regulating, Village Law, § 90. Parades on Sunday prohibited, Penal Law, § 2151.

§ 6. Swearing witnesses.—Whenever the common council of a city shall have appointed a committee of members of their body upon any subject or matter within the jurisdiction of such common council, or to examine

any officer of the city, in relation to the discharge of his official duties, or to the receipt of disbursement by him of any moneys in the discharge of such duties, or concerning the possession or disposition by him, in his official capacity, of any property belonging to the city; or to use, inspect or examine any book, account, voucher or document, in his possession or under his control as such officer, relating to the affairs or interests of such city, the chairman of such committee is authorized to administer oaths to all such witnesses as may appear or be brought before such committee.

Source.—Gen. City L. (L. 1900, ch. 327) § 5; originally revised from L. 1860, ch. 39, § 1, in part. The remainder of § 1 was repealed by L. 1886, ch. 593.

References.—Before whom oath may be taken, Code Civ. Pro., § 842. General mode of swearing witnesses, Id. §§ 845–850.

§ 7. Summoning witnesses.—On application by the chairman or a majority of any such committee to a justice of the supreme court or to the county judge of the county in which the city is situate, or to the recorder of such city, and it satisfactorily appearing to such justice, judge or recorder, that the testimony of any witness named, residing in this state, is or may be material in such investigation or inquiry, such justice, judge or recorder, shall issue a summons to such witness, requiring him to appear before such committee to testify in the matter of such investigation or inquiry at a time and place within such city to be specified in such summons. Such summons shall be served by showing to the witness the original summons under the hand of the officer issuing the same, and by delivering to such witness a copy of the summons, or a memorandum containing its substance, and paying to him the fees of witnesses in civil actions in courts of record.

Source.—Gen. City L. (L. 1900, ch. 327) § 6; originally revised from L. 1860, ch. 39, § 2.

References.—Mode of serving subpoenas generally, Code Civ. Pro. § 852; witnesses fees in civil actions, Id. §§ 3318, 3319.

§ 8. Attachment for witness in contempt; proceedings thereon.—If a witness shall fail to attend, as directed by such summons, the justice or officer issuing the summons, on due proof of the service thereof, and of the failure of such witness to appear, or to produce such books and papers, according to the direction of such subpoena, or shall refuse to testify before such committee, or to answer any question which a majority thereof shall decide to be proper and pertinent, he shall be deemed in contempt, and it shall be the duty of such justice or officer to issue an attachment, in the form usual in the court of which he shall be judge, directed to the sheriff of the county where such witness was required to appear and testify, commanding such sheriff to attach such person and forthwith bring him before such justice or officer. On the return of the attachment, and the production of the body of the defendant, such justice or officer shall have jurisdiction of the matter, and the person charged may purge himself of the contempt in the same way, and the same proceeding shall be had, and

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the same penalties may be imposed, and the same punishment inflicted as in cases of witnesses subpoenaed to appear and give evidence on the trial of a civil action before a trial or a special term of the supreme court.

Source.—Gen. City L. (L. 1900, ch. 327) § 7; originally revised from L. 1860, ch. 39, § 3.

References.—Issue of subpoenas by board or committee. Code Civ. Pro. §§ 854-859. Penalty for disobedience, Id. § 853.

§ 9. **Licenses for retailing goods on boats.**—The common council of any city may charge and collect a license fee from any person doing a retail business in the sale of goods of any description, except products of the farm and unmanufactured products of the forest, from canal boats on the canals of this state or from the lands by the side of such canals and within the boundary lines of such city, within the limits of said city. The common council shall have power to fix the amount to be charged for such license at such sum as in their discretion they may deem just. They shall also have power to enforce the collection of such license fees in the same manner as they are now or may be severally authorized by law to enforce the collection of other license fees which they are authorized to impose. The common council shall have power to adopt laws or ordinances to prevent any person making such sale without first obtaining a license and to punish a violation thereof by a fine not exceeding one hundred dollars, the offender to be imprisoned in the county jail until such fine be paid, not exceeding, however, six months.

Source.—Gen. City L. (L. 1900, ch. 327) § 8; originally revised from L. 1880, ch. 434, § 1. The portion of the act of 1880, relating to villages, is covered by Village Law, § 91.

§ 10. **Licenses to adult blind persons.**—In any city of the first class having a population of over one million inhabitants, the mayor thereof shall have the power to issue a license to any adult blind person, for the vending of goods or newspapers, or the playing of musical instruments, on such public thoroughfares, and in such places as said license may designate, and upon the conditions prescribed therein. The license shall be issued upon application for the term of one year, no charge being made therefor, and shall be issued only to a person who is a citizen of the United States, and has resided for three years consecutively in the city in which he makes application for such license.

This license shall be revocable only for cause.

Source.—L. 1899, ch. 631, §§ 1-3.

§ 11. **Use of soft coal in public institutions.**—No public institution maintained by the state within the corporate limits of any city of the second class, shall use or burn bituminous coal in the operation of any of its departments, provided that the local ordinances of any such city forbid the use thereof.

Source.—Gen. City L. (L. 1900, ch. 327) § 9; originally revised from L. 1896, ch. 530.

§ 12. **Money for Memorial day in cities of the third class.**—The common council of any city of the third class is hereby authorized to appropriate and set aside each year a sum not * exceeding three hundred dollars for the purpose of providing for the due and proper observance of Memorial day in such city. (*Amended by L. 1909, ch. 288.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 10; originally revised from L. 1898, ch. 58, § 1, in part.

§ 13. **Moneys; how expended.**—The moneys thus appropriated shall be expended under the direction of a board composed of the mayor and the commanders and quartermasters of the Grand Army posts, the United Spanish War Veteran Camps and the commanders and treasurers of Sons of Veterans camps of such city. The whole amount of such money appropriated or any part thereof may be spent by such board in observance of Memorial day. Bills properly verified for all claims and expenditures arising under this or the preceding section, shall be presented to and audited by such board and shall be paid by the common council of any such city. The moneys appropriated shall be raised by tax on the real and personal property liable to taxation in any such city in the same manner as the ordinary expenses of maintaining the city government. (*Amended by L. 1909, ch. 288, and L. 1915, ch. 85.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 11; originally revised from L. 1898, ch. 58, § 4, in part.

§ 13-a. **Moneys for maintaining the conference of mayors and other city officials of the state of New York and any of its activities.**—The common council of any city is hereby authorized to appropriate and expend annually, from moneys raised by taxation in such city, a sum to meet the actual and necessary expenses of maintaining and continuing the conference of mayors and other city officials of the state of New York and any of its activities, in this state, for the purpose of devising practicable ways and means for obtaining greater economy and efficiency in the government thereof. The moneys thus appropriated shall be raised by tax on the real and personal property liable to taxation in any such city in the same manner as other city expenses. (*Added by L. 1911, ch. 622, and amended by L. 1916, ch. 215.*)

§ 13-b. **Publicity fund.**—When authorized by a resolution duly adopted by a majority of the qualified voters of such city, voting thereon at a general election or a special election called and held for that purpose, any city of the third class may establish a publicity fund of such amount as the resolution may direct, to be expended for the purpose of advertising the advantages of such city as a winter and summer resort or otherwise, including the necessary and legitimate expense of securing the designation of such city as the place for holding the convention or meeting of any organization or society, and for such other and additional purposes as may

* So in original.

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tend to promote the general commercial * and industrial welfare of the city, and for that purpose may raise by taxation a sum not exceeding one thousand dollars per annum to be assessed, levied and collected in the same manner that other city taxes are assessed, levied and collected. (*Added by L. 1917, ch. 279, in effect Apr. 27, 1917.*)

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§ 14. **Permits for erection of booths and arches.**—The mayor of any city of the first class and the president of any borough in any city of the first class having a borough form of government, may, in his discretion, grant temporary permits for the erection of booths, stands, arches, overhead passageways, or flag staffs for the stringing of flags or banners for other than advertising purposes, upon or over the sidewalks or streets of such city or borough, as the case may be, for the purpose of a public celebration, exposition, fair or political demonstration; provided, however, that no such permit shall be granted by virtue of this section without the consent of the owners of the abutting property constituting more than one-half of the foot frontage upon both sides of such street in the block formed by the nearest cross-streets on each side of such structure or erection. (*Amended by L. 1916, ch. 350.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 12; originally revised from L. 1896, ch. 823.

§ 15. **Firemen moving from one city to another.**—The firemen of the different cities of this state, in case of removal from one city to another, shall be allowed the time which they have served as such firemen in the city they left, in the city to which they have removed, upon producing a certificate of such service, signed by the chief engineer of the city so left, and being appointed firemen in the city to which they have removed.

Source.—Gen. City L. (L. 1900, ch. 327) § 13; originally revised from L. 1835, ch. 243, § 1.

References.—Exemption of firemen from jury duty generally, Judiciary Law, § 546, subd. 13; in New York county, Id., § 635, subd. 12; in Kings county, Id. § 720, subd. 10. Exemption from military duty, Military Law, § 1, subd. 4. Exemption of firemen in villages from poll tax, Village Law, § 102; from taxation for village purposes, Id. § 132. Qualifications for exemption under civil service, General Municipal Law, § 204. Special privileges in civil service, Civil Service Law, § 22. Certificates of exemptions for members of volunteer fire companies, General Municipal Law, §§ 202-204.

Repealed or superseded in effect by General Municipal Law, section 200-205. Rept. of Atty. Genl. (1911) 324.

§ 16. **Term of service; how reckoned.**—When any such fireman shall have served as such for so long a time thereafter as shall make the whole term of service the same as required by law of firemen residing in the city removed to, he shall be entitled to all the privileges and exemptions secured by law to the firemen of the cities of Albany and New York.

* So in original.

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General provisions.

L. 1909, ch. 26.

Source.—Gen. City L. (L. 1900, ch. 327) § 14; originally revised from L. 1835, ch. 243, § 2.

References.—See notes under preceding section.

§ 17. **Operation of crematories for disposal of garbage.**—A crematory in any city or within ten miles of the corporate limits of any city, owned or controlled by any person or corporation or by a city, for the treatment or consuming of garbage or other refuse matter or offal, dead animals or fish, shall be so operated by the use of coke, charcoal, or other fuel device and by such appliances and methods that the offensive and noxious gases and fumes arising from the consumption or treatment of such garbage or other refuse matter or offal, dead animals or fish shall be burned or disposed of without offense or danger to the persons residing in the neighborhood of such crematory. The city authorities or the person or corporation owning or controlling such crematory shall cause the necessary devices, and fuel or other supplies to be furnished for the consumption or proper disposal of such gases and fumes. Any city authority or other person or corporation owning or controlling such crematory and any city employee or other person operating such a crematory who shall allow or permit such gases or fumes arising from the consumption of such garbage or other matter to escape and become offensive or dangerous to the persons residing in the neighborhood of such crematory, shall be guilty of a misdemeanor and shall upon conviction be punished by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars for each day that such offensive or noxious gases or fumes are permitted or allowed to escape, or by imprisonment for not more than one year, or both. (*Amended by L. 1910, ch. 467.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 15, as added by L. 1902, ch. 168.

References.—Disposition of garbage in towns, Town Law, §§ 320–322; in villages, Village Law, §§ 344–346.

§ 18. **License to operate moving picture apparatus.**—It shall not be lawful for any person or persons, save as excepted in section eighteen-a of this article, to operate any moving picture apparatus and its connections in a city of the first class unless such person or persons so operating such apparatus is duly licensed as hereinafter provided. Any person desiring to act as such operator shall make application for a license to so act to the mayor or licensing authority designated by the mayor, unless the charter of said city so designates, which officer shall furnish to each applicant blank forms of application which the applicant shall fill out. Such officer shall make rules and regulations governing the examination of applicants and the issuance of licenses and certificates. A license shall not be granted to an applicant unless he shall have served as an apprentice under a licensed operator, for a period of not less than six months prior to the date of the application; the application must be made in writing, and contain a verified statement to that effect; it must be accompanied by the affidavit of the licensed operator to the same effect; before entering upon the period

of apprenticeship the applicant must register his name and address with the officer issuing such license. The applicant shall be given a practical examination under the direction of the officer required to issue such license and if found competent as to his ability to operate moving picture apparatus and its connections shall receive within six days after such examination a license as herein provided. Such license may be revoked or suspended at any time by the officer issuing the same. Every license shall continue in force for one year from the date of issue unless sooner revoked or suspended. Every license, unless revoked or suspended, as herein provided, may at the end of one year from the date of issue thereof be renewed by the officer issuing it in his discretion upon application and with or without further examination as he may direct. Every application for renewal of license must be made within the thirty days previous to the expiration of such license. With every license granted there shall be issued to every person obtaining such license a certificate, certifying that the person named therein is duly authorized to operate moving picture apparatus and its connections. Such certificate shall be displayed in a conspicuous place in the room where the person to whom it is issued operates moving picture apparatus and its connections. No person shall be eligible to procure a license unless he shall be of full age. Any person offending against the provisions of this section, as well as any person who employs or permits a person not licensed as herein provided to operate moving picture apparatus and its connections, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding the sum of one hundred dollars, or imprisonment for a period not exceeding three months, or both. (*Added by L. 1911, ch. 252, and amended by L. 1916, ch. 184.*)

Source.—New.

References.—Regulations as to cinematographs or moving picture apparatus, General Business Law, §§ 209-216.

§ 18-a. Preceding section inapplicable to miniature picture apparatus.—Nothing contained in section eighteen shall be considered to apply to any so-called miniature motion picture apparatus which uses only an enclosed incandescent electric lamp and approved acetate of cellulose or slow-burning films, and is of such construction that films ordinarily used on full-sized commercial picture apparatus cannot be used therewith. (*Added by L. 1916, ch. 184.*)

§ 19. Special lighting districts.—The common council in all cities of the third class shall have the power, upon application, in writing, of the property owners, owning at least two-thirds of the number of feet fronting or abutting upon the street and along the line of any proposed improvement for the construction of an improved system of street lighting, to establish such special lighting district or districts for the proposed system of street lighting, and from time to time may alter or extend the same, with full power to order such construction and installation and to enter into a con-

tract for lighting in such district or districts so established or extended as they may deem proper or expedient.

The amount of any such contract that may be entered into for such special lighting, pursuant to the provisions of this act, shall be assessed, levied and collected upon and between the taxable property in said city and the district or districts respectively, in the same manner and by the same officers as city taxes, charges or expenses for said city are now assessed, levied and collected.

The common council shall, by ordinance, apportion the expenses that shall be borne by the property fronting or abutting upon the street and along the line of the proposed system or systems, and the city at large; but in no event shall the property fronting or abutting upon the street or streets along the line of the proposed system or systems be charged less than fifty per centum for such charges or expenses, nor more than the per centum specified in the application and agreed to by the property owners. (*Added by L. 1915, ch. 304.*)

Source.—New.

ARTICLE II-A.

(Article added by L. 1913, ch. 247, in effect Apr. 10, 1913.)

POWERS OF CITIES.

Section 19. General grant of powers.

20. Grant of specific powers.

21. Public or municipal purpose and general welfare defined.

22. This grant in addition to existing powers.

23. Powers hereby granted, how to be exercised.

24. Construction of this act.

§ 19. General grant of powers.—Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within this general grant. (*Added by L. 1913, ch. 247.*)

References.—This article is known as the City Home Rule Act. It is supplemented by the Optional Form of Government Act, which authorizes a city of the second or third class to adopt by vote of the people of the city one of the forms of government specified in such act. See Cities (L. 1914, ch. 444), p. 1032, ante.

Application.—The Attorney-General by opinion dated Apr. 30, 1913, gives to this article broad application. He said: "From an examination of this statute I am clearly of the opinion that self-government is vested in the various cities of the state in terms most broad. There may occur certain features of municipal government, to which my attention has not been called and which do not arise in the bill under consideration which requires special legislation; but I have not in mind such conditions and they are not pertinent to this discussion."

Constitutionality of the Home Rule Law upheld and same held not to supersede

the Pension Act (L. 1911, chap. 669). *Hammit v. Gaynor* (1913), 82 Misc. 196, 144 N. Y. Supp. 127, *affd.* (1914), 165 App. Div. 909, 150 N. Y. Supp. 1089.

Effect of chapter 247 of the Laws of 1913, granting certain powers to cities considered. Rept. of Atty. Genl. (1913), Vol. 2, p. 375.

The common council of the city of Kingston has no power under the Home Rule Law to change the fees of the city marshal during his term of office. Rept. of Atty. Genl. (1913), Vol. 2, p. 677.

The fixing of salaries of officials is not one of the powers conferred generally or specifically by this chapter (L. 1913, ch. 247), and the provision of the city charter of Glens Falls fixing the salary of the chamberlain has not been repealed or superseded by said chapter. Opinion of State Comptroller (1916), 9 State Dept. Rep. 466.

Section cited. *Hellyer v. Prendergast* (1917), 176 App. Div. 383, 385, 162 N. Y. Supp. 788.

§ 20. Grant of specific powers.—Subject to the constitution and general laws of this state, every city is empowered:

1. To contract and be contracted with and to institute, maintain and defend any action or proceeding in any court.

2. To take, purchase, hold and lease real and personal property within and without the limits of the city, and acquire by condemnation real and personal property within the limits of the city, for any public or municipal purpose, and to sell and convey the same, but the rights of a city in and to its water front, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section.

3. To take by gift, grant, bequest or devise and to hold and administer real and personal property within and without the limits of the city, absolutely or in trust for any public or municipal purpose, upon such terms and conditions as may be prescribed by the grantor or donor and accepted by the city.

4. To levy and collect taxes on real and personal property for any public or municipal purpose.

5. To become indebted for any public or municipal purpose and to issue therefor the obligations of the city, to determine upon the form and the terms and conditions thereof, and to pledge the faith and credit of the city for payment of principal and interest thereof, or to make the same payable out of or a charge or lien upon specific property or revenues; to pay or compromise claims equitably payable by the city, though not constituting obligations legally binding on it, but it shall have no power to waive the defense of the statute of limitations or to grant extra compensation to any public officer, servant or contractor.

6. To establish and maintain sinking funds for the liquidation of principal and interest of any indebtedness, and to provide for the refunding of any indebtedness other than certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certifi-

cates or revenue bonds are issued or in the taxes for the year next succeeding, and payable out of such taxes.

7. To lay out, establish, construct, maintain, operate, alter and discontinue streets, sewers and drainage systems, water supply systems, and lighting systems, for lighting streets, public buildings and public places, and to lay out, establish, construct, maintain and operate markets, parks, playgrounds and public places, and upon the discontinuance thereof to sell and convey the same.

8. To control and administer the water front and waterways of the city and to establish, maintain, operate and regulate docks, piers, wharves, warehouses and all adjuncts and facilities for navigation and commerce and for the utilization of the water front and waterways and adjacent property.

9. To establish, construct and maintain, operate, alter and discontinue bridges, tunnels and ferries, and approaches thereto.

10. To grant franchises or rights to use the streets, waters, water front, public ways and public places of the city.

11. To construct and maintain public buildings, public works and public improvements, including local improvements, and assess and levy upon the property benefited thereby the cost thereof, in whole or in part.

12. To prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty.

13. To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses.

14. To create, maintain and administer a system or systems for the enumeration, identification and registration, or either, of the inhabitants of the city and visitors thereto, or such classes thereof as may be deemed advisable.

15. To establish, maintain, manage and administer hospitals, sanitarium, dispensaries, public baths, almshouses, workhouses, reformatories, jails and other charitable and correctional institutions; to relieve, instruct and care for children and poor, sick, infirm, defective, insane or inebriate persons; to provide for the burial of indigent persons; to contribute to and supervise charitable, eleemosynary, correctional or reformatory institutions wholly or partly under private control.

16. To establish and maintain such institutions and instrumentalities for the instruction, enlightenment, improvement, entertainment, recreation and welfare of its inhabitants as it may deem appropriate or necessary for the public interest or advantage.

17. To determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of all employees of the city and the relations of all officers and employees of the city to each other, to the city and to the inhabitants.

18. To create a municipal civil service; to make rules for the classification of the offices and employments in the city's service, for appointments, promotions and examinations, and for the registration and selection of laborers.

19. To regulate the manner of transacting the city's business and affairs and the reporting of and accounting for all transactions of or concerning the city.

20. To provide methods and provide, manage and administer funds for pensions and annuities for and retirement of city officers and employees.

21. To investigate and inquire into all matters of concern to the city or its inhabitants, and to require and enforce by subpoena the attendance of witnesses at such investigations.

22. To regulate by ordinance any matter within the powers of the city, and to provide for the enforcement of ordinances by legal proceedings, to compel compliance therewith, and by penalties, forfeitures and imprisonment to punish violations thereof.

23. To exercise all powers necessary and proper for carrying into execution the powers granted to the city.

24. To regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces, and for said purposes to divide the city into districts. Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air and convenience of access, and shall be made with reasonable regard to the character of buildings erected in each district, the value of land and the use to which it may be put, to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city. (*Subd. added by L. 1917, ch. 483, in effect May 15, 1917.*)

25. To regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan. (*Subd. added by L. 1917, ch. 483, in effect May 15, 1917.*)

26. The provisions of subdivisions twenty-four and twenty-five of this

act shall not apply to cities of the first class having a population of not less than two hundred and forty thousand and not more than four hundred and fifty thousand. (*Section added by L. 1913, ch. 247, and subd. 26 added by L. 1917, ch. 483, in effect May 15, 1917.*)

Payment or compromise of claim.—A city cannot pay a judgment against a police officer for assault. *Mollnow v. Rafter* (1915), 89 Misc. 895, 152 N. Y. Supp. 110. But it may repay to a veteran of the Spanish-American War, counsel fees and disbursements incurred by him in an unsuccessful mandamus proceeding instituted to compel his continuance in office. *Matter of Christy* (1915), 92 Misc. 1, 155 N. Y. Supp. 39.

Power to regulate business.—Subdivision 13 does not vest a city with the governmental or police power to compel a street railway company to relocate its track to another place upon a street on the ground of public safety and convenience. *People ex rel. City of New York v. N. Y. R. Co.* (1916), 217 N. Y. 310, 313, 112 N. E. 49.

Regulate by ordinance.—The additional powers granted to a city under this section, did not, and could not, surrender the general power to legislate against criminal offenses, which remains in the Legislature. Held, that the city of Yonkers could not compel the closing of moving picture theaters on Sunday by means of fine or imprisonment. *People ex rel. Kieley v. Lent* (1915), 166 App. Div. 550, 152 N. Y. Supp. 18, *affd.* (1915), 215 N. Y. 626, 109 N. E. 1088.

See *Repts. of Atty. Genl.* (1913) 376; (1913) 377; (1913) 379; (1913) 380; (1913) 381; (1913) 382; (1913) 679.

City employees.—Although the board of aldermen of the city of New York cannot select the individuals to be employed by the board of health, it may require that they be citizens who are residents of the state. *Hellyer v. Prendergast* (1917), 176 App. Div. 383, 162 N. Y. Supp. 788.

§ 21. **Public or municipal purpose and general welfare defined.**—The terms "public or municipal purpose," and "general welfare," as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section. (*Added by L. 1913, ch. 247.*)

§ 22. **This grant in addition to existing powers.**—The powers granted by this article shall be in addition to and not in substitution for, all the powers, rights, privileges and functions existing in any city pursuant to any other provision of law. (*Added by L. 1913, ch. 247.*)

Scope.—The Home Rule Bill was not intended to empower a municipal corporation to change or modify the express provisions of its charter, as otherwise it would have power to make its charter. A bond issue which is illegal under a city charter cannot be legalized under this act. *City of Geneva v. Fenwick* (1913), 159 App. Div. 621, 145 N. Y. Supp. 884.

A city charter contained provisions for paving streets, assessing the expense thereof and the details of accomplishing the same. The common council, disregarding such charter provisions, adopted a resolution for paving streets under the Home Rule Law. Held, that this act grants powers in addition to and not in substitution of charter provisions and is intended to supply omissions, but does not pretend to direct the details and methods of carrying out the powers granted and in that regard the provisions of the charter must be followed in order to secure a legal proceeding. *Gibbs v. Luther* (1913), 81 Misc. 611, 143 N. Y. Supp. 90, *affd.* (1913), 158 App. Div. 951, 143 N. Y. Supp. 1118.

The Pension Act. (L. 1911, chap. 669), relating to the city of New York is not superseded by this act. *Hammitt v. Gaynor* (1913), 82 Misc. 196, 144 N. Y. Supp. 127, *affd.* (1914), 165 App. Div. 909, 150 N. Y. Supp. 1089.

§ 23. Powers hereby granted, how to be exercised.—1. The powers granted by this act are to be exercised by the officer, officers or official body vested with such powers by any other provision of law or ordinance (subject to amendment or repeal of any such ordinance) and in the manner and subject to the conditions prescribed by law or ordinance (subject to amendment or repeal of any such ordinance), but no provision of any special or local law shall operate to defeat or limit in extent the grant of powers contained in this act; and any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this article, shall be superseded. Where any such provision of special or local law is superseded under the provisions of this subdivision, such power, freed from the limitations imposed by such provisions, shall be exercised by the same officer, officers or official body that would be vested with the same under the provisions of this subdivision, if such provision had not been superseded, but the exercise thereof shall be subject to the limitations provided for in subdivision two of this section.

2. In the absence of any provision of law or ordinance determining by whom or in what manner or subject to what conditions any power granted by this act shall be exercised, the common council or board of aldermen or corresponding legislative body of the city shall, subject to the provisions of this section, have power by ordinance to determine by whom and in what manner and subject to what conditions said power shall be exercised. The exercise by any city of any power granted by this article not now vested in such city or now vested in such city subject to provisions which are superseded by the provisions of subdivision one of this section, shall be subject to the following limitations:

a. No city shall issue any obligations for expenses for maintenance, repairs or current operation or administration of the property or government of the city or otherwise than for betterments, improvements and acquisitions of property of a permanent nature, or for the purpose of refunding obligations of the city. No city shall issue obligations until there shall first have been filed in the office of the city clerk a certificate of the comptroller or other chief financial officer of the city under his hand and seal, stating (1) the then existing indebtedness of the city; (2) how much, if any, thereof consists of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, and how much, if any, of such certificates or revenue bonds has not been paid out of the taxes for the year when such certificates or revenue bonds were issued or for the year next succeeding; (3) the amount of the assessed valuation of the real estate of the city subject to taxation, as shown by the assessment-rolls of said city on the last previous assessment for state or county taxes; (4) a

description of the property or improvement for the acquisition or making of which the debt is to be created; and (5) the probable life of such property or improvement. Such certificate shall be a public record. The term of payment of any obligations issued to secure such debt shall not exceed the probable life of such property or improvement as stated in such certificate and shall in no case exceed fifty years. This subdivision shall not apply to certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. This subdivision shall not apply to certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts to be contained in the taxes for the year next succeeding the year when such certificates or revenue bonds are issued and payable out of such taxes, except that a certificate shall be filed as required by this subdivision before any such certificates or revenue bonds shall be issued.

b. No sale or lease of city real estate or of any franchise belonging to or under the control of the city shall be made or authorized except by vote of three-fourths of all the members of the common council or corresponding legislative body of the city. In case of a proposed sale or lease of real estate or of a franchise, the ordinance must provide for a disposition of the same at public auction to the highest bidder, under proper regulations as to the giving of security and after public notice to be published at least once each week for three weeks in the official paper or papers. A sale or lease of real estate or a franchise shall not be valid or take effect unless made as aforesaid and subsequently approved by a resolution of the board of estimate and apportionment in any city having such a board, and also approved by the mayor. No franchise shall be granted or be operated for a period longer than fifty years. The common council or corresponding legislative body of the city may, however, grant to the owner or lessees of an existing franchise, under which operations are being actually carried on, such additional rights or extensions in the street or streets in which the said franchise exists, upon such terms as the interests of the city may require, with or without any advertisement, as the common council may determine, provided, however, that no such grant shall be operative unless approved by the board of estimate and apportionment in any city having such a board, and also by the mayor.

In any city the question whether any proposed sale or lease of city real estate or of any franchise belonging to or under the control of the city shall be approved shall, upon a demand being filed, as hereinafter provided, be submitted to the voters of such city at a general or special election, after public notice to be published at least once each week for three weeks in the official paper or papers. Such demand shall be subscribed and acknowledged by voters of the city equal in number to at least ten per centum of the total number of votes cast in such city at the last pre-

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ceding general election and shall be filed in the office of the clerk of such city before the adoption of an ordinance or resolution making or authorizing such sale or lease. If such demand is filed, as aforesaid, such sale or lease of real estate or such franchise shall not take effect unless in addition to the foregoing requirements a majority of the electors voting thereon at such election shall vote in the affirmative.

The foregoing limitations shall not apply to the exercise by any city of any power now vested in it, where the existing provisions of law determining by whom or in what manner or subject to what conditions such power shall be exercised are not superseded by the provisions of subdivision one of this section; but in such case the exercise of such power shall be subject only to such existing provisions of law, and shall not be limited or restricted by any provisions of this section. (*Added by L. 1913, ch. 247.*)

See cases cited under section 22; also, Rept. of Atty. Genl. (1913) 380.

§ 24. **Construction of this act.**—This article shall be construed, not as an act in derogation of the powers of the state, but as one intended to aid the state in the execution of its duties, by providing adequate power of local government for the cities of the state. (*Added by L. 1913, ch. 247.*)

ARTICLE III.

HEARING ON CITY BILLS.

Section 30. Public hearing.

31. Notice, how given.
32. Hearing.
33. Return by mayor; contents of certificate.
34. Duties of clerk on return of mayor's certificate; indorsement on bill.
35. Expenses of hearing to be a city charge.

§ 30. **Public hearing.**—Whenever a certified copy of any bill for a special city law shall be transmitted to the mayor of a city, pursuant to the provisions of the second section of the twelfth article of the constitution of this state, the mayor of such city shall forthwith upon the receipt of such bill fix a day for a public hearing in such city concerning such bill, and cause public notice of the time and place of such hearing to be given. In a city of the first class such hearing shall be before the mayor. In a city of the second or third class, such hearing shall be before the mayor and the legislative body of such city.

Source.—Gen. City L. (L. 1900, ch. 327) § 30; originally revised from L. 1895, ch. 1, § 1; L. 1895, ch. 9, § 1.

References.—Classification of cities, and definition of special city law, Constitution, Art. XII, § 2. Transmission of special laws to cities affected, Id. Art. XII, § 2.

Mayor has no legal right to preside at hearing. Rept. of Atty. Genl. (1904) 268.

§ 31. **Notice, how given.**—In a city of the first class such notice shall be given by the mayor by causing such notice to be published for two suc-

cessive days in two daily newspapers published in such city, to be designated by him. In a city of the second class, or of the third class in which a daily newspaper is published, such notice shall be given by the mayor by causing such notice to be published for three successive days in a daily newspaper published in such city to be designated by him. In a city of the third class, in which no daily newspaper is published, such notice shall be given by the mayor by causing such notice to be published one or more times in a weekly, semi-weekly or tri-weekly newspaper published in such city, to be designated by him, at least three days prior to the day fixed for such hearing, and in a city of the second or third class, he shall also cause a copy of such notice to be served upon each member of the legislative body of such city, either personally or by mail at least two days before the day fixed for such public hearing. Such notice shall also contain the title of the bill and any explanatory statement concerning the same which the mayor shall deem advisable.

Source.—Gen. City L. (L. 1900, ch. 327) § 31, as amended by L. 1902, ch. 353; originally revised from L. 1895, ch. 1, § 1; L. 1895, ch. 9, § 1.

§ 32. **Hearing.**—In a city of the first class, the mayor, and in a city of the second or third class the mayor and the legislative body of such city, shall attend at the time and place appointed for such hearing, and shall afford an opportunity for a public hearing concerning such bill.

Source.—Gen. City L. (L. 1900, ch. 327) § 32; originally revised from L. 1895, ch. 1, § 2; L. 1895, ch. 9, § 2.

See Rept. of Atty. Genl. (1904) 269.

§ 33. **Return by mayor; contents of certificate.**—After such hearing and within fifteen days after the transmission to him of a certified copy of such bill, the mayor shall return the same to the house from which it was sent, or, if the session of the legislature at which such bill was passed has terminated, to the governor with the proper certificates attached, stating whether such city has or has not accepted the same. In a city of the first class such certificate shall be signed by the mayor. In a city of the second or third class such certificate shall be signed by the mayor and by the presiding officer of the legislative body of such city, and such bill shall not be deemed to have been accepted by such city, unless the mayor and a majority of the legislative body shall concur in such acceptance. The mayor shall also append to the certified copy of such bill a further certificate stating that the public notice provided for has been given, and if in a city of the second or third class, that a meeting of the legislative body has been held pursuant thereto, and that an opportunity for a public hearing concerning such bill has been offered pursuant to the provisions of the preceding sections, and such certificate shall be conclusive evidence thereof. Each certificate required under this section shall be under the seal of the city.

Source.—Gen. City L. (L. 1900, ch. 327) § 33; originally revised from L. 1895, ch. 1, § 3; L. 1895, ch. 9, § 3.

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"Within fifteen days" has been construed by recent governors to require the return of a bill, and its delivery in Albany within fifteen days from the date of its transmission from Albany.

See Rept. of Atty. Genl. (1911) 314.

§ 34. Duties of clerk on return of mayor's certificate; indorsement on bill.—The clerk of the house in which such bill originated shall indorse upon the original bill to be presented to the governor, and upon the certified copy thereof to be transmitted to the mayor, the date of such transmission. Such clerk, if the certified copy of such bill is returned to the house in which the bill originated, or the governor, if such certified copy is returned to him, shall indorse the date of such return upon such original bill and also upon such certified copy thereof. In every case in which a bill for a special city law has been accepted by the city or cities to which it relates, the certified copy or copies thereof transmitted to the mayor or mayors of such city or cities and returned by him or them, with the certificates indorsed thereon or appended thereto, shall be attached to the original bill and presented therewith to the governor.

Source.—Gen. City L. (L. 1900, ch. 327) § 34; originally revised from L. 1895, ch. 1, § 4; L. 1895, ch. 9, § 4.

See Rept. of Atty. Genl. (1909) 270.

§ 35. Expenses of hearing to be a city charge.—The necessary expenses incurred by a city in complying with the requirements of this article shall be a city charge and shall be paid out of any fund or appropriation applicable thereto.

Source.—Gen. City L. (L. 1900, ch. 327) § 35; originally revised from L. 1895, ch. 1, § 5; L. 1895, ch. 9, § 5.

ARTICLE IV.

PLUMBING AND DRAINAGE.

Section 40. Examining boards of plumbers in cities.

41. Term of office; vacancies.
42. Compensation of members of board.
43. Qualifications.
44. Powers and duties.
45. Examinations; conducting business without certificate prohibited.
- 45-a. Corporations may conduct business.
- 45-b. Further requirements relating to the business of plumbing.
46. Registration; when required.
47. Cancellation of registration; notice.
48. Inspectors; qualifications; notice.
49. Duties of inspectors; reports.
50. Expiration and renewals of certificates and licenses.
51. Notice of violation of rules.
52. Notice, how served; proceedings when violations not removed.
53. Plumbing and drainage to be executed according to rules.
54. Office room; expenses a city charge.

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Plumbing and drainage.

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55. Violations, how punished.

56. Issue of licenses to connect with sewers and water mains restricted.

57. Article limited.

§ 40. **Examining boards of plumbers in cities.**—The existing boards for the examination of plumbers in cities of this state are continued and each shall hereafter be known as the examining board of plumbers. Such board in each city shall continue to consist of five persons to be appointed by the mayor, of whom two shall be employing or master plumbers of not less than ten years' experience in the business of plumbing, and one shall be a journeyman plumber of like experience, and the other members of such board shall be the chief inspector of plumbing and drainage of the board of health of such city, or officer performing the duties of such inspector, and the chief engineer having charge of sewers in such city, but in the event of there being no such officers in such city, then any two other officers having charge or supervision of the plumbing, drainage or sewerage, whom the mayor shall designate or appoint, or two members of the board of health of such city having like duties or acting in like capacities.

Source.—Gen. City L. (L. 1900, ch. 327) § 40; originally revised from L. 1892, ch. 602, § 1, in part.

References.—Regulation of plumbing in New York city. L. 1896, ch. 803. Such act not affected by this article. Section 57, post.

Constitutional.—L. 1892, ch. 602, held constitutional as a protection of the public health. *People ex rel. Necharncus v. Warden, etc.* (1895), 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, affg. (1894), 81 Hun 434, 30 N. Y. Supp. 1095.

Appointment of examining board of plumbers.—This section is applicable to the city of Geneva, although the charter of that city (L. 1897, ch. 360) does not provide for the appointment of such a board, and imposes the duty of supervising the plumbing of the city upon the board of health. The provisions of this article are mandatory. Where a question of fact arises as to whether or not there are persons within the city eligible for appointment to such a board an alternative writ of mandamus should be granted so that this question may be determined. *People ex rel. Van Deren v. Moore* (1902), 78 App. Div. 28, 79 N. Y. Supp. 7.

Failure of mayor to appoint examining board excuses plumber from registering.—Where the mayor of a city has failed to appoint an examining board of plumbers, as required by this section, so that no board exists, a plumber in an action for services and materials furnished by him to defendant in such city is excused from obtaining a certificate of competency and from registering with the board of health, as prescribed by sections 45 and 46 of the General City Law, and his failure to plead and prove a compliance with the statute is no defect and is no defense. *Meade v. Lamarche* (1912), 150 App. Div. 42, 134 N. Y. Supp. 479.

Section cited in *Schnaier v. Navarre Hotel & Imp. Co.* (1905), 182 N. Y. 83, 87, 70 N. E. 561, 70 L. R. A. 722; *Wexler v. Rust* (1911), 144 App. Div. 296, 128 N. Y. Supp. 977; *People ex rel. Lavier, v. Hessler* (1912), 152 App. Div. 839, 137 N. Y. Supp. 664.

§ 41. **Term of office; vacancies.**—The term of office of each member of such board shall be three years, from the first day of January following his appointment. Vacancies occurring by expiration of a term shall be filled by the mayor for a full term. Vacancies by death, removal, inability

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to act, resignation or removal from the city of any member shall be filled by him for the unexpired term. The chief inspector of plumbing and drainage and the engineer in charge of sewers or the officers holding equivalent positions or acting in like capacities designated or appointed by the mayor as herein provided, shall be ex officio members of such examining board, and when they shall cease to hold their offices by reason or on account of which they were so designated or appointed, their successors shall act on the examining board in their stead.

Source.—Gen. City L. (L. 1900, ch. 327) § 41; originally revised from L. 1892, ch. 602, § 1, in part.

Reference.—Vacancies generally. Public Officers Law, § 30.

§ 42. Compensation of members of board.—The master and journey-men plumbers serving as members of such board shall severally be paid the rate of five dollars per day for each day's service when actually engaged in the performance of the duties pertaining to the office; but such compensation shall not exceed five dollars per month in a city of the third class, nor the sum of ten dollars per month in a city of the second class, nor the sum of twenty dollars per month in a city of the first class. It shall be the duty of such ex officio members of the board of examiners to discharge their duties as members of such board without compensation therefor.

Source.—Gen. City L. (L. 1900, ch. 327) § 42; originally revised from L. 1892, ch. 602, § 2.

Reference.—City classification. Constitution, art. 12, § 2.

§ 43. Qualifications.—All members of such board shall be citizens and actual residents of the cities in which they are appointed.

Source.—Gen. City L. (L. 1900, ch. 327) § 43; originally revised from L. 1892, ch. 602, § 3.

§ 44. Powers and duties.—The several examining boards of plumbers shall have power and it shall be their duty:

1. To meet at stated intervals in their respective cities; they shall also meet whenever the board of health of such city or the mayor thereof shall in writing request them so to do.

2. To have jurisdiction over and to examine all persons desiring or intending to engage in the trade, business or calling of plumbing as employing plumbers in the city in which such board shall be appointed with the power of examining persons applying for certificates of competency as such employing or master plumbers or as inspectors of plumbing, to determine their fitness and qualifications for conducting the business of master plumbers or to act as inspector of plumbing, and to issue certificates of competency to all such persons who shall have passed a satisfactory examination before such board and shall be by it determined to be qualified for conducting the business as employing or master plumbers or competent to act as inspectors of plumbing.

3. To formulate in conjunction with the local board of health of the city or an officer, board or body performing the duties of a board of health a code of rules regulating the work of plumbing and drainage in such city, including the materials, workmanship and manner of executing such work and from time to time to add to, amend or alter the same.

4. To charge and collect from each person applying for examination the sum of five dollars for each examination made by such board, and all money so collected shall be paid over by the board monthly to the chamberlain or treasurer of such city in which such board shall be appointed.

Source.—Gen. City L. (L. 1900, ch. 327) § 44; originally revised from L. 1892, ch. 602, § 4, as amended by L. 1893, ch. 162.

Purpose of this and other sections of this act relating to the registration of plumbers was to vest in the examining board of each city the exclusive authority to pass upon the qualification of an applicant to carry on the work of master plumber in such city, and its certificate of competency is an essential prerequisite to registration. *People ex rel. Lavier v. Hessler* (1912), 152 App. Div. 839, 137 N. Y. Supp. 664.

Adoption of rules regulating plumbing and drainage. Rept. of Atty. Genl. (1902) 270.

See Repts. of Atty. Genl. (1911) 338; (1912) 167.

Section cited in *Wexler v. Rust* (1911), 144 App. Div. 296, 128 N. Y. Supp. 977.

§ 45. **Examinations; conducting business without certificate prohibited.**—A person desiring or intending to conduct the trade, business or calling of a plumber or of plumbing in a city of this state as employing or master plumber, shall be required to submit to an examination before such examining board of plumbers as to his experience and qualifications for such trade, business or calling, and it shall not be lawful in any city of this state for a person to conduct such trade, business or calling, unless he shall have first obtained a certificate of competency from such board of the city in which he conducts or proposes to conduct such business.

Source.—Gen. City L. (L. 1900, ch. 327) § 45; originally revised from L. 1892, ch. 602, § 5, as amended by L. 1893, ch. 66.

Constitutional.—The act of 1892 (Chap. 602, Laws of 1892), from which this section was devised, held constitutional. *People ex rel. Nechancus v. Warden*, etc. (1895), 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718.

Examination, what to cover.—Applicant entitled to be examined as to experience in the plumbing business as well as in the theory and science of the trade. *People ex rel. Kelly v. Scott* (1895), 86 Hun 174, 33 N. Y. Supp. 229.

Certiorari.—Action of board may be reviewed by. *Id.*

Employing or master plumber, what constitutes. An engineer who occasionally supervised plumbing jobs and the plumbers employed to assist him, held not subject to examination. *People v. O'Connell* (1896), 1 App. Div. 110, 36 N. Y. Supp. 1092.

Where neither member of partnership has registered.—Where neither member of a copartnership engaged in the plumbing business is certified or registered, it cannot recover for labor performed and material furnished, even though a registered manager was employed. *Bronold v. Engler* (1907), 121 App. Div. 123, 105 N. Y. Supp. 508, *affd.* (1909), 194 N. Y. 323, 87 N. E. 427, 21 L. R. A. (N. S.) 176.

License of non-resident plumbers.—Local plumbing boards have no power to

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recognize the certificate of competency or registration of master or employing plumbers where granted by the authorities of another municipality. If a plumber proposes to conduct his business in more than one city, he must procure a certificate from the board of each city in which he intends so to pursue his calling. Rept. of Atty. Genl. (1912) 167; *People ex rel. Lavier v. Hessler* (1912), 152 App. Div. 839, 137 N. Y. Supp. 664.

Validity of contract by unlicensed plumber.—Where one not a duly licensed plumber pursues that business he cannot recover on a contract made by him exclusively for plumbing work, although he sublets the contract to plumbers who are duly licensed. *Wexler v. Rust* (1911), 144 App. Div. 296, 128 N. Y. Supp. 977.

§ 45-a. Corporations may conduct business.—A domestic corporation desiring or intending to conduct the trade, business or calling of a plumber or of plumbing in a city of this state, as employing or master plumber, may do so provided one or more officers of such corporation separately or aggregately actually hold and own at least fifty-one per centum of the issued and outstanding capital stock of said corporation, and provided that each of such officers holding such percentage of the stock is the holder of a certificate of competency of such board of the city in which it conducts or proposes to conduct such business as provided in section forty-five. Each and every member of said corporation holding a certificate of competency shall comply with all the rules and regulations applicable to master or employing plumbers in the locality in which the corporation is engaged in business. Such corporation shall register at the office of the board of health as provided in section forty-six of this chapter. (*Added by L. 1915, ch. 467.*)

Under prior statutes it was held that a corporation might engage in the business of plumbing in the city of New York, where it actually carried on the work through certified and registered plumbers. *Nesser Co. v. Rothstein* (1908), 129 App. Div. 215, 113 N. Y. Supp. 772, *affd.* (1910), 198 N. Y. 532, 92 N. E. 1107; but see, *Schnaier & Co. v. Grigsby* (1909), 132 App. Div. 854, 858, 117 N. Y. Supp. 455, *affd.* (1910), 199 N. Y. 577, 93 N. E. 1125.

§ 45-b. Further requirements relating to the business of plumbing.—
1. No person otherwise qualified shall engage in the trade, business or calling of a plumber or of plumbing in a city of this state as employing or master plumber until he has first procured from the board or department of health in such city or in the city of New York, from the examining board of plumbers a metal plate or sign appropriately lettered or marked "licensed plumber"; such plate or sign to be conspicuously posted in the window of the place where such business is conducted. Any person retiring, abandoning or not actually engaged in such trade, business or calling hereinbefore mentioned, shall surrender to the board or department of health of the city, or in the city of New York, to the examining board of plumbers such metal plate or sign and shall not again engage in such trade, business or calling until he has again procured a metal sign as herein provided.

2. Within thirty days after this section takes effect, the board or department of health in every city of this state and in the city of New York, the examining board of plumbers shall prepare metal plates or signs, at least fourteen inches wide and not less than twenty-two inches in length appropriately lettered or marked "licensed plumber," the lines of each letter to be four inches long and five-eighths of an inch wide; such plate or sign shall, on some part thereof, contain an identification number, which number together with the name and location of the place of business of the person to whom issued shall be recorded in the office of such board or department of health or such examining board of plumbers in the city of New York. Every person now actually engaged or about to engage in the trade, business or calling of a plumber or of plumbing as employing or master plumber, who has otherwise complied with the provisions of law relating to the conduct of such business upon the payment of five dollars to the board or department of health of such city or in the city of New York to the examining board of plumbers shall have issued to him a sign or plate hereinbefore described. Any person to whom such plate or sign has been issued who shall loan, rent, sell or transfer the same to another person whether such person be entitled to receive a similar plate or sign or not, or otherwise wilfully violates the provisions of this section forfeits his license and certificate of qualifications and shall be guilty of a misdemeanor punishable by a fine of not exceeding fifty dollars for the first offense, and not less than one hundred nor more than five hundred dollars for a subsequent offense.

The provisions of this section shall apply to all cities of the state, including the city of New York. (*Added by L. 1916, ch. 305.*)

§ 46. **Registration; when required.**—Every employing or master plumber carrying on his trade, business or calling in any city of this state shall register his name and address at the office of the board of health of the city in which he shall conduct such business, under such rules as the respective boards of health of each of the cities shall prescribe, and thereupon he shall be entitled to receive a certificate of such registration, provided, however, that such employing or master plumber shall at the time of applying for such registration hold a certificate of competency from an examining board of plumbers.

Source.—Gen. City L. (L. 1900, ch. 327) § 46; originally revised from L. 1892, ch. 602, § 6, in part, as amended by L. 1893, ch. 66.

Registration essential to enforcement of contracts for plumbing, even though having certificate of competency. *Johnston v. Dahlgren* (1898), 31 App. Div. 204, 52 N. Y. Supp. 555; but if contract is separable and a part is not for plumbing, recovery may be had as to such part. *Id.* Recovery cannot be had, without certificate and registry, on ground that work was of a character which anyone could do, if action is expressly brought for services "as a plumber." *Bloom v. Saberski* (1894), 8 Misc. 311, 28 N. Y. Supp. 731.

Services performed by unregistered plumber.—The failure of a master plumber to register as provided in this section, precludes a recovery for work performed

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by him in violation of the statute. *Johnston v. Dahlgren* (1901), 166 N. Y. 354, 59 N. E. 987, affg. (1900), 48 App. Div. 537, 62 N. Y. Supp. 1115.

Cited with last section. *Bronold v. Engler* (1907), 121 App. Div. 123, 105 N. Y. Supp. 508, affd. (1909), 194 N. Y. 323, 87 N. E. 427, 21 L. R. A. (N. S.) 176.

Necessity of allegation of registration.—A master plumber suing to recover for services performed must allege as a condition precedent that he is registered. This must be alleged by the plaintiff and proven as part of his case, and is not a matter of defense to be pleaded by defendant. *Schnaler & Co. v. Grigsby* (1909), 132 App. Div. 854, 117 N. Y. Supp. 455, affg. (1908), 59 Misc. 595, 112 N. Y. Supp. 505, affd. (1910), 199 N. Y. 577, 93 N. E. 1125.

Certificate of competency prerequisite to registration.—The purpose of the provisions of the General City Law relating to the registration of plumbers was to vest in the examining board of each city the exclusive authority to pass upon the qualifications of an applicant to carry on the work of master plumber in such city, and its certificate of competency is an essential prerequisite to registration. Hence, an applicant who merely presents a certificate of the examining board of another city is not entitled to registration. *People ex rel. Lavier v. Hessler* (1912), 152 App. Div. 839, 137 N. Y. Supp. 664.

See Rept. of Atty. Genl. (1911) 339.

§ 47. **Cancellation of registration; notice.**—Such registration may be canceled by such board of health for a violation of the rules and regulations for the plumbing and drainage of such city duly adopted and enforced therein, after a hearing had before such board of health and upon a prior notice of not less than ten days stating the ground of complaint and served on the person charged with the violation, but such revocation shall not be operative unless concurred in by the local board of examiners. It shall not be lawful for any person to engage in or carry on the trade, business or calling of an employing or master plumber in any of the cities of this state, unless his name and address shall have been registered in the city in which he carries on or conducts such business.

Source.—Gen. City L. (L. 1900, ch. 327) § 47; originally revised from L. 1892, ch. 602, § 6, in part, as amended by L. 1893, ch. 66.

§ 48. **Inspectors; qualifications; notice.**—The local board of health or the commissioner or commissioners of the board of health, or the health department thereof, as the case may be, shall detail, designate or appoint an inspector or inspectors of plumbing, subject, however, to the provisions or limitations of law, regulating the appointment of such inspectors by such commissioner or commissioners or board or department of health of such city. All inspectors of plumbing who are detailed, designated or appointed shall be practical plumbers and shall not be engaged directly or indirectly in the business of plumbing, during the period of their appointment. They shall be citizens and actual residents of the city in which they are appointed and before entering upon the discharge of their duties as such inspectors they shall each be required to obtain a certificate of competency from said examining board. They shall be entitled to receive compensation not exceeding five dollars per day for each day of actual service, to be fixed by the board, commission or department making such appointment.

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Source.—Gen. City L. (L. 1900, ch. 327) § 48; originally revised from L. 1892, ch. 602, § 7.

Qualifications.—Inspector must be more than an employing plumber. He must be a practical plumber, and must obtain a certificate of competency from an examining board. *Stearns v. Tew* (1894), 6 Misc. 404, 27 N. Y. Supp. 26.

The general amendments to the Public Health Law have not taken from local boards of health in cities and given to the local health officer the power of appointment of inspectors of plumbing. *Rept. of Atty. Genl.* (1913), p. 696.

Taxpayer's action.—Under section 1925 of the Code of Civil Procedure, a taxpayer may maintain an action against the mayor and common council of a city and their appointee as inspector of plumbing, to enjoin payment of the latter's salary where he had not obtained the particular certificate of competency from the examining board of plumbers required by this section. *Gregory v. Simpson* (1916), 173 App. Div. 6, 159 N. Y. Supp. 1016.

Inspector of plumbing.—Where an applicant for inspector of plumbing fails to obtain a certificate of competency, as required by section 48 of the General City Law, but enters upon the duties of the office and receives the salary, an action to prevent payment to him is an action to obtain a judgment preventing waste of the funds of the city under the express provision of section 1925 of the Code of Civil Procedure. *Gregory v. Simpson* (1916), 173 App. Div. 6, 159 N. Y. Supp. 1016.

§ 49. Duties of inspectors; reports.—The inspector or inspectors of plumbing appointed under the provisions of the preceding sections of this article, in addition to the duties prescribed by law and those which may be enjoined or required by the commissioner of health, the board of health or the health department of the city in which they shall be appointed, shall be to inspect the construction and alteration of all plumbing work performed in such city, and to report in writing the results of such inspection to such commissioner of health or the board of health or the health department of their respective cities. They shall also report in like manner any person engaged in or carrying on the business of employing plumber, without having the certificate hereinbefore provided.

Source.—Gen. City L. (L. 1900, ch. 327) § 49; originally revised from L. 1892, ch. 602, § 8.

§ 50. Expiration and renewals of certificates and licenses.—All certificates of registration issued under the provisions of the preceding sections of this article and all licenses authorizing connections with street sewers or water mains shall expire on the thirty-first day of December of the year in which they shall be issued, and may be renewed within thirty days preceding such expiration. Such renewals to be for one year from the first day of January in each year.

Source.—Gen. City L. (L. 1900, ch. 327) § 50; originally revised from L. 1892, ch. 602, § 9.

§ 51. Notice of violation of rules.—Whenever any inspector or other person reports a violation of any such rules and regulations for plumbing and drainage, or a deviation from any officially approved plan or specification for plumbing and drainage filed with any board or depart-

ment, the local board of health shall first serve a notice of the violation thereof upon the master plumber doing the work, if a registered plumber.

Source.—Gen. City L. (L. 1900, ch. 327) § 51; originally revised from L. 1892, ch. 602, § 10, in part.

§ 52. Notice, how served; proceedings when violated not removed.—Such notice may be served personally or by mail, and if by mail it may be addressed to such master plumber at the address registered by him with such local board of health, but the failure of a master plumber to register will relieve any board of health from the requirement of giving notice of violation. Unless the violation is removed within three days after the day of serving or mailing such notice, exclusive of the day of serving or mailing, the board of health may proceed according to law.

Source.—Gen. City L. (L. 1900, ch. 327) § 52; originally revised from L. 1892, ch. 602, § 10, in part.

§ 53. Plumbing and drainage to be executed according to rules.—The plumbing and drainage of all buildings, both public and private, in each of the cities of this state, shall be executed in accordance with the rules and regulations adopted by the local board of examining plumbers, in conjunction with the board of health for plumbing and drainage, and all repairs and alterations in the plumbing and drainage of all buildings heretofore constructed shall also be executed in accordance with such rules and regulations; but this section shall not be construed to repeal any existing provision of law requiring plans for the plumbing and drainage of new buildings to be filed with any local board of health and be previously approved in writing by such board of health and be executed in accordance therewith, except that in case of any conflict with such plans, rules and regulations of the board of examiners, the latter shall govern.

Source.—Gen. City L. (L. 1900, ch. 327) § 53; originally revised from L. 1892, ch. 602, § 11.

§ 54. Office room; expenses a city charge.—Each of such examining boards of plumbers shall have power to procure suitable quarters for the transaction of business, to provide the necessary books and stationery and to employ a clerk to keep such books and record the transactions of such board. The board of estimate and apportionment or the common council of a city as the case may be shall annually insert in their tax levy a sufficient sum to meet all the expenditures incurred under the provisions of this article. The expenses incurred by the several examining boards of plumbers in the execution and performance of the duties imposed by this article shall be a charge on the respective cities and shall be audited, levied, collected and paid in the same manner as other city charges are audited, levied, collected and paid.

Source.—Gen. City L. (L. 1900, ch. 327) § 54; originally revised from L. 1892, ch. 602, § 12.

§ 55. Violations, how punished.—Any person violating any of the pro-

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visions of this article, or any rules or regulations of the board of health or of the examining board of plumbers in any city regulating the plumbing and drainage of buildings in such city, shall be guilty of a misdemeanor, and on conviction, if a master plumber, shall in addition, forfeit any certificate of competency or registration, which he may hold under the provisions thereof.

Source.—Gen. City L. (L. 1900, ch. 327) § 55; originally revised from L. 1892, ch. 602, § 13.

§ 56. Issue of licenses to connect with sewers and water mains restricted.—The commissioner of public works of any city, or the officer or officers acting in like capacity in any of the cities of this state, and having charge of the sewers and water mains therein, shall not issue a license to any one to connect with the sewers or with the water mains of such cities, unless such person has obtained and shall produce a certificate of competency from the examining board of such city.

Source.—Gen. City L. (L. 1900, ch. 327) § 56; originally revised from L. 1892, ch. 602, § 14.

Section cited, *People ex rel. Lavier v. Hessler* (1912), 152 App. Div. 839, 137 N. Y. Supp. 664.

§ 57. Article limited.—This article shall not apply to the city of New York. (*Amended by L. 1913, ch. 753.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 57.

ARTICLE 4-A.

(Article added by L. 1911, ch. 156.)

SUPERVISION AND REGULATION OF PLASTERING.

Section 60. Supervision of plastering by building department.

61. Three coat work required on lath.
62. Key space.
63. First coat or scratch coat.
64. Second coat.
65. Finishing.
66. Cornices or coves.
67. Patent plasters.
68. Effect.

§ 60. Supervision of plastering by building department.—The building department of every city of the first class shall have jurisdiction over all plastering except where it conflicts with the duties of any other department or conflicts with any law conferring on any other department supervision of any portion of plastering. For such purpose there shall be appointed in each building department in a city of the first class by the head thereof a sufficient number of inspectors to perform such work as is necessary in the enforcement of this article who, in addition to such quali-

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fications as may be required by the civil service law, shall be competent plasterers of at least ten years' practical experience. (*Added by L. 1911, ch. 156.*)

§ 61. **Three coat work required on lath.**—All plastering in tenements, apartments, hospitals, schools and other public buildings when on lath shall be known as three coat work, namely, scratch coat, brown coat and finish. (*Added by L. 1911, ch. 156.*)

§ 62. **Key space.**—All ceilings, stud partitions and furred walls in tenements, apartments, hospitals, schools, and other public buildings where plastered with lime on wood lath shall have not less than three-eighths space between lath. All grounds and jambs shall mean not less than seven-eighths from the stud. (*Added by L. 1911, ch. 156.*)

§ 63. **First coat or scratch coat.**—First or scratch coat shall be of first quality to be scratched thoroughly to make a key to retain second coat; and shall be thoroughly dry or set before applying second coat. (*Added by L. 1911, ch. 156.*)

§ 64. **Second coat.**—Second coat or brown mortar shall be of first quality. All browning must be straight, true with no unevenness or irregularity of surface. (*Added by L. 1911, ch. 156.*)

§ 65. **Finishing.**—When white mortar, or any other material of a like character is used for finish coat, it shall be laid on regular and troweled to a smooth surface showing neither deficiencies or brush marks. (*Added by L. 1911, ch. 156.*)

§ 66. **Cornices or coves.**—All cornices or coves shall be run straight, true and smooth. (*Added by L. 1911, ch. 156.*)

§ 67. **Patent plasters.**—When patent plasters, such as ivory, acme, windsor, et cetera, are used, lathing, if of wood lath, shall not be less than one-quarter inch key space. First coat shall be thoroughly scratched to make key to retain second coat, and shall be set before second coat is applied. (*Added by L. 1911, ch. 156.*)

§ 68. **Effect.**—Nothing in this article contained shall affect the tenement house act and the enforcement of the provisions thereof by the city of New York. (*Added by L. 1911, ch. 156.*)

ARTICLE V.

BRIDGES.

Section 70. Submission of proposition to borrow money.

71. Special meeting.

72. Notice of submission.

73. Ballots.

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Bridges.

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- 74. Polls of special meeting; certificate of result.
- 75. Erection of bridge; acquisition of lands.
- 76. Issue of bonds.
- 77. Lien on city property.
- 78. Tax for interest and principal.
- 79. Bridges to be free.
- 80. Application of article.

§ 70. Submission of proposition to borrow money.—Whenever the common council of any city shall by resolution declare and determine that the interests of such city and the convenience of the public require that a bridge should be erected across any stream or watercourse within the corporate limits of such city, such common council is authorized to submit to the qualified electors of such city, being taxpayers, at any annual charter election held in such city, or at a special meeting of such electors, being taxpayers, held for that purpose, the proposition whether the amount needed to build such bridge shall be borrowed by such city.

Source.—Gen. City L. (L. 1900, ch. 327) § 70; originally revised from L. 1892, ch. 209, § 1.

§ 71. Special meeting.—In case such proposition shall be submitted to such electors at a special meeting, the common council shall by resolution prescribe by whom, and in what manner and at what place or places within such city such special meeting shall be held.

Source.—Gen. City L. (L. 1900, ch. 327) § 71; originally revised from L. 1892, ch. 209, § 2.

§ 72. Notice of submission.—Whether such proposition shall be submitted at the annual election or at a special meeting, the city clerk shall give at least two weeks' notice of such submission by publishing at least twice, notice thereof in two newspapers published in any such city, and by posting such notices in at least one public place in each ward of such city, at least ten days prior to the time mentioned in such notice for such submission, which notice shall set forth the estimated cost of such bridge and the proposed location of the same, and the time and place or places of such submission.

Source.—Gen. City L. (L. 1900, ch. 327) § 72; originally revised from L. 1892, ch. 209, § 3.

§ 73. Ballots.—The vote shall be by ballot, and ballots therefor shall be provided by the common council for that purpose of two kinds, one containing the words "For the building of a bridge and borrowing the money by the city to defray the cost of the same," and the other containing the words "Against building a bridge and borrowing the money by the city to defray the cost of the same."

Source.—Gen. City L. (L. 1900, ch. 327) § 73; originally revised from L. 1892, ch. 209, § 4.

§ 74. Polls of special meeting; certificate of result.—If such

special meeting be held, the polls of such special meeting shall be kept open at least from nine o'clock in the forenoon until four o'clock in the afternoon, and the persons directed to hold and holding the same shall certify the result thereof to the common council, and if such proposition is submitted at the annual election, the inspectors of such election shall certify the result thereof to the common council and such common council shall at its next regular meeting held after such result is so certified or at a special meeting called for that purpose by resolution to be entered in its minutes, declare according to the fact whether such proposition was carried or not and whether a majority of such votes were cast in favor of or against such proposition and such declaration shall be conclusive evidence of the fact it shall declare.

Source.—Gen. City L. (L. 1900, ch. 327) § 74; originally revised from L. 1892, ch. 209, § 5.

§ 75. **Erection of bridge; acquisition of lands.**—If such proposition is carried and so declared, then such common council is authorized to erect such bridge and acquire such lands as may be needed for the approaches thereof, and if for any reason such lands cannot be acquired by purchase, to acquire the same by condemnation for the public use thereof, pursuant to existing laws.

Source.—Gen. City L. (L. 1900, ch. 327) § 75; originally revised from L. 1892, ch. 209, § 6, in part.

§ 76. **Issue of bonds.**—Such common council is authorized to borrow such sum of money as may be needed to defray the cost of such bridge, and such land, at a rate of interest not exceeding four per centum per annum, and to secure the payment of the sum so borrowed, to issue the bonds of the city to an amount not exceeding such cost. Such bonds shall be an obligation of such city and shall be signed by the mayor of such city, countersigned by the clerk, and shall bear the corporate seal of such city, but the interest coupons or warrants need only be signed by the mayor. The principal of such bonds or obligations shall be made payable at such times and in such amounts not exceeding fifty years from their date, as the common council may deem best, and shall bear interest at the rate of not exceeding four per centum per annum; the interest thereon shall be payable semi-annually and the principal and interest may be made payable in the city of New York.

Source.—Gen. City L. (L. 1900, ch. 327) § 76; originally revised from L. 1892, ch. 209, § 6, in part.

§ 77. **Lien on city property.**—The principal and the interest of such bonds or obligations shall be a lien on the taxable property of such city, and the credit of such city is hereby pledged for the payment of the same, and the money so borrowed shall be used and appropriated for the purpose contemplated by this article, and for no other purposes, and such bonds or obligations shall not be sold for less than par.

§§ 78-80, 90.

Police matrons.

L. 1909, ch. 26.

Source.—Gen. City L. (L. 1900, ch. 327) § 77; originally revised from L. 1892, ch. 209, § 7.

§ 78 **Tax for interest and principal.**—The common council of such city shall have power, and it shall be their duty, from time to time, and as often as it may become necessary, to provide for the payment at maturity of the principal of all bonds or obligations authorized by this article, and issued pursuant thereto, and the interest thereon, and to include in the annual tax levy and cause to be levied and collected each and every year until such bonds and the interest thereon shall be fully paid, such sum or sums of money as will be necessary to pay such bonds or obligations and the interest thereon at maturity, and see that the moneys so raised and collected are applied to the payment of such principal and interest.

Source.—Gen. City L. (L. 1900, ch. 327) § 78; originally revised from L. 1892, ch. 209, § 8.

§ 79. **Bridges to be free.**—Every bridge erected pursuant to the provisions of the preceding sections, shall be free to the public.

Source.—Gen. City L. (L. 1900, ch. 327) § 79; originally revised from L. 1892, ch. 209, § 9.

§ 80. **Application of article.**—The provisions of this article shall not apply to any bridge erected or authorize the erection of any bridge on the Hudson river below Waterford, or on the East river or over water forming a part of the boundaries of the state.

Source.—Gen. City L. (L. 1900, ch. 327) § 80; originally revised from L. 1892, ch. 209, § 10.

ARTICLE VI.

POLICE MATRONS.

Section 90. Police station houses for the detention of women; how designated.

91. Police matrons; how appointed.

92. Term of service, salaries, vacancies.

93. When police matrons to reside at station houses.

94. Women under arrest to have separate accommodations.

95. Proceeding in case of arrest of women.

96. Woman defined.

97. Appropriations under article, how made.

§ 90. **Police station houses for the detention of women; how designated.**—The mayor of every city containing a population of twenty-five thousand shall and the mayor of every other city when authorized by a resolution of the common council may designate one or more station houses within his city for the detention and confinement of all women under arrest in such city. Such mayor or board of commissioners of police may at any time designate for such purpose any additional station house or houses, or may revoke the designation of any station house or

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Police matrons.

§§ 91-93.

houses theretofore designated, provided that at least one such station house shall at all times be so designated for such purpose in each city.

Source.—Gen. City L. (L. 1900, ch. 327) § 90; originally revised from L. 1888, ch. 420, § 1, as amended by L. 1891, ch. 90, extended to include all cities.

References.—Inapplicable to New York. See L. 1899, ch. 674, adding §§ 372-388 to Greater New York charter. Made §§ 360-367 by L. 1901, ch. 466. See § 367, as amended by L. 1901, ch. 466.

§ 91. **Police matrons; how appointed.**—The mayor of each city shall appoint for each station house designated as provided in the preceding section, not more than two respectable women who shall be known as police matrons in the same manner and under the restrictions governing the appointment of patrolmen, so far as the same may be applicable, except that any rule or regulation as to the age of a person appointed patrolman shall not apply to matrons appointed under the provisions of this article. No woman shall be appointed a police matron unless suitable for the position and recommended therefor in writing by at least twenty women of good standing, residents of the city in which the appointment is made. In cities where there are no station houses, and where the county jail is used for the purposes of a house of detention, it shall be deemed a compliance with the provisions of this article if there shall be in constant attendance at such jail, so long as any woman is detained under arrest therein, a woman properly qualified for and who shall perform the duties herein imposed upon police matrons.

Source.—Gen. City L. (L. 1900, ch. 327) § 91; originally revised from L. 1888, ch. 420, § 2, as amended by L. 1891, ch. 90.

§ 92. **Term of service, salaries, vacancies.**—Police matrons shall on appointment hold office until removed, and they may be removed at any time by the authority appointing them, after an opportunity to be heard, by written order stating the cause of such removal. Upon the death, resignation or removal of a police matron, her successor shall be appointed as soon as may be, in the manner hereinbefore provided. A police matron shall receive a compensation or salary to be fixed by the common council in the several cities where such matrons shall be provided, not exceeding in any case the minimum salary paid to patrolmen in the city in which such matron is appointed.

Source.—Gen. City L. (L. 1900, ch. 327) § 92; originally revised from L. 1888, ch. 420, § 3, as amended by L. 1891, ch. 90.

Reference.—Vacancies generally, Public Officers Law, § 30.

§ 93. **When police matrons to reside at station houses.**—When only one police matron is attached to a police station, she shall reside there, or within a reasonable distance therefrom, and shall hold herself in readiness to respond to any call therefrom at any hour of the day or night, and each matron shall, during such hours as may be fixed by the head of the police department, remain in such station and hold herself in readiness to respond to any call therefrom. So long as any woman is detained or

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held under arrest in a police station to which a police matron is attached, it shall be the duty of such matron to remain constantly thereat, ready for service; or if there be more than one matron attached to such station, then one of them shall be constantly ready for service. A police matron shall, subject to the officer in charge of such station house, have the immediate care and charge of all women held under arrest in the station to which she is attached, and she may at any time call upon the officer in charge of such station for assistance. She shall be subject to the authority of the board of police, or if there be no such board, then to the chief of police in the city where she may be appointed, and to the rules prescribed by such authority, but at a station where she may be on duty she shall be subject only to the authority of the officer in charge thereof.

Source.—Gen. City L. (L. 1900, ch. 327) § 93; originally revised from L. 1888, ch. 420, § 4, as amended by L. 1891, ch. 90.

§ 94. Women under arrest to have separate accommodations.—It shall be the duty of the boards of commissioners of police in every city, or if there be no board of police, then of the mayor of such city, to provide sufficient accommodations for women held under arrest to keep them separate and apart from the cells, corridors and apartments provided for males under arrest, and to so arrange each station house that no communication can be had between the men and women therein confined, except with the consent of the matrons and officers in charge of such station house.

Source.—Gen. City L. (L. 1900, ch. 327) § 94; originally revised from L. 1888, ch. 420, § 5, as amended by L. 1891, ch. 90.

§ 95. Proceeding in case of arrest of women.—Whenever a woman is arrested and taken to a police station, to which a matron is attached, it shall be the duty of the officer in charge of the station to cause such matron to be summoned forthwith, and whenever, in any city in which a police matron has been appointed, a woman is arrested and taken to a station house to which no matron is attached, it shall be the duty of such officer to cause such woman to be removed as soon as possible to the nearest station house within such city to which a police matron is attached. No such separate confinement nor any such removal of any woman shall operate to take from any court any jurisdiction it has.

Source.—Gen. City L. (L. 1900, ch. 327) § 95; originally revised from L. 1888, ch. 420, § 6, as amended by L. 1891, ch. 90.

§ 96. Woman defined.—The term "woman" as used in this article shall not include any female either actually or apparently under the age of sixteen years, whose care is assumed by any society referred to in section four hundred and ninety of the penal law; but every such female upon being taken to a station house shall be at once transferred therefrom by the officer in charge to the custody of such society.

L. 1909, ch. 26.

Contracts for supply of gas.

§§ 97, 130.

Source.—Gen. City L. (L. 1900, ch. 327) § 96; originally revised from L. 1888, ch. 420, § 6, as amended by L. 1891, ch. 90.

§ 97. Appropriations under article, how made.—The proper local authorities of each city in which a police matron has been appointed shall appropriate annually such sum as may be needed for the separate care and confinement in station houses of any women arrested in such city, and for the appointment, salary and maintenance of police matrons for the purposes of this article.

Source.—Gen. City L. (L. 1900, ch. 327) § 97; originally revised from L. 1888, ch. 420, § 7, as amended by L. 1891, ch. 90.

ARTICLE VII.

§§ 110–115. Lodging houses.—(*Repealed by L. 1917, ch. 690, in effect May 31, 1917.*)

Source.—General City L. (L. 1900, ch. 327) §§ 110–115, originally revised from L. 1895, ch. 758. The article has been superseded by the Election Law.

ARTICLE VIII.

§§ 120–120-c. Licensing of dogs in third class cities.—(*Added by L. 1911, ch. 718, and repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Reference.—The provisions of this article superseded by Article 5-b of the Agricultural Law, as added by L. 1917, ch. 800.

ARTICLE IX.

CONTRACTS FOR SUPPLY OF GAS.

Section 130. Contracts with corporations for supply of gas.

131. Letting of contract to be public.

132. Contract to provide for reduction of price.

§ 130. Contracts with corporations for supply of gas.—The municipal officers authorized by law to contract in behalf of any city of the first class, for the lighting of its streets may, from time to time, in the manner, upon the terms and with the conditions hereinafter provided contract in behalf of such city with any corporation or corporations then supplying gas therein for a supply of gas to such city, for and during such specified period not exceeding fifteen years as shall by such municipal officers be deemed to be for the best interests of such city and of the inhabitants thereof.

Source.—Gen. City L. (L. 1900, ch. 327) § 130; originally revised from L. 1895, ch. 990, § 1.

References.—Price of gas in N. Y. City furnished to the city, L. 1905, ch. 736; to consumers generally, L. 1906, ch. 125.

§§ 131, 132, 140. Hospitals for treatment of pulmonary tuberculosis. L. 1909, ch. 26.

§ 131. Letting of contract to be public.—Every such contract shall be let at public letting as required by law, and as a consideration for the execution and performance thereof, shall expressly provide for and secure to such city, prices lower than any now prescribed therein by law, and a progressive reduction in such price for each year during the continued performance of such contract and also adequate assurance of the continuing mutual performance of such contract according to the conditions thereof, with proper indemnity to either party to such contract against any possible violation, impairment, abrogation or supersession thereof, within the term specified.

Source.—Gen. City L. (L. 1900, ch. 327) § 131; originally revised from L. 1895, ch. 990, § 2, in part.

§ 132. Contract to provide for reduction of price.—Every such contract shall also provide and require that during the term therein specified the corporation party thereto may and shall supply gas to the inhabitants of such city at prices lower than those now or then charged therein by such corporation party thereto and progressively lower for each year of such term; any company or corporation bidding for such contract shall specify such several prices and reductions of price for the several classes and terms of gas supply, and the same shall be considered in the award of any such contract to the bidders or bidder therefor, and the corporation receiving any such contract shall be entitled to charge and collect the prices therein specified during the continuance thereof. Nothing in this article contained is intended or shall be construed to affect or impair any existing right or contract except with the consent of the parties to any such contract.

Source.—Gen. City L. (L. 1900, ch. 327) § 132; originally revised from L. 1895, ch. 990, § 2, in part.

ARTICLE X.

HOSPITALS FOR TREATMENT OF PULMONARY TUBERCULOSIS.

Section 140. Establishment of hospitals.

141. Selection of site.

142. Jurisdiction of local board of health.

§ 140. Establishment of hospitals.—A city of the first class shall have power whenever its board of health shall deem it necessary for the promotion of the health of its inhabitants, to establish, equip and maintain, outside of its corporate limits, and not within the limits of any other city or any village, a hospital or hospitals for the regular treatment of the disease known as pulmonary tuberculosis.

Source.—Gen. City L. (L. 1900, ch. 327) § 140; originally revised from L. 1899, ch. 637, § 1, made applicable only to cities.

References.—State hospital. See State Charities Law, §§ 150-163.

L. 1909, ch. 26.

Protection of purchasers of coal.

§§ 141, 142, 161.

§ 141. **Selection of site.**—Whenever a city of the first class shall desire to exercise the power conferred by this article it shall through its board of health, select such locality outside of its corporate limits, but within the state, and not within the corporate limits of any other city or any village, as it may consider best adapted by reason of climatic and other conditions for the treatment of such disease, and shall make application to the state board of health for the approval of the site so selected. Upon such approval being given the city may acquire title to such lands as its board of health may designate, within the limits of the locality submitted to and approved by the state board of health. The provisions of law relating to the acquiring of private property for public purposes are hereby made applicable as far as may be necessary to the acquiring of title to such lands.

Source.—Gen. City L. (L. 1900, ch. 327) § 141; originally revised from L. 1899, ch. 637, § 2.

§ 142. **Jurisdiction of local board of health.**—All hospitals or institutions now or hereafter established or maintained by any city of the first class for the regular or special treatment of persons suffering from the disease known as pulmonary tuberculosis shall be subject to the approval of the local board of health; special wards or pavilions for the treatment of cases of pulmonary tuberculosis in existing hospitals shall be provided with separate nurses, cooking utensils, washing and plumbing facilities.

Source.—Gen. City L. (L. 1900, ch. 327) § 142; originally revised from L. 1899, ch. 637, § 3.

ARTICLE XI.

PROTECTION OF PURCHASERS OF COAL.

Section 161. Bills of lading; penalty for altering.

§§ 150–160. **Protection of purchasers of coal.**—*Repealed by L. 1911, ch. 825, in effect Sept. 1, 1911.*

§ 161. **Bills of lading; penalty for altering.**—A person guilty of altering with intent to defraud, any original bill of lading issued by the person, firm or corporation by whom the coal was loaded into the vessel in which such coal is transported to any city of the first or second class, in this state, or of uttering any such bill of lading so altered, or who is guilty of making, preparing or subscribing or uttering a false or fraudulent manifest, invoice or bill of lading thereof, or removing any part of such cargo of coal without having the amount thereof certified to in writing on such original bill of lading, by the person, firm or corporation receiving the coal so removed, and by the captain of the vessel containing such cargo, is punishable by imprisonment in a state prison, not exceeding three years, or by a fine not exceeding one thousand dollars, or both, and the delivery

§§ 165-167.

Art commission.

L. 1909, ch. 26.

of any fraudulent bill of lading to any purchaser of coal shall be presumptive evidence of uttering the same with criminal intent.

Source.—Gen. City L. (L. 1900, ch. 327) § 161; originally revised from L. 1897, ch. 174, § 7.

ARTICLE XI-A.

(Former Art. 8; renumbered Art 11-a by L. 1911, ch. 718.)

ART COMMISSION.

Section 165. Purchase of art productions in certain cities.

166. Art commissioners.

167. Selection and placing of art productions.

§ 165. Purchase of art productions in certain cities.—Cities of the first and second class are hereby authorized, in the discretion of those officers or bodies in such cities that have charge of the appropriation of the public funds, to purchase works of art which are the production of professional artists who are citizens of the United States, and which have been executed in the United States. The word “productions” shall be held to include among other works of art, mural paintings or decorations which artists may be employed to put on the walls of public buildings of such cities, mosaic and stained or painted glass. A city of the first class may expend under this section any amount not to exceed fifty thousand dollars annually. A city of the second class may expend under this section not to exceed ten thousand dollars annually. (*Former § 122; renumbered § 165 by L. 1911, ch. 718.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 120; originally revised from L. 1898, ch. 395, § 1.

§ 166. Art commissioners.—Where provision is not made by law for an art commission for any city of the first or second class, the mayor of such city shall, as soon as any city decides to expend any moneys under the provisions of this article, appoint art commissioners for such city. Such commissioners may include women, but shall not contain more than a bare majority of persons selected from any one political party. It shall be composed of persons who are experts in art matters. (*Former § 120; renumbered § 166 by L. 1911, ch. 718.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 121; originally revised from L. 1898, ch. 395, § 2.

§ 167. Selection and placing of art productions.—All art productions purchased under this article shall be selected by the art commission of the city, and shall be placed in the public buildings, grounds or parks thereof for the purpose of beautifying the same. (*Former § 122; renumbered by § 167 by L. 1911, ch. 718.*)

Source.—Gen. City L. (L. 1900, ch. 327) § 122; originally revised from L. 1898, ch. 395, § 3.

L. 1909, ch. 26.

Laws repealed.

§§ 170, 171.

ARTICLE XII.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 170. Laws repealed.

. 171. When to take effect.

§ 170. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 171. When to take effect.—This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1835	243	All	1895	548	All
1839	241	3	1895	768	All
1839	255	3	1895	990	All
1840	21	All	1895	1011	All
1860	39	All	1896	448	All
1872	590	All	1896	530	All
1880	434	All	1896	823	All
1883	375	All	1897	174	All
1886	543	All	1897	385	All
1888	420	All	1898	58	All
1888	539	All	1898	395	All
1891	90	All	1899	237	All
1892	209	All	1899	631	All
1892	602	All	1899	637	All
1893	66	All	1900	327	All
1893	162	All	1902	168	All
1893	344	2	1902	353	All
1895	1	All	1903	347	All
1895	9	All			

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Where a statute has been specifically repealed, that and the repealing statute are given without explanatory note.

L. 1839, ch. 241, § 3.—Statute amends L. 1835, ch. 243. L. 1900, ch. 327, § 172, repeals L. 1835, ch. 243, and amendatory acts.

L. 1839, ch. 255, § 3.—Statute amends L. 1835, ch. 243. L. 1900, ch. 327, § 172, repeals L. 1835, ch. 243, and all amendatory acts.

L. 1863, ch. 281.—Regulating places of amusement in cities and incorporated villages. All except §§ 2, 4 and 7 are specifically repealed. Section 2 repealed by Liquor Tax Law. Section 4, making violations of the statute misdemeanors, is abrogated by the repeal of the other sections. Section 7 states when act shall take effect.

L. 1872, ch. 590.—Regulating parades in cities. Consists of five sections. Section 2 was amended so as to read as follows. Sections 2, 4 repealed. Sections 1, 3 covered by Penal Code, §§ 426, 376 (now Penal Law, §§ 1450, 1990). Section 5 states when act takes effect.

L. 1883, ch. 375.—Relates to and limits the carrying and sale of pistols and other firearms in the cities of this state. Similar provisions of law differing in some particulars from statute cited for repeal, but covering the entire subject, are contained in §§ 410, 411 of the Penal Code (now Penal Law, §§ 1897, 1898), as amended by L. 1884, ch. 46, and L. 1889, ch. 140. Superseded by Penal Code, §§ 410, 411 (now Penal Law, §§ 1897, 1898).

L. 1896, ch. 448.—Relates to the licensing of dogs in cities having a population of between 20,000 and 800,000 in which there is a duly incorporated society for the prevention of cruelty to animals. The statute has been before the court of appeals on the question of its constitutionality and that court held it to be unconstitutional in certain particulars. The decision was of such a character that the statute has no life or value left. See 165 N. Y. 517.

L. 1899, ch. 631.—Relates to licenses to adult blind persons to vend goods or play musical instruments in public thoroughfares in certain cities. Consolidated in General City Law, § 10.

L. 1900, ch. 327.—This statute, which is the "old" General City Law, is recommended for repeal because its live provisions have been consolidated in General City Law.

L. 1902, ch. 168.—Amends L. 1900, ch. 327, art. 1, by adding new § 15. Consolidated in General City Law, § 17.

L. 1902, ch. 353.—Relates to notice of hearing to be given by the mayor on bills. Consolidated in General City Law, § 31.

L. 1903, ch. 347.—Reports of cities of the second and third class to secretary of state. Consolidated in General City Law, § 4.

GENERAL CONSTRUCTION LAW.

L. 1909, ch. 27.—"An act relating to construction, constituting chapter twenty-two of the consolidated laws."

[In effect February 17, 1909.]

CHAPTER XXII OF THE CONSOLIDATED LAWS.**GENERAL CONSTRUCTION LAW.**

- Article 1.** Short title (§ 1).
 2. Meaning of terms (§§ 10-58).
 3. Ancient statutes and resolutions (§§ 70-72).
 4. References, titles and head notes (§§ 80, 81).
 5. Effect of repeals (§§ 90-96).
 6. Effect of consolidated laws (§§ 100, 101).
 7. Application of chapter (§ 110).
 8. Laws repealed; when to take effect (§§ 120, 121).

ARTICLE I.**SHORT TITLE.**

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the "General Construction Law."

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 1.

ARTICLE II.**MEANING OF TERMS.**

- Section 10.** Acknowledge and acknowledgment.
 11. Acknowledgment or proof of instrument.
 12. Affidavit.
 13. Adjournment of meeting.
 14. Bond and undertaking.
 15. Chattels.
 16. Choose.
 17. Civil code and criminal code.
 18. Consolidated laws.
 19. Day, calendar.
 20. Day, computation.
 21. Folio.
 22. Gender.

§§ 10, 11.	Meaning of terms.	L. 1909, ch. 27.
23.	Heretofore and hereafter.	
24.	Holiday and half holiday.	
25.	Holiday in contractual obligations.	
26.	Judge.	
27.	Last, preceding, next and following.	
28.	Lunatic and lunacy.	
29.	Men.	
30.	Month, computation.	
31.	Month in statute, contract and public or private instrument.	
32.	Municipal officers.	
33.	Notice.	
34.	Now.	
35.	Number, singular and plural.	
36.	Oath, affidavit and swear.	
37.	Person.	
38.	Property.	
39.	Property, personal.	
40.	Property, real.	
41.	Quorum and majority.	
42.	Register of county.	
43.	Seal of court, public officer or corporation.	
44.	Seal, private.	
45.	Seal, private as corporate seal.	
46.	Signature.	
47.	State.	
48.	Tense, present.	
49.	Territory.	
50.	Time, computation.	
51.	Time, night.	
52.	Time, standard.	
53.	Time, use of standard.	
54.	Village.	
55.	Women.	
56.	Writing and written.	
57.	Year, common and leap.	
58.	Year in statute, contract and public or private instrument.	

§ 10. **Acknowledge and acknowledgment.**—The terms acknowledge and acknowledgment, when used with reference to the execution of an instrument or writing other than a deed of real property, include a compliance with the provisions of the next section by either such proof or acknowledgment.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 15, in part.

Acknowledgment.—The word, acknowledgment, as commonly used by the legislature, the courts and the bar means both the act and the written evidence thereof made by the officer. An instrument is not "duly acknowledged" unless there is not only the oral acknowledgment but the written certificate also, as required by the statute regulating the subject. *Rogers v. Pete* (1898), 154 N. Y. 518, 529, 49 N. E. 75.

Venue.—The main function of a venue to an acknowledgment is to show where it was made, and an acknowledgment is presumed to have been taken in the state where the venue is in this state. *Id.*

§ 11. **Acknowledgment or proof of instrument.**—When the execution of

L. 1909, ch. 27.

Meaning of terms.

§§ 12-14.

any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to be filed or recorded in a public office, the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 15, in part.

References.—Who may take acknowledgments, Real Property Law, § 292; notaries public, power to take, Executive Law, § 105; commissioners of deeds, Id. § 108. Surrogates and surrogates' clerks, Code Civ. Pro. (Surrogates Code) § 2490, sub. 12, § 2502, sub. 5. Requisites of acknowledgments, Real Property Law, § 303. Acknowledgments and proof by married women, Id. § 302. Acknowledgment of conveyance of real property within state, Id. § 298; within other states and counties, Id. §§ 299-301; authentication of certificate of acknowledgment, when necessary; contents, etc., Id. §§ 310-312. Form of acknowledgment by corporation, Id. § 309. False certificate of acknowledgment a crime, Penal Law, § 885, recording instrument or conveyance without certificate of acknowledgment, Id. § 1862.

Section cited in *People ex rel. L. I. R. R. Co. v. Bd. R. R. Com'rs* (1902), 75 App. Div. 106, 108, 77 N. Y. Supp. 380, in connection with section 2 of the Railroad Law; in *Kennedy v. Warner* (1906), 51 Misc. 362, 365, 100 N. Y. Supp. 616, and *Jackson v. Seeber* (1906), 50 Misc. 479, 481, 100 N. Y. Supp. 563, in connection with section 16 of the Liquor Tax Law.

Scope.—See Rept. of Atty. Genl. (1911) 651.

§ 12. **Affidavit.**—When an affidavit is authorized or required it may be sworn to before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified before whom it is to be taken.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 14, in part; originally revised from Code Crim. Pro. § 957.

References.—"Affidavit" includes a verified pleading, Code Civ. Pro. §§ 3343, subd. 11. Who may administer oaths, and manner of administering, Id. §§ 842-850. Swearing falsely in any form perjury, Penal Law, § 1622. Definition of "oath" for purposes of perjury, Id. § 1621.

§ 13. **Adjournment of meeting.**—Any meeting referred to in section forty-one of this chapter may be adjourned by a less number than a quorum.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 19, in part; originally revised from R. S., pt. 1, ch. 16, tit. 1, § 125; R. S., pt. 3, ch. 8, tit. 17, § 27 as amended by L. 1874, ch. 321; L. 1842, ch. 130, tit. 8, § 2; L. 1886, ch. 21, § 20.

See *Matter of Light* (1897), 21 Misc. 737, 49 N. Y. Supp. 345, revd. (1898), 30 App. Div. 50, 51 N. Y. Supp. 743.

Section cited in *Wilson v. Blelock* (1908), 125 App. Div. 191, 195, 109 N. Y. Supp. 340, affd. (1909), 195 N. Y. 592, 89 N. E. 1115.

§ 14. **Bond and undertaking.**—A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 16.

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References.—Bonds or undertakings of public officers generally, Public Officers Law, §§ 11-13. For special provisions as to bonds or undertakings of public officers see titles of various officers.

Validity of bond.—An instrument purporting to be an undertaking given in abandonment proceedings is not invalid because in the form of a bond. *Tully v. Lewitz* (1906), 50 Misc. 350, 98 N. Y. Supp. 829.

§ 15. **Chattels.**—The term chattels includes goods and chattels.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 4, in part; originally revised from Code Civ. Pro. § 3343, subd. 7; L. 1850, ch. 140, § 8; L. 1853, ch. 117, § 8; L. 1867, ch. 974, § 8; Penal Code, § 718, subd. 15; L. 1854, ch. 232, § 8. For remainder of section, see § 39.

See *Niles v. Mathusa* (1900), 162 N. Y. 546, 57 N. E. 184, as to the character of liquor tax certificates.

§ 16. **Choose.**—The term choose includes elect and appoint.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 17.

See Rept. of Atty Genl. (1911) 520.

§ 17. **Civil code and criminal code.**—The term civil code means the code of civil procedure. The term criminal code means the code of criminal procedure.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 29.

§ 18. **Consolidated Laws.**—The term Consolidated Laws shall mean the compilation of the statutes prepared by the board of statutory consolidation and the amendments thereof.

Source.—New.

§ 19. **Day, calendar.**—A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 27, in part, as amended by L. 1894, ch. 447; originally revised from Code Civ. Pro. § 788; Penal Code, §§ 261, 500.

This contemplates a day of twenty-four hours. *Matter of Norton* (1898), 34 App. Div. 79, 53 N. Y. Supp. 1093.

Fractions of a day.—The courts of this state long ago determined that in the service of process, notices or pleadings the law does not regard fractions of a day. Notice served upon the afternoon of June sixth of an application to be made in the morning of June eleventh is five days' notice. *Matter of Niel* (1907), 55 Misc. 317, 318, 106 N. Y. Supp. 479. The law does not regard fractions of a day, except in cases where the hour itself is material, as is the case where priority of judgments is in question. *Marvin v. Marvin* (1878), 75 N. Y. 240.

The legal fiction that the law does not recognize the fractions of a day is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case, and there may be even a priority in an instant of time. *Ottman & Co. v. Hoffman* (1894), 7 Misc. 714, 28 N. Y. Supp. 28.

§ 20. **Day, computation.**—A number of days specified as a period from a certain day within which or after or before which an act is authorized

or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning. (*Amended by L. 1910, ch. 347.*)

L. 1910, ch. 347, § 2.—Nothing in this act contained shall affect any action or proceeding now pending in any court.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 27, in part, as amended by L. 1894, ch. 447; originally revised from Code Civ. Pro. § 788; Penal Code, §§ 261, 500.

References.—Time of service of motion papers, Code Civ. Pro. §§ 780-787. As to time for performance of certain acts by town and county officers, see Time Table for Town and County Officers, Benders Town and County Officers Manual (8th ed.), Part XIII. Courts not to sit on Sunday, Judiciary Law, § 5. Maturity of negotiable instruments when last day falls on Sunday, Negotiable Instruments Law, § 5; payment on succeeding day, *Id.* § 145.

Application.—This act discloses no intention on the part of the Legislature to materially change the existing rule for the computation of time, except, perhaps, to more definitely fix the event from which the count is to be made. *People ex rel. v. Burgess* (1897), 153 N. Y. 561, 47 N. E. 889; *Sugerman v. Jacobs* (1914), 160 App. Div. 411, 145 N. Y. Supp. 429.

The rule for computing the time within which an act, in an action or special proceeding, is required by law to be done, established by Code Civ. Pro. § 788, from which the above section was originally revised, applies to actions or proceedings in the municipal court of Rochester. *Dorsey v. Pike* (1887), 46 Hun 112.

"Years" not included.—In reckoning by years the first day is not excluded. *Aultman & Taylor Co. v. Syme* (1900), 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565, modg. (1897), 23 App. Div. 344, 48 N. Y. Supp. 231, affg. the doctrine of *Aultman & Taylor Co. v. Syme* (1895), 91 Hun 632, 36 N. Y. Supp. 528, and contrary to the rule laid down in *Conn. Nat. Bank v. Bayles* (1897), 17 App. Div. 596, 45 N. Y. Supp. 305, revd. (1900), 163 N. Y. 561, 57 N. E. 1107.

The clause of this section requiring Sunday to be excluded from the reckoning of a period of time, if it is the last day of such period, does not apply in determining whether the three years' statute of limitations has run. The requirement that Sunday be excluded has no force where the time to be computed is a period of years. *Benoit v. N. Y. C. & H. R. R. Co.* (1904), 94 App. Div. 24, 87 N. Y. Supp. 951.

A week is the period of time between midnight Saturday and midnight of the following Saturday. *Cortland Sav. Bank v. Lighthall* (1907), 53 Misc. 423, 104 N. Y. Supp. 1022.

Half holiday.—A half holiday is not excluded from the days counted in computing the number of days. Where it is agreed to close a loan on Saturday, no hour being fixed, the transaction may be closed at any time on that day. *Van Orden v. Simpson* (1915), 90 Misc. 322, 153 N. Y. Supp. 134.

Acts to be done before the day of a specified event.—When an act is required to be done a certain number of days before the day of a specified event, the day of the specified event is excluded in the computation, and in counting back from

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that time, the day on which the required act was performed may be included. *People v. Burgess* (1897), 153 N. Y. 561, 47 N. E. 889.

Where a statute requires the posting of certain notices at least fifteen days prior to an election, a posting of notices on the second day of the month for an election to be held on the sixteenth is insufficient. *Matter of Village of Lynbrook* (1911), 142 App. Div. 487, 127 N. Y. Supp. 82.

Limitation of actions.—In computing the time in which an action may be brought, the first day upon which it might have been brought is excluded. *Davison v. Budlong* (1886), 40 Hun 245.

Service of pleadings.—The day of the service of a pleading should be excluded in the computation of time, because it is fractional—the party should have the whole number of full and entire days given him for that purpose. *Phelan v. Douglass* (1855), 11 How. Pr. 193; *Reynolds v. Palen* (1887), 20 Abb. N. C. 11, 13. Where last day falls on Saturday, service may be made on Monday. *Reynolds v. Palen* (1887), 20 Abb. N. C. 11. Compare *Nichols v. Kelsey* (1887), 20 Abb. N. C. 14 and *Fries v. Coar* (1887), 19 Abb. N. C. 267.

"Until."—Under a stipulation allowing a defendant "until" a certain date in which to answer, the answer may be served at any time during the day mentioned. *Sugerman v. Jacobs* (1914), 160 App. Div. 411, 145 N. Y. Supp. 429.

"After."—The provision of this section which, in computing time, excludes the first and includes the last day, has no application to a provision which is clear and explicit, and can only be invoked where the act is to be done within a certain number of days or a specified period of time. When the statute says *after* the expiration of a time named, that time must fully expire. *Marvin v. Marvin* (1878), 75 N. Y. 240, 242.

"Within."—Where the hearing before the board of trustees of a village in relation to the widening of a highway is fixed for April twenty-first, a determination made by the board on May eleventh, is made "within twenty days from the date fixed for such hearing." *People ex rel. Burnett v. Van Brunt* (1904), 99 App. Div. 564, 90 N. Y. Supp. 845.

"For."—See Rept. of Atty. Genl. (1912) 123.

Legal notices.—Section 27 of the Statutory Construction Law, of which this section is a part, held not in conflict with section 787 of the Code of Civil Procedure. *Cortland Savings Bank v. Lighthall* (1907), 53 Misc. 423, 104 N. Y. Supp. 1022.

Rendering judgment.—Where the fourth day after the submission of a cause to a justice of the peace is Sunday, the justice of the peace may, under the above section, properly render his judgment on the fifth day. *Huber v. Ehlers* (1902), 76 App. Div. 602, 79 N. Y. Supp. 150. But it has been held that where the eighth day after submission of a cause in a N. Y. district court falls on Sunday the justice must render judgment on or before Saturday. He loses jurisdiction by delaying till the ninth day. *Ready Roofing Co. v. Chamberlain* (1876), 6 Daly 521, 1 Abb. N. C. 192, 52 How. Pr. 123.

Redemption from sale on execution.—Where real estate is sold under execution and the last day to redeem falls on Sunday it may be redeemed on the following Monday. *Porter v. Pierce* (1887), 43 Hun 11, *affd.* (1890), 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847.

Payment of award in condemnation proceedings.—Where the date for the payment of the award of lands taken by a city under condemnation proceedings falls on Sunday, the city has the whole of Monday within which to pay the award. *Fredricks v. City of New York* (1899), 44 App. Div. 274, 60 N. Y. Supp. 724, *affd.* (1899), 165 N. Y. 656, 59 N. E. 1122.

Notice for payment of rent or to quit premises.—In summary proceedings for the payment of rent, if the notice expires on a legal holiday, the tenant has the whole

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of the succeeding day in which to make payment. *Bristed v. Harrell* (1897), 20 Misc. 348, 45 N. Y. Supp. 780. Where notice to quit premises is given on October 2, and tenant is entitled to one month's notice, he has the whole of November 2 in which to leave. *Hungerford v. Wagoner* (1896), 5 App. Div. 590, 39 N. Y. Supp. 369.

Sunday or a public holiday is not to be excluded from the reckoning of a period of time, if it be the last day of a period of years. *Hendrickson v. Callan* (1911), 70 Misc. 342, 128 N. Y. Supp. 980, *revd. on other grounds* (1911), 147 App. Div. 480, 131 N. Y. Supp. 839, *affd.* (1913), 210 N. Y. 543, 103 N. E. 1124.

The provision of this section with reference to the exclusion of Sunday or a public holiday, if it is the last day of a period of time, does not refer to days within which, after or before which an act must be done. It refers to a definite part of a particular month; a different rule is applicable to a computation of months. *Rept. of Atty. Genl.* (1908) 385.

Last day of stay falling on Sunday.—Where a stay of execution upon a judgment is granted for ten days and the tenth day falls on Sunday, the stay continues all of the following Monday, and hence the filing of the transcript of judgment and issuing of the execution on such Monday will be set aside as void. *Matter of Heckman v. Stein* (1909), 64 Misc. 144, 117 N. Y. Supp. 1026.

Where the last of twenty days within which a defendant must serve an answer falls on Sunday, due service may be made on the following Monday. *Gilbert v. Johnson* (1915), 169 App. Div. 840, 155 N. Y. Supp. 687.

Nomination certificates.—See *Rept. of Atty. Genl.* (1911) 647.

§ 21. **Folio.**—The term folio shall mean one hundred words, counting each figure as a word. When an officer empowered by law to do so shall order an official advertisement published in a newspaper in display type or to be so displayed as to leave an unusual quantity of blank space in the advertisement, or to contain pictures or diagrams, or where the character of such advertisement requires it, such advertisement shall be paid for by measurement over all of such space necessarily used, two square inches of space to count as one folio. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice or order contains less than fifty words. (*Amended by L. 1914, ch. 72.*)

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 11; originally revised from Code Civ. Pro. § 3343, subd. 24; R. S., pt. 3, ch. 10, tit. 4, § 4; R. S., pt. 4, ch. 2, tit. 10, § 16.

The word "figure" does not include punctuation marks. *Matter of Murtaugh* (1911), 71 Misc. 518, 128 N. Y. Supp. 850.

§ 22. **Gender.**—Words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons; and, when the sense so indicates, words of the neuter gender may refer to any gender.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 8, in part; originally revised from Penal Code, § 718, subds. 10-12; Code Crim. Pro. § 955; L. 1828, ch. 20, § 11; L. 1877, ch. 466, § 27.

§ 23. **Heretofore and hereafter.**—Each of the terms, heretofore, and hereafter, in any provision of a statute, relates to the time such provision takes effect.

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Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 9, in part; originally revised from Code Civ. Pro. § 3343, subd. 22; L. 1828, ch. 20, §§ 9, 10.

Constitution.—The rule prescribed by this section was held to apply to the State Constitution. *Matter of Brenner* (1901), 35 Misc. 306, 71 N. Y. Supp. 44, *affd.* (1901), 67 App. Div. 628, 74 N. Y. Supp. 1121; *People ex rel. Jackson v. Potter* (1872), 47 N. Y. 375, 379.

Section cited in *McMahon v. Arnold* (1905), 107 App. Div. 132, 94 N. Y. Supp. 775.

§ 24. **Holidays; half-holiday.**—The term includes the following days in each year; the first day of January known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as memorial day; the fourth day of July, known as Independence day; the first Monday of September, known as labor day; the twelfth day of October, known as Columbus day, and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances. The term half-holiday includes the period from noon to midnight of each Saturday which is not a holiday. (*Amended by L. 1909, ch. 112.*)

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 24, in part, as amended by L. 1902, ch. 39; originally revised from Code Civ. Pro. § 3343, subd. 21.

References.—Maturity of negotiable instruments when last day falls on holiday, *Negotiable Instruments Law*, § 5; payment on succeeding day, *Id.* § 145. Business in public offices on holidays, *Public Officers Law*, § 62. Governor may limit effect of certain holidays, *Executive Law*, § 9. Public schools to be closed on certain holidays, *Education Law*, § 492, sub. 3.

Memorial day is a legal holiday, but is not a *dies non*, and any business may be transacted during it except such acts as are expressly excepted by the statute. *Morel v. Stearns* (1902), 37 Misc. 486, 75 N. Y. Supp. 1082.

Service of papers.—Service of summons and writs may be made on holiday. *Didsbury v. Van Tassel* (1890), 56 Hun 423, 10 N. Y. Supp. 32; *People ex rel. Fulton v. Supervisors of Oswego* (1888), 50 Hun 105, 3 N. Y. Supp. 751. Service of summons on labor day is a valid service, since the provisions of the above section do not prohibit the transaction of business on that day, except in the case of the presentment, acceptance or payment of commercial paper. *Flynn v. Union Surety & Guaranty Co.* (1902), 170 N. Y. 145, 63 N. E. 61, *affg.* (1901), 61 App. Div. 170, 70 N. Y. Supp. 403.

When a legal holiday falls on Sunday, Monday becomes the legal holiday. *Jones v. Tuchs* (1905), 106 App. Div. 260, 261, 94 N. Y. Supp. 57.

§ 25. **Holiday in contractual obligations.**—Where a contract by its terms requires the payment of money or the performance of a condition on a public holiday, such payment may be made or condition performed on the next business day succeeding such holiday, with the same force and effect as if made or performed in accordance with the terms of the contract.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 24, in part, as amended by L. 1902, ch. 39; originally revised from Code Civ. Pro. § 3343, subd. 21.

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Statute is permissive.—It does not provide that the acts therein mentioned cannot be done on a public holiday, but only that they "may" be done on the next day. *Van Orden v. Simpson* (1915), 90 Misc. 322, 153 N. Y. Supp. 134.

Official acts on Saturday half-holiday.—The provision of § 24 declaring Saturday afternoon to be a public holiday for the purpose specified, does not prohibit an officer from voluntarily performing an official act on such day, or render such act void or voidable, unless the act is such as to create an unlawful preference under the recording act, or is prohibited by some other statute. A municipal board of school examiners may continue an examination of applicants to secure positions as public school teachers beyond noon on Saturday. *Cohn v. Townsend* (1905), 48 Misc. 47, 94 N. Y. Supp. 817.

Tender of stock on holiday.—The fact that the day upon which an option requiring another to purchase certain stock must be exercised falls upon a holiday other than Sunday, does not extend the time for tendering the stock and demanding payment until the succeeding business day, and unless the tender and demand are made on the day specified the option expires. Such a transaction does not come within the exceptions contained within the above section and except as prescribed therein, all business may be transacted upon a holiday other than a Sunday the same as on any other day. *Page v. Schainwald* (1901), 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173.

The amendment of 1902 was designed to meet the difficulty pointed out in the *Page* case, namely, the payment of money or the performance of a condition on a public holiday. *Wax v. Largdon Co. Inc.* (1914), 88 Misc. 5, 9, 150 N. Y. Supp. 351.

Rent due on a holiday other than Sunday is payable on that day. *Walton v. Stafford* (1900), 162 N. Y. 558, 57 N. E. 92.

Application to constitutional provisions.—It seems that the provision that wherever a certain event is to be performed within a certain number of days and the last day falls upon Sunday, the time is to be extended to include the following Monday, does not apply, in interpreting provisions of the Constitution. *Rept. of Atty. Genl. May 28, 1909.*

§ 26. Judge.—The term judge includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 6; originally revised from Code Civ. Pro. § 3343, subd. 3.

References.—Definition of term as used in Code of Civil Procedure, Code Civ. Pro. § 3343, sub. 3. Judge deemed court in assignment proceedings, Debtor and Creditor Law, § 23. Courts of record and not of record, and judges thereof, see Judiciary Law, §§ 2, 3.

A police magistrate is not a judge within the meaning of this section. *Tully v. Lewitz* (1906), 50 Misc. 350, 98 N. Y. Supp. 829.

See *In re Spingarn's Estate* (1916), 96 Misc. 141, 159 N. Y. Supp. 605, revd. 162 N. Y. Supp. 695.

§ 27. Last, preceding, next and following.—A reference to the last or preceding section, or other provision of a statute, means the section or other division immediately preceding, and a reference to the next or following section or other division of a statute means the section or other division immediately following.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 10.

§ 28. Lunatic and lunacy.—The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy.

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Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 7; originally revised from Code Civ. Pro. § 3343, subd. 15.

References.—Irresponsibility of lunatics, Penal Law, § 1120. Exemption from military duty, Military Law, § 1. Commitment of lunatics to state hospitals, Insanity Law, §§ 81–83. Jurisdiction of proceedings for care of lunatics' property, Code Civ. Pro. §§ 2320–2344-a. Payment of lunatic's debts by committee, Debtor and Creditor Law, §§ 250–255. Use of force in preventing injury by lunatic, Penal Law, § 246; cruel treatment of lunatic when confined, Id. § 1121.

The word "lunacy" evidences all phases of alleged incompetency, except idiocy, including imbecility arising from old age and loss of memory or understanding. *Matter of Preston* (1906), 113 App. Div. 732, 99 N. Y. Supp. 312; but weakness of mind is not lunacy. *Matter of Clark* (1903), 175 N. Y. 139, 67 N. E. 212.

A serious distinction has always been recognized between lunatics and idiots. The one had lucid intervals, the other had no power of mind whatever. The term "lunatic" has broadened to include all insane persons except idiots, as no other distinction seems to be essential. *Bicknell v. Spear* (1902), 38 Misc. 389, 77 N. Y. Supp. 920.

Section applied in construing Code Civ. Pro. § 2320. *Matter of Schrodtt* (1900), 32 Misc. 540, 67 N. Y. Supp. 244; *Jackson v. Jackson* (1885), 37 Hun 306; *Matter of Brugh* (1891), 16 N. Y. Supp. 551, *affd.* (1895), 145 N. Y. 601, 40 N. E. 163; *Meekins v. Kinsella* (1912), 152 App. Div. 32, 136 N. Y. Supp. 806; *Schoenberg & Co. v. Ulman* (1906), 51 Misc. 83, 99 N. Y. Supp. 650, *revd.* (1906), 52 Misc. 104, 101 N. Y. Supp. 798.

§ 29. Men.—The term men includes boys.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 8, in part; originally revised from Penal Code, § 718, subsd. 10–12; Code Crim. Pro. § 955; L. 1828, ch. 20, § 11; L. 1877, ch. 466, § 27.

§ 30. Month, computation.—A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 26, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, § 4; R. S., pt. 2, ch. 4, tit. 3, § 9.

Computation of months.—This section negatives any right to include in a computation of months a day beyond the day "in the last month so counted having the same numerical order in days of the month as the day from which the computation is made"; and therefore where a life insurance policy provides that no action can be maintained thereon unless commenced within six months after the death of the insured, and such period expires on Sunday, an action commenced upon the following Monday is barred by the express terms of the policy. *Ryer v. Prudential Ins. Co.* (1906), 185 N. Y. 6, 77 N. E. 727, *revg.* (1905), 110 App. Div. 897, 95 N. Y. Supp. 1158.

Where a testator made his will on the sixth day of February and died on the sixth day of April following, the will was not made "at least two months before the death of the testator" and a bequest to a benevolent corporation contained therein is invalid. *Matter of Babcock* (1911), 74 Misc. 31, 133 N. Y. Supp. 655.

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§§ 31-33.

Under section 4 of article 6 of the State Constitution which provides, "when a vacancy shall occur otherwise than by expiration of term in the office of justice of the Supreme Court, the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs." A vacancy occurring on August 3, 1896 was held properly filled at a general election held on November 3, 1896. *People ex rel. Hart v. Goodrich* (1904), 92 App. Div. 445, 87 N. Y. Supp. 114, *affd.* (1904), 180 N. Y. 522, 72 N. E. 1148.

A city charter provided that no action could be maintained against the city for personal injuries unless a notice in writing of the intention to sue was filed with the corporation counsel within one month after the injury. An accident occurred February 10, 1902, and it was held that the month allowed for filing the notice expired on March 10, 1902. *Biggs v. City of Geneva* (1904), 100 App. Div. 25, 90 N. Y. Supp. 858, *affd.* (1906), 184 N. Y. 580, 77 N. E. 1182.

Six months of service cannot be computed by assuming that one hundred and eighty-two days, being half the number of days comprised in a year, constitutes the period of time. *People ex rel. Kastor v. Kearny* (1902), 36 Misc. 717, 74 N. Y. Supp. 391.

§ 31. Month in statute, contract and public or private instrument.—In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 26, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, § 4; R. S., pt. 2, ch. 4, tit. 3, § 9.

Section of former Revised Statutes applied.—*Hosley v. Black* (1863), 28 N. Y. 438, 26 How. Pr. 97.

See *Ryer v. Prudential Ins. Co.* (1906), 185 N. Y. 6, 77 N. E. 727, where this section was applied in construing a life insurance policy.

§ 32. Municipal officers.—A reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding such office, when but one person is chosen to fill such office in pursuance of law.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 18.

References.—Meaning of terms "local officer" and "state officer," Public Officers Law, § 2. As to officers generally, see Public Officers Law; as to powers of municipal officers generally, see General Municipal Law; as to powers and duties of constitutional state officers, see Executive Law; as to city, county, town, village and school officers, see General City Law, County Law, Town Law, Village Law, Education Law, and other consolidated laws prescribing special powers and duties of such officers.

Section cited in *Matter of Dobson* (1895), 146 N. Y. 357, 361, 40 N. E. 988; *Wilson v. Bleloch* (1908), 125 App. Div. 191, 195, 109 N. Y. Supp. 340, *affd.* (1909), 195 N. Y. 592, 89 N. E. 1115.

§ 33. Notice.—When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 20.

Application.—A charter provision requiring a notice to be presented to the common council is complied with where it was presented to both the acting president and to the clerk. *O'Donnell v. City of Syracuse* (1905), 102 App. Div. 80, 90,

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92 N. Y. Supp. 555, *revd.* (1906), 184 N. Y. 1, 76 N. E. 738, 3 L. R. A. (N. S.) 1053, citing *McIntee v. City of Middletown* (1903), 80 App. Div. 434, 81 N. Y. Supp. 124. Likewise a claim required to be presented "to the president or board of trustees" was held properly presentable to the clerk of the village who was required to "act as clerk of the board of trustees," although such presentation was not made at a meeting of the board of trustees. *Dobson v. Village of Oneida* (1905), 106 App. Div. 377, 94 N. Y. Supp. 558.

§ 34. **Now.**—The term now in any provision of a statute referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 9, in part; originally revised from Code Civ. Pro. § 3343, subd. 22; L. 1828, ch. 20, §§ 9, 10.

Section cited in *Leach v. Anwell* (1912), 154 App. Div. 170, 138 N. Y. Supp. 975.

§ 35. **Number, singular and plural.**—Words in the singular number include the plural, and in the plural number include the singular.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 8, in part; originally revised from Penal Code, § 718, subds. 10-12; Code Crim. Pro. § 955; L. 1828, ch. 20, § 11; L. 1877, ch. 466, § 27.

Rule not inflexible.—This section does not mean that always and under all circumstances a word in the singular has a plural meaning. It should be borne in mind that rules of construction are invoked only when the language used leaves its purpose and intent uncertain or questionable. They cannot be resorted to for the purpose of enabling the courts to enlarge or extend the legislative design or intent. *People ex rel. v. N. Y. C., etc., R. R. Co. v. Woodbury* (1913), 208 N. Y. 421, 102 N. E. 565, 566.

To like effect, see *Moynahan v. City of New York* (1912), 205 N. Y. 181, 98 N. E. 482; *Beekman v. Third Ave. R. R. Co.* (1897), 13 App. Div. 279, 287, 43 N. Y. Supp. 174, *affd.* (1897), 153 N. Y. 144, 47 N. E. 277.

Section applied.—*Bueb v. Geraty* (1899), 28 Misc. 134, 137, 59 N. Y. Supp. 249; *People v. Heiselbetz* (1898), 30 App. Div. 199, 201, 51 N. Y. Supp. 685; *Troy Waste Mfg. Co. v. Saxony Woolen Mills* (1893), 4 Misc. 245, 247, 24 N. Y. Supp. 693, *affd.* in *Troy Waste Mfg. Co. v. Harrison* (1893), 73 Hun 528, 26 N. Y. Supp. 109; *Clement v. Congress Hall* (1911), 72 Misc. 519, 132 N. Y. Supp. 16; *Williams v. Conover* (1911), 71 Misc. 310, 130 N. Y. Supp. 118; *Matter of Watson* (1914), 86 Misc. 588, 148 N. Y. Supp. 902, *affd.* (1915), 161 N. Y. Supp. 875.

§ 36. **Oath, affidavit and swear.**—The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 14, in part; originally revised from Code Crim. Pro. § 957.

Reference.—See notes under General Construction Law, § 12.

§ 37. **Person.**—The term person includes a corporation and a joint-stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any

other state, government or country which may lawfully own property in the state.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 5; originally revised from Penal Code, § 718, subd. 13; R. S., pt. 2, ch. 4, tit. 2, § 3; L. 1857, ch. 536, § 3.

References.—The term "person" is defined in several of the chapters of the consolidated laws as used in such chapters; viz.: Conservation Law, §§ 380, subd. 3; 430, subd. 7; General Business Law § 142 (as to warehouses), § 189 (as to employment agencies); Liquor Tax Law, § 2; Negotiable Instruments Law, § 2; Public Service Commissions Law, § 2; Second Class Cities Law, § 245.

"Person" includes corporation.—A prohibition against any person not a registered physician from practicing medicine applies to a corporation except such as are organized under other statutes for that purpose. *People v. Woodbury Dermatological Inst.* (1908), 192 N. Y. 454, 85 N. E. 697, affg. (1908), 124 App. Div. 877, 109 N. Y. Supp. 578. A domestic corporation is a person within the meaning of § 3268 of the Code of Civil Procedure. *Sherin Special Agency v. Seaman* (1900), 49 App. Div. 33, 63 N. Y. Supp. 407; *Tingley v. Thatcher* (1911), 144 App. Div. 710, 129 N. Y. Supp. 170, affd. (1912), 207 N. Y. 66, 100 N. E. 596. But under § 411 of the Education Law a corporation is not a person so as to permit the assessment of an undivided lot as one lot in the school district where the owner or occupant resides, see *People ex rel. Fleischmann Mfg. Co. v. Marenus* (1909), 134 App. Div. 170, 118 N. Y. Supp. 838.

Municipal corporations are included in the term "person" employed in this section. *Ackert v. City of New York* (1913), 156 App. Div. 836, 142 N. Y. Supp. 65.

Foreign corporation.—A foreign corporation, having a place for the regular transaction of business in the City of New York, is included within the term "person," used in section 1370 of the Greater New York Charter. *Scharmann & Sons v. De Palo* (1901), 66 App. Div. 29, 72 N. Y. Supp. 1008.

Liability of corporation for conspiracy.—A corporation may be indicted and convicted for conspiracy and similar crimes of which a specific intent is the necessary and controlling element. *People v. Dunbar Contracting Co.* (1914), 165 App. Div. 59, 61, 151 N. Y. Supp. 164.

Corporation as "person" under tax law.—The word "person" as mentioned in sections 21 and 37 of the tax law, providing for deduction of debts from personal property, includes a corporation. *People ex rel. Cornell S. B. Co. v. Dederick* (1900), 161 N. Y. 195, 55 N. E. 927.

"Person" does not include estate.—The term "person" includes a corporation and a joint stock corporation, but does include an estate. So § 3268 of the Code of Civil Procedure, providing that a "person" who is a non-resident may be compelled to give costs, does not include an action brought by the representative of an estate or trust as such, for the estate or trust, and not the person who represents it, is really the party. *Cole v. Manson* (1903), 42 Misc. 149, 85 N. Y. Supp. 1011. Nor does it include a partnership. *Rosenwasser v. Oglogia* (1916), 158 N. Y. Supp. 58.

The forest commission nor state.—The word "person" is defined in this section does not include the Forest Commission nor does it include the state within the meaning of that word as used in the Champerty Law. *Saranac Land & Timber v. Roberts* (1908), 125 App. Div. 333, 352, 109 N. Y. Supp. 547, affd. (1909), 195 N. Y. 303, 88 N. E. 753.

Section cited in connection with section 1948 of the Code of Civil Procedure. *People v. Bleecker Street & Fulton Ferry R. R. Co.* (1910), 140 App. Div. 611, 125 N. Y. Supp. 1045, affd. (1911), 201 N. Y. 594, 95 N. E. 1136, in connection with section 1532, *N. Y. Home M. Soc. v. First F. Baptist Church* (1911), 73 Misc. 128, 130, 130 N. Y. Supp. 879.

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§ 38. Property.—The term property includes real and personal property.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 2; originally revised from Code Civ. Pro. § 3343, subd. 8; Penal Code, § 718, subd. 9.

References.—Definition of property in section authorizing appointment of receiver, Code Civ. Pro. § 713, subd. 3. In law relating to taxable transfers, Tax Law, § 243.

Money is embraced within the word "property," as defined by this section. *Fulberton v. Young* (1905), 46 Misc. 292, 94 N. Y. Supp. 511.

§ 39. Property, personal.—The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 4, in part; L. 1883, ch. 372; originally revised from Code Civ. Pro. § 3343, subd. 7; Penal Code, § 718, subd. 15; L. 1850, ch. 140, § 8; L. 1853, ch. 117, § 8; L. 1867, ch. 974, § 8; L. 1854, ch. 232.

References.—As to personal property generally, Personal Property Law, § 2. Term defined for purposes of taxation, Tax Law, § 2, subd. 3; for purposes of determining jurisdiction of surrogate, Code Civ. Pro. § 2768.

Application.—This section, in terms, is only applicable to a statute, where its general object, or the context of the statute construed, or other provisions of law, do not indicate that a different meaning is intended. *Matter of Bronson* (1896), 150 N. Y. 1, 5, 44 N. E. 707, 34 L. R. A. 238.

Purpose.—In *Matter of Schmerhorn* (1906), 50 Misc. 233, 234, 100 N. Y. Supp. 480, the court said: "The Statutory Construction Law (from which this section is derived) in defining personal property as including 'all written instruments themselves, as distinguished from the rights and interests to which they relate,' was not merely declaratory of the law, but affected a change which was the foundation of a decision in *Matter of Whiting* (1896), 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232; *Matter of Morgan*, 150 N. Y. 35, 44 N. E. 1126.

Bonds of United States are personal property. Section applied under Transfer Tax Law. *Matter of Whiting* (1896), 2 App. Div. 590, 38 N. Y. Supp. 131, mod. in (1896), 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, but not on this point.

Intangible obligation, evidenced by a tangible bond, is not, apart from the bond, specific personal property subject to attachment. *Von Heese v. MacKaye* (1890), 55 Hun 365, 8 N. Y. Supp. 894, affd. (1890), 121 N. Y. 694, 24 N. E. 1099.

Bonds of foreign corporation, owned by a non-resident and at his death in 1888 on deposit in the State of New York and which pass to non-residents, are not subject to inheritance tax. *Matter of Gibbes* (1903), 84 App. Div. 510, 83 N. Y. Supp. 53, affd. (1903), 176 N. Y. 565, 68 N. E. 1117.

Certificates of stock in a foreign corporation, owned by a non-resident and indorsed in blank, but deposited in the state for the purposes of sale, are "personal

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property." *People ex rel. Wynn v. Grifenhagen* (1915), 167 App. Div. 572, 152 N. Y. Supp. 679.

Joint stock associations.—The shares of a joint stock association constitute personal property. *Matter of Jones* (1902), 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476.

Life insurance policy in the hands of the legal representatives of the deceased, issued by a foreign life insurance company, doing business within this state, is personal property as defined by this section. *Morgan v. Mutual Benefit Life Ins. Co.* (1907), 189 N. Y. 447, 82 N. E. 438, affg. (1907), 119 App. Div. 645, 104 N. Y. Supp. 185.

Leasehold interests.—Character not changed by this chapter, but same remain chattels real. *State Trust Co. v. Casino Co.* (1897), 19 App. Div. 344, 46 N. Y. Supp. 492.

Growing rye held personal property within Code, § 3343. *Harder v. Plass* (1890), 57 Hun 540, 11 N. Y. Supp. 226.

Definition as used in Penal Code, § 718, applied. *People v. Christy* (1892), 65 Hun 349, 20 N. Y. Supp. 278.

Liquor tax certificate is personal property. *Niles v. Mathusa* (1902), 162 N. Y. 546, 57 N. E. 184.

Chose in action is property. *Wilson v. Aeolian Company* (1901), 64 App. Div. 337, 72 N. Y. Supp. 150, affd. (1902), 170 N. Y. 618, 63 N. E. 1123.

Railroad ticket is personal property. *N. Y. Central, etc., Co. v. Reeves* (1903), 41 Misc. 490, 85 N. Y. Supp. 28.

Oil interests.—Prior to the statute the courts recognized some kind of a right relating to real property in a case of oil interests. *Buck v. Cleveland* (1911), 143 App. Div. 874, 128 N. Y. Supp. 864.

Oil rights do not pass under deed.—The right to produce oil both by authority and express legislative enactment is personal property, and does not pass under a deed from the lessee's executors and devisees purporting to convey all the lands owned by them "or in which they have an interest," since the deed announces an intent to convey an interest in real estate, not in personality. *Wagner v. Mallory* (1902), 169 N. Y. 501, 62 N. E. 584.

While the right to operate for oil under a lease, contract or other right or license to operate for oil is declared to be personal property by virtue of this section, it has never been held that the perpetual exclusive right to operate lands other than those occupied could be created except as provided by section 259 of the Real Property Law. *De Hart v. Enright* (1916), 93 Misc. 213, 157 N. Y. Supp. 46.

§ 40. Property, real.—The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

Source.—Former Stat. Con. L. (L. 1892, ch. 667) § 3; originally revised from Code Civ. Pro. § 3343, subd. 6; Penal Code, § 718, subd. 14.

References.—Definitions of "real property," Real Property Law, § 2; as used in conveyances, *Id.* § 290; as used in law relating to descent of decedent's property, Decedent Estate Law, § 80. As used in taxation, Tax Law, § 2, subd. 3. As used in Condemnation Law, Code Civ. Pro. § 3358.

Lease for years not real estate. *Matter of Ehrsam* (1889), 37 App. Div. 272, 55 N. Y. Supp. 942; *State Trust Co. v. Casino Co.* (1896), 5 App. Div. 381, 387, 39 N. Y. Supp. 258.

Definition in code, § 3343, applied. In *re Hesdra's Estate* (1892), 1 Pow. 359, 23 N. Y. Supp. 842; *People ex rel. Young v. Willis* (1891), 35 N. Y. St. Rep. 176, 12 N. Y. Supp. 385, 387, revd. (1892), 133 N. Y. 383, 31 N. E. 225. This definition is expressly limited to the construction of the Civil Code in which it is embodied, and is conspicuously absent from the list of definitions given in the Penal Code.

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People v. Barondess (1891), 61 Hun 571, 573, 16 N. Y. Supp. 436, revd. (1892), 133 N. Y. 649, 31 N. E. 240.

Section cited in *People ex rel. N. Y. C., etc. R. R. Co. v. Walsh* (1914), 211 N. Y. 90, 98, 105 N. E. 1095; *Adel v. Nassau Electric R. R. Co.* (1902), 72 App. Div. 404, 410, 76 N. Y. Supp. 589, affd. (1904), 177 N. Y. 548, 69 N. E. 1120.

§ 41. **Quorum and majority.**—Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, if not less than a majority of the whole number of such persons or officers may perform and exercise any such power, authority or duty.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 19, in part; originally revised from R. S., pt. 1, ch. 16, tit. 1, § 125; R. S., pt. 3, ch. 8, tit. 17, § 27, as amended by L. 1874, ch. 321; L. 1842, ch. 130, tit. 8, § 2; L. 1886, ch. 21, § 20.

References.—See various provisions of consolidated laws as to quorums in boards, commissions, etc., both public and private. This section controls as to the power of a majority of a board or commission having public duties to perform where no other provisions are made by statute.

Application.—The provision of this section authorizing a majority of public officers to act under certain circumstances is limited to cases where no special provision is otherwise made. *People ex rel. Ottman v. Hynds* (1864), 30 N. Y. 470, 473. This section was intended to make an absolute and universal rule for cases arising thereunder, and to prevent any presumptions whatever. *People ex rel. Ottman v. Hynds* (1864), 30 N. Y. 470, 472.

Neither the individual members nor a majority of the board of trustees of public buildings can act or be compelled to act except in the manner provided by this section. *Matter of Broderick* (1898), 25 Misc. 534, 539, 56 N. Y. Supp. 99.

Two surviving condemnation commissioners have ample power to continue the work of the commission after the death of the third member. *Lake Shore & Michigan Southern R. Co. v. Mahle* (1911), 72 Misc. 129, 129 N. Y. Supp. 288, revd. (1913), 158 App. Div. 889, 143 N. Y. Supp. 1126.

Quorum remains the same even though there may be vacancies in the membership. *Erie R. R. Co. v. City of Buffalo* (1904), 180 N. Y. 192, 197, 73 N. E. 26.

See generally for cases applying this section.—*Matter of Reddish* (1899), 45 App. Div. 37, 60 N. Y. Supp. 1111; *Matter of Sells* (1897), 15 App. Div. 571, 575, 44 N. Y. Supp. 570; *People ex rel. Pond v. Trustees of Saratoga Springs* (1896), 4 App. Div. 399, 403, 39 N. Y. Supp. 607; *Rathbone v. Wirth* (1896), 6 App. Div. 277, 40 N. Y. Supp. 535, affd. (1896), 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *People ex rel. Sprague v. Board of Excise* (1895), 91 Hun 94, 36 N. Y. Supp. 678; *People ex rel. Barron v. Martin* (1892), 48 N. Y. St. Rep. 288, 20 N. Y. Supp. 585. Sections of revised statutes, from which this section was revised, applied. *Marble v. Whitney* (1863), 28 N. Y. 297, 304; *People ex rel. Dann v. Williams* (1867), 36 N.

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Y. 441; *Walker v. Dunsbaugh* (1859), 20 N. Y. 170, 173; *Cruger v. Hudson Riv. R. R. Co.* (1854), 12 N. Y. 190, 197; *People ex rel. Mygatt v. Supervisors of Chenango* (1854), 11 N. Y. 563, 571; *People ex rel. Swift v. Bd. of Police Commissioners of New York* (1885), 99 N. Y. 676, 2 N. E. 151; *People ex rel. Haws v. Walker* (1856), 23 Barb. 304, 2 Abb. Pr. 421, 426; *Clute v. Robinson* (1885), 38 Hun 283; *Phillips v. Schumacher* (1877), 10 Hun 405, 408; *Schoepflin v. Calkins and Davis* (1893), 5 Misc. 159, 161, 25 N. Y. Supp. 696; *Greene v. Goodwin Sand & Gravel Co.* (1911), 72 Misc. 192, 129 N. Y. Supp. 709.

§ 42. Register of county.—Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county. The term county clerk when used in relation to conveyances of real property or the filing or recording of instruments which are or may be filed in the office of the register of a county, shall include the register of each county in which there is a register.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 21, as amended by L. 1907, ch. 300; originally revised from L. 1871, ch. 560, § 3.

References.—Powers and duties of county clerk as to recording papers, etc., see County Law, § 161. Duties of county clerk as to recording deeds, mortgages and other instruments as to real property, Real Property Law, §§ 290-327; registering titles to real property, Id. §§ 370-435.

§ 43. Seal of court, public officer or corporation.—A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 13, in part; originally revised from Code Civ. Pro. §§ 29, 960; R. S., pt. 1, ch. 8, tit. 8, § 16; L. 1859, ch. 366, § 4.

References.—Seals of particular officers, see specific titles of offices. Official seal of court of appeals and state officers, Public Officers Law, § 60. State seal, description, custody and use, State Law, §§ 73, 74. Deposit of ancient or obsolete seals in state library, Public Officers Law, § 60. Right of corporation to have and alter seals, General Corporation Law, § 11.

§ 44. Seal, private.—The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L. S.," opposite the signature.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 13, in part; originally revised from Code Civ. Pro. §§ 29, 960; R. S., pt. 1, ch. 8, tit. 8, § 16; L. 1859, ch. 366, § 4.

References.—Seal as evidence of consideration, Code Civ. Pro. § 840. Seal on negotiable instruments, Negotiable Instruments Law, § 25.

Seals at common law.—All the authorities in this state reviewed. Town of

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Solon v. Williamsburgh Savings Bank (1889), 114 N. Y. 122, 132, 21 N. E. 168. Where a common-law seal is absent from an instrument required to be under seal, but it shows upon its face that the party executing it intended to seal it, a court of equity will assume that it is sealed, and grant the same relief as if such a seal was attached. **Barnard v. Gantz** (1893), 140 N. Y. 249, 35 N. E. 430.

§ 45. Seal, private as corporate seal.—An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 13, in part; originally revised from Code Civ. Pro. §§ 29, 960; R. S., pt. 1, ch. 8, tit. 8, § 16; L. 1859, ch. 366, § 4.

§ 46. Signature.—The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 12, in part; originally revised from Code Civ. Pro. § 3343, subd. 23; Code Crim. Pro. § 956.

References.—Definition of "signature" as used in Penal Law, Penal Law, § 3. Obtaining signatures through fraud, Id. §§ 935, 943. Signature to wills, Decedent's Estate Law, §§ 21, 22.

Signature to will by mark.—*Matter of Porters' Will* (1892), 1 Misc. 262, 22 N. Y. Supp. 1062.

§ 47. State.—The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 23; originally revised from Code Civ. Pro. § 3343, subd. 17.

Effect of definition of state.—*People ex rel. Munsell v. Oyer and Terminer* (1885), 36 Hun 277, 284, *affd.* (1886), 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691.

Section cited in *Matter of Avery* (1904), 45 Misc. 529, 537, 92 N. Y. Supp. 974.

§ 48. Tense, present.—Words in the present tense include the future.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 8, in part; originally revised from Penal Code, § 718, subds. 10-12; Code Crim. Pro. § 955; L. 1828, ch. 20, § 11; L. 1877, ch. 466, § 27.

Application.—This provision is applicable only when the context of a statute, or other provisions of law do not indicate that a different meaning or application was intended. *Stack v. City of Brooklyn* (1896), 150 N. Y. 335, 342, 44 N. E. 1030.

"Where a particular statute refers in general terms to the laws upon a given subject it will be regarded as including not only the laws then in effect, but also the laws subsequently enacted upon that subject." *Matter of Hammond v. City of Fulton* (1917), 220 N. Y. 337, 115 N. E. 998, *revg.* 163 N. Y. Supp. 51.

§ 49. Territory.—The term territory when used generally to include every territory of the United States, includes also the District of Columbia.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 23, in part; originally revised from Code Civ. Pro. § 3343, subd. 7.

§ 50. Time, computation.—Time shall continue to be computed in this

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state according to the Gregorian or new style. The first day of each year after the year seventeen hundred and fifty-two is the first day of January, according to such style.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 25, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, §§ 1-3; L. 1853, ch. 466, § 12, as amended by L. 1867, ch. 91.

§ 51. **Time, night.**—Night time includes the time from sunset to sunrise.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 27, in part, as amended by L. 1894, ch. 447; originally revised from Code Civ. Pro. § 788; Penal Code, §§ 261, 500.

§ 52. **Time, standard.**—The standard time throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers, and legal and official proceedings, shall be regulated thereby.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 28, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, § 5, as added by L. 1884, ch. 14.

§ 53. **Time, use of standard.**—Any act required by or in pursuance of law to be performed at or within a prescribed time, shall be performed according to the standard time.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 28, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, § 5, as added by L. 1884, ch. 14.

Termination of insurance policy.—An insurance policy issued by a New York company on property located in Virginia is governed by the laws of the latter state, and a provision therein that it shall expire at noon will not be regarded as terminating the policy by standard time as defined by this section. *Globe & Rutgers Fire Ins. Co. v. David Moffat Co.* (1907), 154 Fed. 13.

§ 54. **Village.**—The term village means an incorporated village.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 22.

§ 55. **Women.**—The term women includes girls.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 8, in part; originally revised from Penal Code, § 718, subds. 10-12; Code Crim. Pro. § 955; L. 1828, ch. 20, § 11; L. 1877, ch. 466, § 27.

§ 56. **Writing and written.**—The terms writing and written include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 12, in part; originally revised from Code Civ. Pro. § 3343, subd. 23; Code Crim. Pro. § 956.

Section cited in *People v. Rouss* (1909), 63 Misc. 135, 143, 118 N. Y. Supp. 433.

§ 57. **Year, common and leap.**—For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bissextile or leap year consisting of three hundred and sixty-six days, unless such number of the year is a multiple of one hundred and the first two figures thereof treated as a separate number is not a multiple of four,

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and every year which is not a leap year is a common year consisting of three hundred and sixty-five days.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 25, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, §§ 1-3; L. 1853, ch. 466, § 12, as amended by L. 1867, ch. 91.

References.—Legislative year, Constitution, Art. X, § 6. Fiscal year, State Finance Law, § 2. School year, Education Law, § —. Fiscal year in villages, Village Law, § 100.

The word "year" when used in a public statute means three hundred and sixty-five days. *Platt v. Flower* (1910), 66 Misc. 342, 123 N. Y. Supp. 536, *affd.* (1910), 139 App. Div. 901, 123 N. Y. Supp. 538.

Section cited in *Aultman & Taylor Co. v. Syme* (1900), 163 N. Y. 54, 56, 57 N. E. 168.

§ 58. Year in statute, contract and public or private instrument.—The term year in a statute, contract, or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract or public or private instrument, the term year means twelve months, the term half year, six months, and the term a quarter of a year, three months.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 25, in part; originally revised from R. S., pt. 1, ch. 19, tit. 1, §§ 1-3; L. 1853, ch. 466, § 12, as amended by L. 1867, ch. 91.

Application.—Since "the term year in a statute, contract, or any public or private instrument means three hundred and sixty-five days," when a statute requires a person to certify that he has not done a certain act since the first day of last year, the year there mentioned is a year of 365 days. And when a person so certifies it means that he has not done any such act within such period. *Matter of Duffy* (1908), 125 App. Div. 406, 109 N. Y. Supp. 979, *affd.* (1908), 192 N. Y. 582, 85 N. E. 1117.

Section inapplicable to affect vested rights. Former definition of year, applied. *Hall v. Brennan* (1893), 140 N. Y. 409, 35 N. E. 663.

ARTICLE III.

ANCIENT STATUTES AND RESOLUTIONS.

Section 70. Statutes of England and Great Britain inoperative in this state.

71. Acts of legislature of the colony of New York inoperative.

72. Resolutions of the congress of the colony and the convention of New York inoperative.

§ 70. Statutes of England and Great Britain inoperative in this state.—A statute of England or Great Britain shall not be deemed to have had any force or effect in this state since May first, seventeen hundred and eighty-eight.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 30, in part; originally revised from L. 1828, ch. 21, §§ 3, 4.

Common law.—Although the statute law of England and Great Britain ceased to have any force in the United States after May 1, 1788, the common law continued

L. 1909, ch. 27. References, titles and head notes. §§ 71, 72, 80, 81.

with diminishing force as the body of the common law of this country expanded. *Fulton Light, Heat & Power Co. v. State of New York* (1909), 65 Misc. 263, 273, 121 N. Y. Supp. 536, *affd.* (1910), 138 App. Div. 931, 123 N. Y. Supp. 1117, *affd.* (1911), 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307.

§ 71. Acts of the legislature of the colony of New York inoperative.—Acts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December twenty-ninth, eighteen hundred and twenty-eight.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 30, in part; originally revised from L. 1828, ch. 21, §§ 3, 4.

§ 72. Resolutions of the congress of the colony and the convention of New York inoperative.—The resolutions of the congress of the colony of New York and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 30, in part; originally revised from L. 1828, ch. 21, §§ 3, 4.

ARTICLE IV.

REFERENCES, TITLES AND HEAD NOTES.

Section 80. References to repealed provisions.

81. Titles and head notes.

§ 80. References to repealed provisions.—If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 32, in part, as amended by L. 1894, ch. 448.

Former section 36 of the General Corporation Law which provided that references in laws not repealed to provisions of laws incorporated into general laws and repealed shall be construed as applying to the provisions so incorporated, is not contained in sections 80, 95 and 101 of this act. *Wilson v. Tennent* (1901), 61 App. Div. 100, 70 N. Y. Supp. 2, *affd.* (1904), 179 N. Y. 546, 71 N. E. 1142.

Section cited in *Matter of Jones* (1907), 54 Misc. 202, 105 N. Y. Supp. 932.

§ 81. Titles and head notes.—If the title of any article or other division of a statute, or the head note of a section shall be amended or repealed in the body of the statute, or if a new article or other division having a title, or a new section having a new head note be added to a statute, the corresponding title or head note, if any, in an abstract of contents at the beginning of the article or other division of the statute shall be deemed to be correspondingly amended or repealed, although there be no express reference thereto.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 34.

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ARTICLE V.

EFFECT OF REPEALS.

Section 90. Effect of the repeal of a repealing statute.

91. Effect of the repeal of a statute upon amendments thereof.

92. Effect of the repeal of an amending statute.

93. Effect of repealing statute upon existing rights.

94. Effect of repealing statute upon pending actions and proceedings.

95. Effect of the repeal of a statute by another statute substantially re-enacting the former.

96. Effect of hyphen in schedule of repeals.

§ 90. Effect of the repeal of a repealing statute.—The repeal hereafter or by this chapter of any provision of a statute, which repeals any provision of a prior statute, does not revive such prior provision.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 31, in part.

Repeal of repealing act before the statute revived the act repealed. *Chard v. Holt* (1892), 136 N. Y. 30, 32 N. E. 740.

Effect of subsequent legislation.—It will be presumed that all legislation subsequent to the enactment of this article relating to the repealing and modification of statutes, was passed in view of the provisions thereof. *People v. Bremer* (1902), 69 App. Div. 14, 74 N. Y. Supp. 570.

Section cited in *People ex rel. Eppens S. & W. Co. v. Roberts* (1900), 51 App. Div. 152, 154, 64 N. Y. Supp. 627; *Leask v. Horton* (1902), 39 Misc. 144, 146, 79 N. Y. Supp. 148; *Matter of City of New York* (1912), 153 App. Div. 418, 422, 138 N. Y. Supp. 594; *People ex rel. Conine v. Co. of Steuben* (1903), 41 Misc. 590, 594, 85 N. Y. Supp. 244, *affd.* (1904), 93 App. Div. 604, 87 N. Y. Supp. 1144, *affd.* (1905), 183 N. Y. 114, 75 N. E. 1108.

§ 91. Effect of the repeal of a statute upon amendments thereof.—The repeal by the Consolidated Laws of a statute includes a statute amendatory of the statute repealed.

Source.—New.

§ 92. Effect of the repeal of an amending statute.—The repeal hereafter or by this chapter of any provision of a statute, which amends a provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 31, in part.

Repeal of amendatory act.—Effect before the statute. *People v. Wilmerding* (1893), 136 N. Y. 363, 32 N. E. 1099; *White v. Inebriates Home* (1894), 141 N. Y. 123, 35 N. E. 1092; *People ex rel. Strough v. Canvassers* (1894), 143 N. Y. 84, 37 N. E. 649.

Effect of repeal.—A statute which amends a former statute "so as to read as follows," operates as a repeal by implication of provisions in the former law inconsistent with the latter law and of provisions in the former law omitted therefrom. The amendatory act does not repeal the amended act, but, after the passage of the amendatory act, such act is the only enactment on the subject as to future transactions, and the former statute is merged and lost in and has no vitality distinct from the amendatory act. *Davidson v. Witthaus* (1905), 106 App. Div. 182, 92 N. Y. Supp. 428.

Unconstitutionality of amendment.—Where an amendment is declared unconstitutional and therefore void, a prior amendment is not affected thereby. The statute is never repealed by implication when a provision of a later act which would otherwise affect a repeal is unconstitutional and void. *People ex rel. Farrington v. Mensching* (1907), 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. (N. S.) 625.

§ 93. **Effect of repealing statute upon existing rights.**—The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 31, in part.

Applies to all subsequent legislation unless a contrary intent is clearly expressed. Pending proceedings may be prosecuted to completion under former law. *People ex rel. The City of Buffalo v. N. Y. C. & H. R. R. Co.* (1898), 156 N. Y. 570, 51 N. E. 312; *People ex rel. City of Niagara Falls v. N. Y. C. & H. R. R. Co.* (1899), 158 N. Y. 410, 53 N. E. 166; *Village of Champlain v. McCrea* (1901), 165 N. Y. 264, 59 N. E. 83; *McCann v. City of New York* (1900), 52 App. Div. 358, 65 N. Y. Supp. 308, *affd.* (1901), 166 N. Y. 587, 59 N. E. 1125; *Thacher v. Supervisors of Steuben* (1897), 21 Misc. 271, 47 N. Y. Supp. 124, *revd.* (1898), 31 App. Div. 634, 53 N. Y. Supp. 1116; *People v. England* (1895), 91 Hun 152, 36 N. Y. Supp. 534, distinguishing *Mongeon v. People* (1874), 55 N. Y. 613. The provisions of this section are general and apply to all legislation adopted after 1892. *Mahoney v. Bernhardt* (1899), 27 Misc. 339, 347, 58 N. Y. Supp. 748, *mod.* (1899), 45 App. Div. 499, 63 N. Y. Supp. 642, *affd.* (1901), 169 N. Y. 589, 62 N. E. 1097.

Source of section. *People v. Bruno* (1916), 176 App. Div. 56, 161 N. Y. Supp. 647.

Not ex post facto or retroactive legislation, but on contrary saves legislation from being retroactive. *People v. Maxwell* (1894), 83 Hun 157, 31 N. Y. Supp. 564. This section is not retroactive and will not restore a cause of action which had been lost by the repeal of the statute giving it, before the enactment of this section. *Reinhardt v. Fritzsche* (1893), 69 Hun 565, 23 N. Y. Supp. 958.

Statutes taking effect at same time as Statutory Construction Law are to be construed according to its provisions. *Close v. Potter* (1898), 155 N. Y. 145, 49 N. E. 686; *Bank of Metropolis v. Faber* (1896), 1 App. Div. 341, 37 N. Y. Supp. 423, *affd.* (1896), 150 N. Y. 200, 44 N. E. 779. These decisions supersede the effect of *Ottman v. Hoffman* (1894), 7 Misc. 714, 721, 28 N. Y. Supp. 28.

Accrued rights.—What are. See *Cameron v. N. Y. & Mt. Vernon Water Co.* (1892), 133 N. Y. 336, 31 N. E. 104; *People ex rel. Standard Gas Co. v. Gilroy* (1893), 67 Hun 323, 22 N. Y. Supp. 271, *affd.* (1893), 139 N. Y. 623, 35 N. E. 205; *Christie v. Bowne* (1894), 83 Hun 107, 31 N. Y. Supp. 390, and cases cited under *first note*, *supra*. Mere procedure is not preserved. *Lazarus v. Met. El. R. R. Co.* (1895), 145 N. Y. 581, 40 N. E. 240. The right of corporations to consolidate may be existing right. *Cameron v. N. Y. & Mt. Vernon Water Co.* (1891), 62 Hun 269, 16 N. Y. Supp. 757, *affd.* (1892), 133 N. Y. 336, 31 N. E. 104.

Repeal of special and local laws.—Special and local laws are not deemed to be repealed by general legislation unless the intent to do so is clear. Ordinarily an express repeal or some intelligible reference to the special act is necessary to accomplish that end. *City of Jamestown v. Home Telephone Co.* (1908), 125 App. Div. 1, 109 N. Y. Supp. 297.

Effect of section.—It seems that this section was not intended to preserve precisely the same procedure in prosecuting or defending an action to final judgment

as provided for before the repealing act became effective. Thus, the repeal of an act providing for a new trial upon appeal was a mere change in the procedure and the right to a new trial was not preserved by this section. *Matter of Peterson* (1910), 137 App. Div. 435, 121 N. Y. Supp. 738.

Repeal of special act.—See *Matter of City of New York (Remsen Ave.)* (1912), 153 App. Div. 418, 138 N. Y. Supp. 594.

See generally for cases applying this section, *McCrea v. Village of Champlain* (1898), 35 App. Div. 89, 55 N. Y. Supp. 125; *Matter of Village of Le Roy* (1898), 35 App. Div. 177, 55 N. Y. Supp. 149; *People ex rel. Forest Commission v. Campbell* (1897), 152 N. Y. 51, 55, 46 N. E. 176; *G. & W. Ry. Co. v. N. Y. C. & H. R. R. Co.* (1900), 163 N. Y. 228, 232, 57 N. E. 498; *People ex rel. Niagara Falls v. N. Y. C. & H. R. R. Co.* (1899), 158 N. Y. 410, 53 N. E. 166; *People v. Mulford* (1910), 140 App. Div. 716, 125 N. Y. Supp. 680, *affd.* (1911), 202 N. Y. 624, 96 N. E. 1125.

Section cited.—*Ryan v. City of New York* (1903), 40 Misc. 228, 231, 81 N. Y. Supp. 685; *Matter of Wright* (1914), 165 App. Div. 312, 150 N. Y. Supp. 517, *revd.* (1915), 214 N. Y. 714, 108 N. E. 1112; *Matter of Iovinella* (1915), 166 App. Div. 460, 463, 151 N. Y. Supp. 1007. Construction and effect of Highway Law, section 172-a. (Opinion of Atty. Genl. July 20, 1916), 8 State Dept. Rep. 526, 532.

§ 94. Effect of repealing statute upon pending actions and proceedings.—Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 31, in part.

Application of section.—The above section is applicable to all legislation passed after it; therefore, an indictment found under the charter of the city of New York, L. 1897, ch. 378, is not nullified by the subsequent enactment of the amended charter of 1901. *People v. Scannell* (1903), 40 Misc. 297, 82 N. Y. Supp. 362.

The right to maintain an action for a penalty incurred for a violation of the Public Health Law prior to the enactment of the Consolidated Laws is preserved. *State Board of Pharmacy v. Mishking* (1910), 65 Misc. 588, 120 N. Y. Supp. 753.

After proceedings were instituted and commissioners appointed, for the opening of a portion of a city avenue, a special act was passed specifically providing for the same improvement, the latter act must be deemed to supersede the general law, notwithstanding the provisions of this section then in force; and the fact that the special act was subsequently repealed does not change the situation or the legal effect of the proceedings. *Matter of City of New York (Remsen Ave.)* (1912), 153 App. Div. 418, 138 N. Y. Supp. 594.

The New York City Municipal Court Code (Laws of 1915, chap. 279) is not retroactive and all actions brought and pending in said court before Sept. 1, 1915, must be prosecuted under section 94 of the old act under which the jurisdiction of the court was limited to claims not exceeding \$500. *Gold v. Langfelder & Son, Inc.* (1916), 93 Misc. 508, 157 N. Y. Supp. 281.

Preservation of procedure.—Although causes of action are saved and the abatement of actions prevented by this section, it was not intended thereby to preserve precisely the same procedure in prosecuting or defending an action to final effect as provided for before the repealing act became effective. *Leake v. Hartman* (1910), 137 App. Div. 451, 121 N. Y. Supp. 771, *affd.* (1911), 202 N. Y. 605, 96 N. E. 1119.

Section cited.—*People ex rel. New York Edison Co. v. Willcox* (1912), 151 App.

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Effect of repeals.

§ 95.

Div. 832, 839, 136 N. Y. Supp. 1031, revd. (1912), 207 N. Y. 86, 100 N. E. 705; *Upson v. United Engineering & Contracting Co.* (1911), 72 Misc. 541, 555, 130 N. Y. Supp. 726.

§ 95. Effect of the repeal of a statute by another statute substantially re-enacting the former.—The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, modified or amended according to the language employed, and not as new enactments.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 32, in part, as amended by L. 1894, ch. 448. As to effect of repeal and re-enactment by Consolidated Laws, see L. 1909, ch. 596, ante, p. 684.

Effect of repeal and revision.—While ch. 399 of L. 1892, repealed the collateral inheritance tax act (L. 1885, ch. 483) and all amendments thereto, without any saving clause in the repealing act itself, it has nevertheless been continually in force by virtue of this section. *Matter of Jones* (1907), 54 Misc. 202, 105 N. Y. Supp. 932.

Continuation or amendment of former law.—Section applied. *McAvoy v. City of New York* (1900), 52 App. Div. 485, 488, 65 N. Y. Supp. 274, affd. (1901), 166 N. Y. 588, 59 N. E. 1125; *Marsh v. Kaye* (1899), 44 App. Div. 68, 74, 60 N. Y. Supp. 439, affd. (1901), 168 N. Y. 196, 61 N. E. 177; *Roddy v. Brooklyn Heights R. R. Co.* (1898), 23 Misc. 373, 52 N. Y. Supp. 885, affd. in *Roddy v. Brooklyn City & N. R. Co.* (1898), 32 App. Div. 311, 52 N. Y. Supp. 1025; *Taylor v. Empire State Savings Bank* (1893), 66 Hun 538, 540, 21 N. Y. Supp. 643. See also *Matter of Prime* (1893), 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713.

Sections of the Penal Code (now Penal Law), which are substantially re-enactments of previous statutes, must be construed as continuing those statutes in force and not as new statutes. *Moore v. Owen* (1908), 58 Misc. 332, 337, 109 N. Y. Supp. 585; *People v. Champlin* (1907), 120 App. Div. 509, 105 N. Y. Supp. 349.

Where a later act covers the whole subject of earlier acts, together with new provisions, and plainly shows that it was intended not only as a substitute for the earlier acts but to cover the whole subject then considered by the legislature and prescribes the only rules in respect thereto, it will operate as a repeal of the former statute relating to the subject matter of the act, even if such former acts are not in all respects repugnant to the new act. *City of Buffalo v. Lewis* (1908), 192 N. Y. 193, 84 N. E. 809, affg. (1908), 123 App. Div. 163, 108 N. Y. Supp. 450.

The State Board of Pharmacy under the Consolidated Laws is a continuation of the former board with all its powers. *State Board of Pharmacy v. Mishking* (1910), 65 Misc. 588, 120 N. Y. Supp. 753.

A re-enacted statute is deemed, not a new law, but a continuation of the former law. *People ex rel. Donegan v. Dooling* (1910), 141 App. Div. 31, 125 N. Y. Supp. 783.

Application.—Under this section the Education Law as it now stands is simply a continuation of the law as it existed prior to 1909. *Western N. Y. Inst. for Deaf Mutes v. County of Broome* (1913), 82 Misc. 63, 143 N. Y. Supp. 241.

Under this section, sections 132, 140 and 157 of the Tax Law of 1896, substantially re-enacted in the Tax Law of 1909 (Laws of 1909, chapter 62, sections 132, 140, 158), have been continuously in force since the Tax Law of 1896 took effect notwithstanding the express repeal thereof by the later Tax Law. *Bandler v. Hill* (1914), 84 Misc. 359, 146 N. Y. Supp. 98, affd. (1914), 163 App. Div. 970, 148 N. Y. Supp. 1105.

The provisions of this section are but declaratory of the rule previously laid

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Effect of consolidated laws.

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down by the courts which also applies to the construction of constitutions. *Matter of Allison v. Welde* (1902), 172 N. Y. 421, 431, 65 N. E. 263.

Consolidated laws.—The Penal Law and the General Business Law are to be construed as continuations of the prior and existing laws. *People v. Dwyer* (1915), 215 N. Y. 46, 109 N. E. 103.

Section cited.—*Ashley Co. v. Fire Dept. of Rochester* (1911), 73 Misc. 636, 640, 133 N. Y. Supp. 591.

§ 96. **Effect of hyphen in schedule of repeals.**—When two numbers in a schedule of repeals of the consolidated laws are connected by a hyphen both such numbers are included as well as all intermediate numbers.

Source.—New.

Effect of hyphen.—Where, in a repealing act, the sections repealed are indicated by two numbers connected by a hyphen, the act is not necessarily to be construed as repealing all the sections that are intermediate the two sections whose numbers are stated. *Lowman v. Billington* (1909), 65 Misc. 111, 119 N. Y. Supp. 825. (The doctrine of this case is probably not applicable to the consolidated laws.)

ARTICLE VI.

EFFECT OF CONSOLIDATED LAWS.

Section 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect.

101. Effect of consolidated laws on penal law and civil and criminal codes.

§ 100. **Effect of consolidation upon laws passed at same session or before consolidation takes effect.**—No provision of any chapter of the consolidation of the general laws, of which this chapter is a part, shall supersede or repeal by implication any law passed at the same session of the legislature at which any such chapter was enacted, or passed after the enactment of any such chapter and before it shall have taken effect; and an amendatory law passed at such session or at any subsequent session begun before any such chapter takes effect, shall not be deemed repealed, unless specifically designated in the repealing schedule of such chapter.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 33.

Construction in connection with section 110.—The proper construction of this section and section 110, read together as they must be, is that an amendatory law, passed at the same session at which a general law is passed, shall not be deemed repealed unless specifically designated in the schedule, or unless the general object, or text of the language, or other provision of the general law, indicates that such repeal was intended. *People ex rel. Hyde v. Potter* (1903), 40 Misc. 485, 82 N. Y. Supp. 649, *affd.* (1903), 88 App. Div. 239, 85 N. Y. Supp. 460.

When act not retroactive.—There having been an express repeal of a statute, the passage, two years later, of this act did not have the effect of giving life to the repealed statute. *People ex rel. Hyde v. Potter* (1903), 88 App. Div. 239, 85 N. Y. Supp. 460.

Section cited.—*O'Bryan v. State of New York* (1911), 148 App. Div. 542, 544, 132 N. Y. Supp. 1098; *United States Condensed Milk Co. v. Smith* (1906), 116 App. Div. 15, 18, 101 N. Y. Supp. 129 *affd.* (1908), 191 N. Y. 536, 84 N. E. 1122; *People ex rel.*

L. 1909, ch. 27. Application of charter; laws repealed. §§ 101, 110, 120, 121.

Interborough R. S. Co. v. Tax Com'rs. (1908), 126 App. Div. 610, 615, 110 N. Y. Supp. 577, *affd.* (1909), 195 N. Y. 618, 89 N. E. 1109.

§ 101. Effect of consolidated laws on penal law and civil and criminal codes.—The Consolidated Laws shall not be construed to amend, repeal or otherwise affect any provision of the penal law, code of civil procedure or code of criminal procedure unless expressly so stated.

Source.—New.

The Penal Law and General Business Law are to be construed as continuations of the prior and existing laws. *People v. Dwyer* (1915), 215 N. Y. 46, 50, 109 N. E. 103.

ARTICLE VII.

APPLICATION OF CHAPTER.

Section 110. Application of chapter.

§ 110. Application of chapter.—This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 1, in part.

Section construed with § 37 *ante*. *People v. Woodbury Dermatological Inst.* (1908), 192 N. Y. 454, 85 N. E. 697, *affg.* (1908), 124 App. Div. 877, 109 N. Y. Supp. 578.

Application of section.—*Matter of Ehrsam* (1899), 37 App. Div. 272, 274, 55 N. Y. Supp. 942; *Beardsley v. N. Y. L. E. & W. R. R. Co.* (1897), 15 App. Div. 251, 255, 44 N. Y. Supp. 175, *revd.* (1900), 162 N. Y. 230, 56 N. E. 488; *People v. Bleecker Street, etc., R. R. Co.* (1910), 140 App. Div. 611, 619, 125 N. Y. Supp. 1045, *affd.* (1911), 201 N. Y. 594, 95 N. E. 1136; *People ex rel. Hyde v. Potter* (1903), 40 Misc. 485, 82 N. Y. Supp. 649, *affd.* 88 App. Div. 239, 85 N. Y. Supp. 460.

"Where a particular statute refers in general terms to the laws upon a given subject it will be regarded as including not only the laws then in effect, but also the laws subsequently enacted upon that subject." *Matter of Hammond v. City of Fulton* (1917), 220 N. Y. 337, 115 N. E. 998, *revg.* 163 N. Y. Supp. 51.

Application to Judiciary Law, § 26.—See *People ex rel. Noble v. Mitchell* (1915), 170 App. Div. 379, 155 N. Y. Supp. 660.

Section cited.—*Matter of Heckman v. Stein* (1909), 64 Misc. 144, 117 N. Y. Supp. 1026.

ARTICLE VIII.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 120. Laws repealed.

121. When to take effect.

§ 120. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 35.

§ 121. When to take effect.—This chapter shall take effect immediately.

Source.—Former Stat. Con. L. (L. 1892, ch. 677) § 36.

Laws repealed.

L. 1909, ch. 27.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part 1, chapter 8, title 8, section	16
Revised Statutes.....	Part 1, chapter 19, title 1, sections	1-5
Revised Statutes.....	Part 2, chapter 4, title 2, section	3
Revised Statutes.....	Part 2, chapter 4, title 3, section	9
Revised Statutes.....	Part 3, chapter 3, title 1, section	10
Revised Statutes.....	Part 3, chapter 7, title 3, article 7, sections ...	61, 62
Revised Statutes.....	Part 3, chapter 8, title 17, section	27
Revised Statutes.....	Part 3, chapter 10, title 4, section	4
Revised Statutes.....	Part 4, chapter 2, title 8, section	16

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1788	46	37	1881	30	All
1801	90	28	1881	442	955-957
R. L. 1813	56	30,	1881	676	261,
second sentence			500, 718, subds. 9-15.		
1828	20	9-11	1882	384	1,
(2d Meet.)			pt. amending L. 1881, Ch. 676, § 718,		
1828	21	2-15	subds. 9-15.		
(2d Meet.)			1883	372	All
1830	320	65-67	1884	14	All
1848	197	1	1886	21	20
1849	261	All	1887	289	All
1857	536	3	1892	677	All,
1865	146	All	except last sentence of § 24		
1870	370	All	1894	447	All
1872	544	All	1894	448	All
1873	577	All	1895	603	All
1873	639	All	1897	614	1,
1874	321	All	except part providing that public of-		
1875	27	All	fices shall be kept open on all week		
1876	448	29, 788, 960	days; 2, 3		
1877	416	1, 176, 214	1902	39	1,
1877	466	27	except part providing that public of-		
1880	178	1,	fices shall be kept open on all week		
pt. adding § 3343, subds. 6-8, 15, 17,			days.		
21-24 to L. 1876, Ch. 448.			1907	300	All

GENERAL CORPORATION LAW.

L. 1909, ch. 28.—“An act relating to corporations generally, constituting chapter twenty-three of the consolidated laws.”

[In effect February 17, 1909.]

CHAPTER XXIII OF THE CONSOLIDATED LAWS.**GENERAL CORPORATION LAW.**

- Article 1. Short title; classification; definitions (§§ 1-3).
2. General provisions (§§ 4-44).
3. Change of name (§§ 60-66).
4. Sale of corporate real property (§§ 70-76).
5. Judicial supervision of corporation and of the officers and members thereof (§§ 90-92).
- *Section 6. Action for sequestration, action for dissolution and action to enforce individual liability of officers and members of corporation (§§ 100-116).
7. Action to annul corporation (§§ 130-136).
8. Action to dissolve moneyed corporation (§§ 150-161).
9. Proceedings for voluntary dissolution of corporation (§§ 170-195).
9a. Forfeiture of charter or revocation of certificate of authority, for maintaining a nuisance (§§ 200-202).
10. Dissolution of stock corporation without judicial proceedings (§§ 220, 221).
10a. Provisions applicable to temporary and permanent receivers of corporations (§§ 225-227).
11. Powers, duties and liabilities of receivers of corporation (§§ 230-278).
12. Provisions applicable to two or more of the foregoing proceedings or actions (§§ 300-316).
13. Alteration and repeal of charter of corporation (§§ 320, 321).
14. Laws repealed; construction; when to take effect (§§ 330-332).

ARTICLE I.**SHORT TITLE; CLASSIFICATION; DEFINITIONS.**

- Section 1. Short title.
2. Classification of corporations.
3. Definitions.

* So in original.

§ 1.

Short title; classification; definitions.

L. 1909, ch. 28.

§ 1. Short title.—This chapter shall be known as the "General Corporation Law."

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 1, as amended by L. 1892, ch. 687.

Consolidators' general note.—Various matters from the Code of Civil Procedure and independent statutes have been added to the General Corporation Law for the purpose of bringing together so far as possible the provisions relating generally to corporations. Most of the added matter is in the nature of actions and proceedings relating to corporations. The provisions in the Code of Civil Procedure relating to the changing the name of a corporation and the sale of corporate real property have been inserted as well as the various articles of the Code of Civil Procedure relating to the judicial supervision of corporations and officers and members thereof and actions for sequestration, for dissolution, for annulment and proceedings for voluntary dissolution.

The provisions in the Stock Corporation Law relating to the voluntary dissolution of a stock corporation have been consolidated in this chapter as well as those relating to the dissolution of moneyed corporations which are now in the form of an independent statute.

There has been added to the law as a separate article the provisions relating to the powers, duties and liabilities of receivers of corporations.

This material was formerly scattered along the road of legislation from 1829 down to the present time. The provisions of the Revised Statutes were found in two separate chapters, one relating to receivers appointed in proceedings for the voluntary dissolution of a corporation and the other relating to trustees of insolvent debtors. These were made applicable by the repealing act of 1880, ch. 245. From 1829 down to the time of the adoption of the Code of Civil Procedure, and after the adoption of the Code of Civil Procedure, various independent statutes were enacted upon the subject of insolvent corporations and receivers. All the statutory provisions applicable to the powers, duties and liabilities of receivers as found in this legislation have been consolidated in one article and by a suitable reference have been made applicable to actions and proceedings as now provided by law. The following independent acts have thus been disposed of: L. 1880, ch. 537; L. 1883, ch. 378; L. 1884, ch. 285; L. 1898, ch. 522; L. 1898, ch. 534; L. 1904, ch. 754. L. 1852, ch. 71, has been treated in the Insurance Law. L. 1886, ch. 271, was repealed by L. 1892, ch. 687, and L. 1886, ch. 310, has been repealed herein as unconstitutional pursuant to the authority of *People v. O'Brien*, 111 N. Y. 1.

Explanatory note.—The General Corporation Law was proposed by the statutory revision commission to the legislature of 1890, and enacted as chapter 363 of the laws of that year, taking effect May 1, 1891. It was intended as a substitute for a large number of similar provisions applicable to corporations generally or to particular classes of corporations. It was the first chapter in the scheme of corporate laws proposed by the commission, being followed by the Stock Corporation Law (L. 1890, ch. 564); The Business Corporations Law (L. 1890, ch. 567); The Railroad Law (L. 1890, ch. 565); The Transportation Corporations Law (L. 1890, ch. 566); The Banking Law (L. 1892, ch. 689); The Insurance Law (L. 1892, ch. 690); The Membership Corporations Law (L. 1895, ch. 559); The Religious Corporations Law (L. 1895, ch. 723), and The Benevolent Orders Law (L. 1896, ch. 377). The Joint-Stock Associations Law (L. 1894, ch. 235) was also included in the scheme. The General and Stock Corporation Laws are of general application and do not provide for the formation of corporations. The remaining chapters authorize the formation of particular classes of corporations, and contain provisions peculiar to the particular class. A conflicting provision in any such

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Short title; classification; definitions.

§ 2.

chapter prevails over the General and Stock Corporation Laws. See General Corporation Law, § 321, post.

It is impracticable to indicate the source of many sections of the General Corporation Law. It superseded and repealed R. S., pt. 1, ch. 18, tit. 3, and many subsequent acts affecting corporations generally.

Construction.—These three acts, the General Corporation Law, the Stock Corporation Law, and the Business Corporation Law, were all passed at one time and were part of a single scheme of legislation, and must be read and construed together. *People ex rel. Haberman v. James* (1896), 5 App. Div. 412, 39 N. Y. Supp. 313. The revisers placed in the General Corporation Law all the provisions which they deemed applicable to all classes of corporations. *Matter of Ringler & Co.* (1912), 204 N. Y. 30, 40, 97 N. E. 593.

Inapplicable to foreign corporations.—The General Corporation Law does not apply to foreign corporations. *Wamsley v. Horton & Co.* (1896), 12 App. Div. 312, 42 N. Y. Supp. 767, *affd.* (1897), 153 N. Y. 687, 48 N. E. 1107.

§ 2. Classification of corporations.—A corporation shall be either,

1. A municipal corporation,
2. A stock corporation, or
3. A non-stock corporation.

A stock corporation shall be either

1. A moneyed corporation,
2. A railroad or other transportation corporation, or
3. A business corporation.

A non-stock corporation shall be either

1. A religious corporation,
2. A membership corporation, or
3. Any corporation other than a stock corporation.

A reference in a general law to a class of corporations described in accordance with this classification shall include all corporations theretofore formed belonging to such class.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 2, as amended by L. 1892, ch. 687.

Consolidators' note.—The proposed amendments to this section relating to classification of corporations are made necessary in order to conform its provisions to the present classification of corporations. This section, when enacted, was intended to indicate the classification into which all corporations were to be divided. The revisers, however, did not adhere to the classification as laid down, and as new general laws were enacted, the original classification was in great part abandoned. Thus, there is no "mixed corporation" known to our laws, and all matter relating to such a class of corporations has been omitted. The words "railroad or other" relating to transportation corporations have been inserted so as to make the application of the language plainer. This will make unnecessary further sub-classifications of either "moneyed" or "transportation" corporations.

The words "Any corporation other than a stock corporation" have been inserted as descriptive of all non-stock corporations authorized by laws other than the Religious and Membership Corporation Laws. This classification of non-stock corporations corresponds to the actual classification now in use. It will include corporations organized under the proposed "Education Law," under the Health Law, and all other general or special laws.

The different chapters of the general laws relating to the organization and regulation of corporations for purposes peculiar to themselves sufficiently define and describe such corporations. Therefore, an enumeration of all the corporations organized for all kinds of purposes under all existing laws, as was attempted in the section, is unnecessary and only tends to confuse. The number and variety of such corporations has greatly increased since the section was enacted, and will probably further increase in the future and make constant amendment of the section necessary.

In fact the section has been open to much criticism for some years.

The paragraph providing that membership corporations shall include benevolent orders has been omitted for the reason that benevolent orders are now governed by a separate chapter of the general laws, and fire and soldiers' monument corporations are expressly provided for in the Membership Corporations Law. This paragraph, therefore, is obsolete and unnecessary, as the nature of such corporations are sufficiently described in the laws referred to.

References.—Provisions as to municipal corporations, generally, see General Municipal Law. Counties as corporations, County Law, §§ 3, 4. As to stock corporations, see Stock Corporation Law. Money corporations are banking and insurance corporations, see Banking and Insurance Law. As to railroad and transportation corporations, see Public Service Commissions Law, Railroad Law, Transportation Corporations Law. As to business corporations see Business Corporations Law. As to religious corporations, see Religious Corporations Law. As to membership corporations, see Membership Corporations Law.

Classification of corporations as made by this section discussed. Matter of Lampson (1897), 22 Misc. 198, 49 N. Y. Supp. 576, *affd.* (1900), 33 App. Div. 49, 53 N. Y. Supp. 531, *affd.* (1900), 161 N. Y. 511, 56 N. E. 9.

An educational corporation, although a non-stock corporation under the above classification, is not necessarily either a religious corporation or a membership corporation under the laws of the state. Matter Lampson (1898), 33 App. Div. 49, 55, 53 N. Y. Supp. 531, *affd.* (1900), 161 N. Y. 511, 56 N. E. 9.

§ 3. Definitions.—1. A "municipal corporation" includes a county, town, school district, village and city and any other territorial division of the state established by law with powers of local government.

Towns and counties as corporations.—For earlier cases holding that towns and counties have certain corporate powers. See *Lorillard v. Town of Monroe* (1854), 11 N. Y. 392; *Newman v. Supervisors of Livingston* (1871), 45 N. Y. 676; *Furey v. Town of Gravesend* (1885), 38 Hun 319, *affd.* (1887), 104 N. Y. 405, 10 N. E. 698; *Miller v. Bush* (1895), 87 Hun 507, 34 N. Y. Supp. 286. But it was formerly held that a town was not liable upon a judgment against its commissioners of highway. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397. Town is now a municipal corporation. *Town of Hempstead v. Lawrence* (1910), 138 App. Div. 473, 122 N. Y. Supp. 1037.

A village is a municipal corporation.—Matter of Heath (1899), 43 App. Div. 236, 60 N. Y. Supp. 27; *Village of Haverstraw v. Eckerson* (1908), 124 App. Div. 18, 108 N. Y. Supp. 506, *affd.* (1908), 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287.

School districts are made municipal corporations by this section. Formerly trustees of an ordinary school district were only a *quasi*-corporation of very limited powers. *Yellow Pine Lumber Company v. Board of Education* (1895), 15 Misc. 58, 36 N. Y. Supp. 922. See Education Law, § 300, and cases cited thereunder.

2. A "stock corporation" is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders

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Short title; classification; definitions.

§ 3.

thereof dividends or shares of the surplus profits of the corporation. A corporation is not a stock corporation because of having issued certificates called certificates of stock, but which are in fact merely certificates of membership, and which is not authorized by law to distribute to its members any dividends or share of profits arising from the operations of the corporation.

Building and loan corporation.—The New York Building-Loan Banking Co., organized under L. 1851, ch. 122, although issuing so-called shares of stock, is not a stock corporation, but a membership corporation. *Preston v. Reinhart* (1905), 109 App. Div. 781, 96 N. Y. Supp. 851, affd. (1906), 185 N. Y. 555, 78 N. E. 1111.

Section cited.—*Leighton v. Leighton Tea Assn.* (1911), 146 App. Div. 255, 130 N. Y. Supp. 935. Rept. of Atty. Genl. (1910) 549.

3. The term "non-stock corporation" includes every corporation other than a stock corporation.

4. A "moneyed corporation" is a corporation formed under or subject to the banking or the insurance law.

Construction by attorney-general.—Companies formed for the purpose of loaning money on real and personal property, and of buying and selling bonds and mortgages are moneyed corporations. Rept. of Atty. Genl. (1893) 182, 187.

Companies formed for the purpose of storing goods and loaning money are moneyed corporations. Rept. of Atty. Genl. (1893) 193.

Foreign Mortgage loan company, held to be a moneyed corporation under § 394 of Code Civil Procedure relating to limitation of actions against directors, the above definition being applied. *Hobbs v. Bank of Commerce* (1900), 101 Fed. 75.

5. A "domestic corporation" is a corporation incorporated by or under the laws of the state or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the code of civil procedure for the purpose of construing such code.

Corporation of United States is a domestic corporation, under Code Civ. Pro. § 3343, subd. 18. *McLanahan v. Mott* (1893), 73 Hun 131, 25 N. Y. Supp. 892.

Railroad corporation operating railroad in other states.—Where a railroad corporation was organized under the laws of the United States for the purpose of constructing a railroad in States other than the State of New York, and the charter and certificate of incorporation did not specify where the main office of the corporation should be located, but did specifically authorize the incorporators to meet in the city of New York to elect directors, etc., and said company has for many years maintained at all times its executive offices in the city of New York, where all the annual meetings of stockholders and directors have been held, it is a domestic corporation under the terms of subdivision 18 of section 3343 of the Code of Civil Procedure for the purpose of determining whether its property is subject to attachment as a foreign corporation. And this is so although the general offices for the actual operation of the railroad plant are located in the foreign States through which the railroad runs and although its revenues are there received and disbursed. *Gould v. Texas & Pacific Railway Co.* (1917), 176 App. Div. 818, 163 N. Y. Supp. 479.

Consolidation.—When domestic and foreign corporations merged into one consolidated corporation which was incorporated in duplicate both in this state and another, it is to be treated as a domestic corporation. *Matter of Cooley* (1906), 186 N. Y. 220, 78 N. E. 939, 10 L. R. A. (N. S.) 1010.

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6. The term "directors," when used in relation to corporations, shall include trustees or other persons, by whatever name known, duly appointed or designated to manage the affairs of the corporation.

Reference.—See also definition of "directors" in Penal Law, § 667.

7. The term "certificate of incorporation" shall include articles of association or any other written instruments required by law to be filed, to effect the incorporation of a corporation, including a certified copy of an original certificate of incorporation filed for such purpose in pursuance of law.

8. The term "member of a corporation" shall include every person having a right to vote at a meeting of the corporation for the election of directors, other than a person having a right to vote only upon a proxy.

9. The term "office of a corporation" means its principal office within the state, or principal place of business within the state if it has no principal office therein.

Principal office synonymous with place of business, and as designated in certificate is conclusive for purpose of taxation. *People ex rel. Knickerbocker Press v. Barker* (1895), 87 Hun 341, 34 N. Y. Supp. 269, *affd.* (1895), 147 N. Y. 715, 42 N. E. 725. See also cases cited under Tax Law, § 11.

In an action under the Labor Law against a foreign corporation, parol evidence is admissible to show that its principal office is not at the place designated by it as its principal place of business. *Mason & Hanger Co. v. Sharon* (1916), 231 Fed. 861.

10. The term "business of a corporation," when used with reference to a non-stock corporation, includes the operations for the conduct of which it is incorporated.

11. The term "corporate law" or "laws," when used in any law forming a part of the consolidation of the general laws of the state of which this chapter is a part, means the general statutes of this state relating to corporations included in such consolidation.

12. The existence of an easement in real property acquired or reserved by a municipal corporation, a railroad corporation or other transportation corporation, shall not be deemed an encumbrance upon such real property under any law relating to investments in mortgages upon real property by corporations, trustees, executors, administrators, guardians or other persons holding trust funds, but the effect of such an easement upon the real property which it affects, shall be taken into consideration in determining the value thereof. (*Subd. 12, added by L. 1914, ch. 128.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 3, as amended by L. 1892, ch. 687, and L. 1895, ch. 672.

Construction of corporate law, § 321, post.

ARTICLE II.

GENERAL PROVISIONS.

Section 4. Qualifications of incorporators.

5. Filing and recording certificates of incorporation.

6. Corporate names.

7. Amended and supplemental certificates.
8. Lost or destroyed certificates.
9. Certificate and other papers as evidence; evidence of consolidation.
10. Limitation of powers; provisions of certificate.
11. Grant of general powers.
12. Enlargement of limitations upon the amount of the property of non-stock corporations.
13. Acquisition of additional real property.
14. Acquisition of property without the state.
15. Certificate of authority of a foreign corporation.
16. Proof to be filed before granting certificate.
17. Reincorporation of foreign moneyed corporations.
18. Papers to be filed upon reincorporation.
19. When reincorporation effective and effect thereof.
20. Acquisition of real property in this state by certain foreign corporations.
21. Acquisition by foreign corporation of real property in this state.
22. Prohibition of banking powers.
23. Qualification of members as voters.
24. Cumulative voting.
25. Voting trust agreements.
26. Proxies.
27. Challenges.
28. Effect of failure to elect directors.
29. Mode of calling special election of directors.
30. Mode of conducting special election of directors.
31. Qualification of voters and canvass of votes at special election.
32. Powers of supreme court respecting elections.
33. Stay of proceedings in actions collusively brought.
34. Quorum of directors and powers of majority.
35. Directors as trustees in case of dissolution.
36. Forfeiture for non-user.
37. Extension of corporate existence.
38. Revival of corporate existence.
39. Approval of certificates of extension or revival; when required.
40. Extension when stock is owned by another corporation.
41. Effect of extension.
42. When notice of lapse of time unnecessary.
43. As to acts of directors.
44. Political contributions prohibited; penalty.

§ 4. **Qualifications of incorporators.**—A certificate of incorporation must be executed by natural persons, who must be of full age, and at least two-thirds of them must be citizens of the United States and one of them a resident of this state. This section shall not apply to a corporation formed by the reincorporation or consolidation of existing corporations, or to the reorganization of a corporation upon the sale of the property and franchises of a previously existing corporation or otherwise.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 4, as added by L. 1892, ch. 687, and amended by L. 1895, ch. 672.

Liability of promoters.—*Brewster v. Hatch* (1890), 122 N. Y. 349, 25 N. E. 505; *Walker v. Anglo-Mortgage & Trust Co.* (1893), 72 Hun 334, 25 N. Y. Supp. 432; *Hub Publishing Co. v. Richardson* (1891), 37 N. Y. St. Rep. 541, 13 N. Y. Supp. 665;

Colton Improvement Co. v. Richter (1899), 26 Misc. 26, 55 N. Y. Supp. 486, and cases cited.

Liability of corporation to promoters.—Harrison v. Vermont Manganese Co. (1892), 1 Misc. 402, 20 N. Y. Supp. 894.

Liability of corporation for contracts of promoters.—Burden v. Burden (1896), 8 App. Div. 160, 40 N. Y. Supp. 499, *affd.* (1899), 159 N. Y. 287, 54 N. E. 17; Oakes v. Cattaraugus Water Co. (1894), 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Hall v. Herter Bros. (1894), 83 Hun 19, 31 N. Y. Supp. 692; Rogers v. N. Y. & Texas Land Co. (1892), 134 N. Y. 197, 32 N. E. 27; Munson v. Syracuse, Geneva and Corning R. R. (1886), 103 N. Y. 58, 8 N. E. 355; Bommer v. Am. Spiral Spring Co. (1880), 81 N. Y. 468; Dillon v. Commercial Cable Co. (1895), 87 Hun 444, 34 N. Y. Supp. 370; Mesinger v. Mesinger Bicycle-Saddle Co. (1899), 44 App. Div. 26, 60 N. Y. Supp. 431.

Infants as incorporators.—Although a statute does not require incorporator to be of full age, the law implies that he must be *sui juris*. Matter of Globe Mutual Benefit Ass'n. (1892), 63 Hun 263, 17 N. Y. Supp. 852, *affd.* (1892), 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547.

Statement of facts in certificate of incorporation, see Matter of Wendover Athletic Ass'n. (1911), 70 Misc. 273, 128 N. Y. Supp. 561.

§ 5. Filing and recording certificates of incorporation.—1. Every certificate of incorporation and every amended or supplemental certificate, and every certificate which alters the provisions of any certificate of incorporation or any amended or supplemental certificate hereafter executed, shall be in the English language, and except as otherwise provided by law, shall be filed in the office of the secretary of state, and shall be by him duly recorded and indexed in books specially provided therefor, and a certified copy of such certificate or amended or supplemental certificate with a certificate of the secretary of state of such filing and record, or a duplicate original of such certificate or amended or supplemental certificate shall be filed and similarly recorded and indexed in the office of the clerk of the county in which the office of the corporation is to be located, or, if it be a non-stock corporation, and such county be not determined upon at the time of executing the certificate of incorporation, in such county clerk's office as the judge approving the certificate shall direct. Nothing herein contained, however, shall be deemed to prohibit a corporation from having and using a corporate name or title in a language other than the English language if the same be in English letters or characters. All taxes required by law to be paid before or upon incorporation and the fees for filing and recording such certificate must be paid before filing. No corporation shall exercise any corporate powers or privileges until such taxes and fees have been paid.

2. Whenever under any law now or heretofore in force the certificate of incorporation of any corporation other than a stock corporation was or is required to be filed in more than one public office, as certified copy of such certificate so filed in any one of such public offices may be filed in such other office with the like effect as if the original had been duly filed therein, provided, however, that no rights accrued prior to the filing of such copy shall be impaired or affected thereby, provided also, that such filing of a

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General provisions.

§ 5.

copy shall not cause a duplication or similarity of corporate names in violation of the next succeeding section. (*Section amended by L. 1913, ch. 479.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 5, as amended by L. 1892, ch. 687; L. 1895, ch. 672, and L. 1902, ch. 285; originally revised from L. 1881, ch. 22, but a substitute for the provisions of many other statutes on the same subject. Subd. 2 as added by consolidators is derived from L. 1906, ch. 531, § 1.

Consolidators' note.—This section relates to filing of certificates in the office of the secretary of state by corporations generally, and it also contains exceptions. Thus, except in the case "of a religious, cemetery, moneyed, municipal or fire department corporation." The wording of the exception has been changed in the proposed section to "except as otherwise provided by law." This change is necessary because the exceptions referred to are incorrect.

(a) In the case of religious corporations it is provided by the Religious Corporations Law (L. 1895, ch. 723, § 3), that in some cases the certificate should be filed in the office of the secretary of state, and so the exception of this class of corporations is too broad.

(b) In the case of cemetery corporations it is now provided by the Membership Corporations Law (L. 1895, ch. 559, § 41) that the certificates of such corporations should be filed in the office of the secretary of state. This exception, therefore, is erroneous.

(c) In the case of moneyed corporations the Insurance Law (L. 1892, ch. 690, § 263) provides that the certificates of town and county co-operative insurance companies shall be filed in the office of the secretary of state. The exception of moneyed corporations is, therefore, not entirely correct.

(d) As to the exception of fire department corporations, it is sufficient to say that there are none such now provided for. Fire companies are included in the Membership Corporations Law (L. 1895, ch. 559), and they do not belong in the exception.

(e) There are also district dental societies whose certificates must be filed with the secretary of State Dental Society (Public Health Law, L. 1893, ch. 661, § 162) and library corporations which may be chartered by the Regents. (University Law, L. 1892, ch. 378, § 27.) So to make the exception accurate it would have to include these and there may be others.

All these peculiar provisions and exceptions are, however, provided for by the phrase "except as otherwise provided by law," and it will be less confusing if the specific exceptions are not set forth in full. Under the section as proposed, it will not have to be amended every time the legislature creates an exception to the general law providing for the filing of certificates in the office of the secretary of state.

References.—Application for incorporation of educational corporations, Education Law, § 59. Fraud in organization of corporations, Penal Law, §§ 660, 661. Certificates of incorporation of different corporations see respective corporation laws. Fees of secretary of state, for filing, \$10; for recording, 15 cents per folio. Executive Law, § 26. Fees of county clerk, for filing, 6 cents; for recording, 10 cents per folio. Code Civ. Pro. § 3304. Organization tax on incorporation, Tax Law, § 180.

Certificate must be entirely in English.—Rept. of Atty. Genl. (1899) 136.

The use of a Spanish phrase or a phrase from a foreign language combined into a single word is not permitted in the title of a corporation. The fact that a word not in the English language which it is proposed to use in the title is the established trade name of the corporation would not modify the rule. Rept. of Atty. Genl. (1912), Vol. 2, p. 553.

Right to file certificate exists only in favor of those who bring themselves within the terms of the act under which they seek to incorporate. *People ex rel. Barney v. Whalen* (1907), 56 Misc. 278, 106 N. Y. Supp. 434.

Mandamus to compel filing of certificate. *People ex rel. Derby v. Rice* (1891), 129 N. Y. 461, 29 N. E. 358; *People ex rel. N. Y. Phonograph Co. v. Rice* (1890), 57 Hun 486, 11 N. Y. Supp. 249, *affd.* (1891), 128 N. Y. 591, 28 N. E. 251.

Certificate as evidence of principal place of business.—See *People ex rel. Armstrong Cork Co. v. Barker* (1898), 157 N. Y. 159, 51 N. E. 1043.

De facto corporation, what constitutes. *Lamming v. Galusha* (1894), 81 Hun 247, 30 N. Y. Supp. 767, *affd.* (1896), 151 N. Y. 648, 45 N. E. 1132; *Methodist Episc. Union Church v. Pickett* (1859), 19 N. Y. 482; *Bank of Toledo v. International Bank* (1860), 21 N. Y. 542; *Van Lengerke v. City of New York* (1912), 150 App. Div. 98, *affd.* 211 N. Y. 558. **Organization under unconstitutional statute.** *Coxe v. State* (1895), 144 N. Y. 396, 39 N. E. 400. **Mere user not sufficient.** *De Witt v. Hastings* (1876), 40 N. Y. Super. Ct. 463, *affd.* (1877), 69 N. Y. 518; *Welch v. Old Dominion Mining, etc., Co.* (1890), 31 N. Y. St. Rep. 916, 10 N. Y. Supp. 174; *Bradley Fertilizer Co. v. South Pub. Co.* (1893), 4 Misc. 172, 23 N. Y. Supp. 675. **Does not affect jurisdiction of court to appoint receiver on insolvency.** *Matter of New York, etc., R. Co.* (1908), 193 N. Y. 72.

Acting as corporation without legal organization, *Fuller v. Rowe* (1857), 57 N. Y. 23; after charter expires, *Savings Bank v. Walker* (1876), 66 N. Y. 424.

Estoppel of person contracting with corporation from denying corporate existence. *Eagle Savings & Loan Co. v. Samuels* (1899), 43 App. Div. 386, 60 N. Y. Supp. 91.

Estoppel of stockholders who participated in the acts of the corporation from questioning its legal organization. *Aspenwall v. Sacchi* (1874), 57 N. Y. 331; *Phoenix Warehousing Co. v. Badger* (1876), 67 N. Y. 294; *Veeder v. Mudgett* (1884), 95 N. Y. 295; *Com. Bk. of Keokuk v. Pfeiffer* (1888), 108 N. Y. 242, 15 N. E. 311.

Filing certified copy of certificate.—Certified copy of certificate of incorporation should not be filed by a county clerk unless the certificate of the clerk of the county where the acknowledgments of the incorporators were taken is attached, showing authority of notary public. *Rept. of Atty. Genl.* (1911) 26.

Effect of failure to file certificate of incorporation, see *Stevens v. Episcopal Church History Co.* (1910), 140 App. Div. 570, 125 N. Y. Supp. 578; *Perrine v. Levin* (1910), 68 Misc. 327, 123 N. Y. Supp. 1007.

Defects may be cured by subsequent legislation. *Smith v. Havens, etc., Soc.* (1907), 118 App. Div. 678, 103 N. Y. Supp. 770, *affd.* (1908), 190 N. Y. 557, 83 N. E. 1132.

§ 6. **Corporate names.**—1. No certificate of incorporation of a proposed corporation having the same name as a corporation authorized to do business under the laws of this state, or a name so nearly resembling it as to be calculated to deceive, shall be filed or recorded in any office for the purpose of effecting its incorporation, or of authorizing it to do business in this state; nor shall any corporation except a religious, charitable or benevolent corporation or bar association be authorized to do business in this state unless its name has such word or words, abbreviation, affix or prefix, therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm or co-partnership; or unless such corporation uses with its corporate name, in this state, such an affix or prefix. A corporation formed by the reincorporation, reorganization or consolidation of other corporations or upon the sale of the property or

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franchises of a corporation, or a corporation acquiring or becoming possessed of all the estate, property, rights, privileges and franchises of any other corporation or corporations by merger, may have the same name as the corporation or one of the corporations to whose franchises it has succeeded. No corporation shall be hereafter organized under the laws of this state with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "title," "casualty," "surety," "fidelity," "bonding," "savings," "investment," "loan" or "benefit" as part of its name, except a corporation formed under the banking law or the insurance law. (*Subd. amended by L. 1911, ch. 638, L. 1912, ch. 2, L. 1913, ch. 24, L. 1916, ch. 222 and L. 1917, ch. 594, in effect May 21, 1917.*)

2. No corporation, society or association, whether now existing or hereafter organized under or by virtue of the laws of this state, shall ever employ the words "Lucretia Mott" to designate, describe or name any hospital, infirmary or dispensary, or any part thereof, or any similar institution. (*Amended by L. 1911, ch. 638, L. 1912, ch. 2, and L. 1913, ch. 24, and L. 1916, ch. 222.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 6, as amended by L. 1892, ch. 687; L. 1895, ch. 672; L. 1900, ch. 704; L. 1902, ch. 9, and L. 1907, ch. 115; originally revised from L. 1875, ch. 611, § 4, and other statutes. Subd. 2, added by consolidators, is derived from L. 1892, ch. 19, § 4.

References.—Change of name, §§ 60–65, post. Unlawful use of corporate name, Penal Law, § 666. Unauthorized use of term "bank," etc., Id. § 302. Prohibition against use of sign or word indicating bank, Banking Law, § 141; use of word "savings," Id. § 279. Restriction as to use of name by insurance corporation, Insurance Law, § 10.

Infringements.—See *Tuerk Hydraulic-Power Co. v. Tuerk* (1895), 92 Hun 65, 36 N. Y. Supp. 384; *Matter of Bank of Attica* (1891), 35 N. Y. St. Rep. 708, 12 N. Y. Supp. 648; *In re U. S. Mercantile Reporting & Collecting Ass'n.* (1899), 22 N. Y. St. Rep. 494, 4 N. Y. Supp. 916. By use of individual name of incorporator. *De Long v. De Long Hook & Eye Co.* (1895), 89 Hun 399, 35 N. Y. Supp. 509; *S. Howes Co. v. Howes Grain-Cleaner Co.* (1897), 19 App. Div. 625, 46 N. Y. Supp. 165; *Same v. Same* (1898), 24 Misc. 83, 52 N. Y. Supp. 468, and cases cited. See *Society of the War of 1812 v. Society of the War of 1812 in the State of N. Y.* (1900), 46 App. Div. 568, 62 N. Y. Supp. 355.

Illustrations of names infringed.—Name "German-American Hand Crochet Button Works" held to be so similar to "German-American Button Company," as to produce confusion in the trade. *German-American Button Co. v. Heymsfeld, Inc.* (1915), 170 App. Div. 416, 156 N. Y. Supp. 223. "Columbian Chemical Co." infringes the name "Columbia Chemical Co." *People ex rel. Columbia Chemical Co. v. O'Brien* (1905), 101 App. Div. 296, 91 N. Y. Supp. 649. No right to exclusive use of words "Material Men's" in corporate name. *Material Men's Mercantile Ass'n. v. N. Y. Material Men's Mercantile Assn.* (1915), 169 App. Div. 843, 155 N. Y. Supp. 706. "Lloyd."—Secretary of State may properly refuse to file certificate of business corporation using this name. *Matter of Barker* (1909), 135 App. Div. 16, 119 N. Y. Supp. 777.

Name on reincorporation.—An incorporated mutual benefit fraternity has an absolute right to reincorporate under the Insurance Law, and by its existing name, although that be very similar to the name of another previously incorporated

benefit fraternity. *People ex rel. U. S. Grand Lodge v. Payne* (1900), 161 N. Y. 229, 55 N. E. 849.

Name on merger.—An omission of the words "freight terminal company," required by section 154 of the Transportation-Corporation Law, from the name of a company, incorporated under said law is an irregularity cured upon the merger therewith of a navigation company of the same name and the assumption of such name under section 6 of the General Corporation Law. *Pub. Serv. Com. 1st Dist.* (1916), 8 State Dept. Rep. 67, 80.

Trade-name by individual or partnership.—This section applies to the adoption of a trade name by an individual or copartnership. *German-American Button Co. v. Heymsfeld, Inc.* (1915), 170 App. Div. 416, 156 N. Y. Supp. 223.

Where defendant, the proprietor of a syndicate business, sold it and the right to use his name to a corporation, he may be restrained from engaging under his own name in the same kind of business in the same city, as may also a corporation thereafter formed by him to which he gave a name so similar as to cause such confusion and mistake as to amount to unfair trade competition. *Wheeler Syndicate, Inc. v. Wheeler* (1917), 99 Misc. 289, 163 N. Y. Supp. 817.

Rule as to use and abuse of individual name, stated in *World's D. M. Ass'n. v. Pierce* (1911), 203 N. Y. 419, 96 N. E. 738.

Rule as to use of similar names calculated to deceive.—*Corning Glass Works v. Corning Cut Glass Co.* (1910), 197 N. Y. 173, 90 N. E. 449, *affg.* (1908), 126 App. Div. 919, 110 N. Y. Supp. 1125.

A domestic corporation engaged in the business of canning tomatoes in the city of Lockport, N. Y., as a rival of the "Lockport Canning Company" having its principal place of business in the town of Lockport, Niagara county, N. Y., will be restrained from using the name "Lock City Canning Company" on the ground that the other company has the exclusive right to its name in connection with its business. *Lockport Canning Co. v. Pusateri* (1913), 79 Misc. 293, 139 N. Y. Supp. 640.

The name "Gaynor Independent League," not so nearly resembling that of the membership corporation, "Independence League," as to be calculated to deceive; it may be accepted for recording with the proposed certificate of a membership corporation. *Rept. of Atty. Genl.* (1913), Vol. 2, p. 573.

Intent, fraud need not be proved. *Matter of U. S. Mortgage Co.* (1894), 83 Hun 572, 32 N. Y. Supp. 11.

Descriptive words cannot be appropriated. *Hygeia Water-Ice Co. v. N. Y. Hygeia Ice Co.* (1892), 47 N. Y. St. Rep. 71, 19 N. Y. Supp. 602, *affd.* (1893), 140 N. Y. 94, 35 N. E. 417.

Use of word "Company."—The application of the "American Cigar Lighter Company" for leave to change its corporate name to "Electric Cigar Lighter Company" denied, on the ground that the proposed name has not, as a part thereof, some word, abbreviation, affix or prefix thereto, which clearly indicates that the applicant is a corporation, as required by this section. *Matter of American Cigar Lighter Co.* (1912), 77 Misc. 643, 138 N. Y. Supp. 455. But see *Rept. of Atty. Genl.* Jan. 8, 1912. But prior to amendment of 1911 (chap. 638 of Laws of 1911) "Company" might have meant a corporation. *Moch Co. v. Security Bank* (1915), 166 App. Div. 121, 151 N. Y. Supp. 756, *dissenting opinion of Dowling, J.*

The use of the word "Limited" in a corporate name is in compliance with this section. *Rept. of Atty. Genl.* (1912) 65.

Name of religious corporation.—An application for an order restraining the operation of an order authorizing "The Polish Roman Catholic Church of the Holy Mother of the Rosary of Buffalo, N. Y.," incorporated under the laws of this state and its affairs conducted as an organization acting independently of the jurisdiction of the Roman Catholic Church, to change its name to "The Polish National

Catholic Church of the Holy Mother of the Rosary," must be denied. Matter of Baker (1916), 94 Misc. 661, 158 N. Y. Supp. 632.

A religious corporation which has adopted the name "The New Thought Church" cannot claim an exclusive right to the use of any such words, as they are neither peculiar, distinctive nor descriptive, but are all generic in character and of common use, and is not entitled *pendente lite* to enjoin another from conducting services under the name of "New Thought Church Services." New Thought Church v. Chapin (1913), 159 App. Div. 723, 144 N. Y. Supp. 1026.

Only corporate name to be used.—A company incorporated under the laws of this state is entitled to use only the corporate name stated in its certificate of incorporation. It may not do business under other corporate names. Rept. of Atty. Genl. Feb. 21, 1912; Carsdale Pub. Co. v. Carter (1909), 63 Misc. 271, 116 N. Y. Supp. 731.

The Public Service Commission has no authority to determine the respective rights of various corporations to use a certain corporate name. N. Y. Telephone Co. v. Pub. Ser. Com. (1913), 157 App. Div. 156, 141 N. Y. Supp. 1018.

Personal loan associations.—Since all personal loan associations must now be incorporated under the Banking Law, they are excepted from the prohibition contained in this section, and may make use of any words contained therein as part of their corporate title, unless prohibited by some other provision of law. Rept. of Atty. Genl. (1909) 318.

The prohibition contained in this section as to the use of the word "loan" has no application to a corporation formed under section 310 of the Banking Law. Rept. of Atty. Genl. (1909) 733.

Certificate of authorization to a foreign corporation, the name of which is not in conformity with this statute, should be issued permitting it to do business in this State only with an added affix or prefix conforming to the statute. Rept. of Atty. Genl. (1912) 9.

Remedy for erroneous filing.—Where the secretary of state does file and record a proposed certificate of a corporation with a name violating this section, relief will not be afforded to the aggrieved corporation under a writ of certiorari, as the action of the secretary of state is not conclusive and the aggrieved corporation has an adequate remedy by an action in equity. People ex rel. Columbia Chemical Co. v. O'Brien (1905), 101 App. Div. 296, 91 N. Y. Supp. 649.

Subscriptions to stock.—The fact that the secretary of state holds that the name of a proposed corporation is in violation of this section does not relieve subscribers to its stock from payment of their subscription after a corporation has been incorporated under a different name. Yonkers Gazette Co. v. Taylor (1898), 30 App. Div. 334, 51 N. Y. Supp. 969.

Injunction.—Chas. S. Higgins Co. v. Higgins Soap Co. (1895), 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, and cases cited. See also B. & P. O. of Elks v. Improved B. & P. O. of Elks (1908), 60 Misc. 223, 111 N. Y. Supp. 1067, *affd.* (1909), 133 App. Div. 929, 118 N. Y. Supp. 1094.

When injunction *pendente lite* will not be granted restraining use of individual name in business. See Schinasi v. Schinasi (1915), 169 App. Div. 887, 155 N. Y. Supp. 867.

It is the liability to deception and consequent injury which justifies the issuance of an injunction to restrain the use of a name; the court will not refuse relief because damage has not already been done. German-American Button Co. v. Heymsfeld, Inc. (1915), 170 App. Div. 416, 156 N. Y. Supp. 223.

The right to relief by injunction against the unfair and misleading use of a corporate name extends to benevolent, humane and charitable organizations incorporated under the laws of this state. Matter of Baker (1916), 94 Misc. 661, 158 N. Y. Supp. 632.

A membership corporation may maintain an action for an injunction restraining a

similar corporation from using the same or a similar name.—The right to relief by injunction against the unfair and misleading use of a corporate name is not confined to business corporations. *B. P. O. Elks v. Improved B. P. O. Elks* (1912), 205 N. Y. 459, 98 N. E. 756, L. R. A. 1915 B 1074.

Opinions of attorney-general.—Domestic corporations of the same name as foreign can file certificates with the secretary of state. *Rept. of Atty. Genl.* (1900) 212.

Certificate should not be granted authorizing a foreign company to do business in this state, where there is already a corporation in existence having a similar name. *Rept. of Atty. Genl.* (1904) 348.

§ 7. **Amended and supplemental certificates.**—If in the original or amended certificate of incorporation of any corporation, or if in a supplemental certificate of any corporation any informality exist, or if any such certificate contain any matter not authorized by law to be stated therein, or if the proof or acknowledgment thereof shall be defective, the corporators or directors of the corporation may make and file an amended certificate correcting such informality or defect or striking out such unauthorized matter; and the certificate amended shall be deemed to be amended accordingly as of the date such amended certificate was filed, and upon the filing of such an amended certificate of incorporation, the corporation shall then for all purposes be deemed to be a corporation from the time of filing the original certificate.

The supreme court may, upon due cause shown, and proof made, and upon notice to the attorney-general, and to such other persons as the court may direct, and upon such terms and conditions as it may impose, amend any certificate of incorporation which fails to express the true object and purpose of the corporation, so as to truly set forth such object and purpose.

When an amended or supplemental certificate is filed, an entry shall be made upon the margin of the index and record of the original certificate of the date and place of record of every such amended certificate.

The amendment of a certificate under this section shall be without prejudice to any pending action or proceeding, or to any rights previously accrued.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 7, as amended by L. 1892, ch. 687; originally revised from L. 1870, ch. 135.

Effect of section.—This section authorizes the filing of an amended certificate correcting any informality or defect in the original or amended or supplementary certificate of corporation; it does not authorize the filing by a railroad corporation of a certificate changing its route or terminus. *Matter of Riverhead Q. & S. R. R. Co.* (1899), 36 App. Div. 514, 55 N. Y. Supp. 938.

What may be included.—See *Matter of N. Y., L. & W. R. R. Co.* (1881), 25 Hun 556, *affd.* (1882), 88 N. Y. 279.

Amendment of a certificate of incorporation should only be allowed under this section where an informality exists. *Rept. of Atty. Genl.* (1911) 23. A void certificate cannot be cured by amendment; but an amended certificate attempting to amend a void certificate, if it satisfies all the statutory requirements, will be treated as an original certificate. *People ex rel. N. Y. etc., R. Co. v. Comrs.* (1903), 81 App. Div. 242, 81 N. Y. Supp. 20, *affd.* (1904), 175 N. Y. 516, 67 N. E. 1088.

The name of a corporation cannot be changed by an amended certificate except upon application to the court as provided in sections 60-65, *post*. Rept. of Atty. Genl. (1910) 410. But an error in spelling the corporate name may be corrected. Rept. of Atty. Genl. (1910) 408.

Amendment of charter of mercantile reporting company.—A corporation, originally organized under the Business Corporations Law for the purpose of conducting the business of a mercantile reporting company supplying merchants with financial reports as to the responsibility of customers at the date of such report is entitled to amend its certificate of incorporation so as to assume a responsibility to its clients for the accuracy of its reports and to provide the measure of damages in case they prove to be inaccurate, and not otherwise, the said damages not to exceed in any event the amount of credit extended by the client to the customer on whom the corporation has reported and not to exceed the amount of loss actually sustained by the client. *People ex rel. Daily Credit Service Corporation v. May* (1914), 162 App. Div. 215, 147 N. Y. Supp. 487, *affd.* (1914), 212 N. Y. 561, 106 N. E. 1032.

§ 8. Lost or destroyed certificates.—If either of the certificates of incorporation shall be lost or destroyed after filing, a certified copy of the other certificate may be filed in the place of the one so lost or destroyed and as of the date of its original filing, and such certified copy shall have the same force and effect as the original certificate had when filed.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 8, as amended by L. 1892, ch. 687; originally revised from L. 1888, ch. 306.

§ 9. Certificate and other papers as evidence; evidence of consolidation.—

1. The certificate of incorporation of any corporation duly filed shall be presumptive evidence of its incorporation, and any amended certificate or other paper duly filed or recorded relating to the incorporation of any corporation or its existence or management, and containing facts required or authorized by law to be stated therein, shall be presumptive evidence of the existence of such facts.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 9, as amended by L. 1892, ch. 687; originally a substitute for many former statutes.

References.—Certified copy evidence. Code. Civ. Pro. § 933. See *Matter of N. Y., L. & W. R. R. Co.*, 99 N. Y. 12 (1885), *affg.* 35 Hun 220.

Proof of corporate acts.—The acts of corporations may be proved in the same way as the acts of individuals. *Morse v. Averell* (1853), 10 N. Y. 449.

Parol testimony not competent to prove fact of incorporation. *Nicoll v. Clark* (1895), 13 Misc. 128, 34 N. Y. Supp. 159.

Purposes of corporation.—Certificate is presumptive evidence of particular purpose for which the corporation was organized. *Acker, Merrill & Condit v. Richards* (1901), 63 App. Div. 305, 71 N. Y. Supp. 929.

2. Whenever, by the laws of any other state or territory, or the dominion of Canada, a copy of the certificate of organization or incorporation or any other certificate, certified or exemplified by any officer or officers in such state or territory or dominion, is or shall be prima facie evidence of the due formation, creation, existence, organization or capacity of any corporation or joint-stock company, created, organized or located in such state, territory or dominion, or claiming so to be, such certificate or cer-

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tificates, duly exemplified, or a duly exemplified copy thereof, shall be received in all actions and proceedings in this state, in or before all courts and officers, with the same force and effect in all respects as prima facie evidence as aforesaid, as in such other state, territory or dominion.

Source.—L. 1877, ch. 311, § 1.

See *U. S. Vinegar Co. v. Foshrenbach* (1893), 74 Hun 425, 26 N. Y. Supp. 397, *affd.* (1895), 148 N. Y. 53, 42 N. E. 403; See *Rept. of Atty. Genl.* (1912) 353, 355.

3. Where two or more corporations have been or shall hereafter be consolidated and merged into a new corporation, a certificate of the secretary of state under his official seal concisely stating the names of the respective corporations consolidated, the dates of the filing of the certificates respectively of the incorporation of such corporations in his office, the object for which they were formed, including the nature and locality of their business as set forth in their respective incorporation papers on file in his office, the date of the filing of the consolidation agreement and other proceedings in his office, the name of the new corporation formed by such consolidation and merger, the term of its corporate existence, the place where its principal office is situated and the amount of its capital stock, shall be presumptive and prima facie evidence in all actions and special proceedings for all purposes of the incorporation of the corporations so consolidated, the incorporation of the new corporation by such consolidation and merger from the date of filing of said consolidation agreement and proceedings, and of the other facts so certified by him.

Source.—L. 1899, ch. 201, § 1.

§ 10. Limitation of powers; provisions of certificate.—1. No corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given.

2. The certificate of incorporation of any corporation may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 10, as amended by L. 1892, ch. 687, and L. 1895, ch. 672; originally revised from R. S., pt. 1, ch. 18, tit. 3, § 3. Last sentence added by L. 1895, ch. 672.

References.—See requirements for certificates of incorporation of corporations organized under chapters of consolidated laws, as Banking Law, Business Corporations Law, Insurance Law, Membership Corporations Law, Railroad Law, and Transportation Corporations Law.

Business corporations law to same effect.—This section substantially includes the provision contained in § 2 of the business corporations law as to the provisions of the certificate of a corporation in regard to the regulation of its business. *People ex rel. Barney v. Whalen* (1907), 119 App. Div. 749, 104 N. Y. Supp. 555, *affd.* (1907), 189 N. Y. 560, 82 N. E. 1131.

Corporate powers generally.—A corporation is an artificial entity created by law. Its powers, rights, obligations, duties and limitations are only those granted, permitted, allowed and prescribed by law. Its right to do business, to acquire, hold and dispose of property is that, and that only, conferred upon it by law. *Black v. Ellis* (1908), 129 App. Div. 140, 113 N. Y. Supp. 558, *affd.* (1910), 197 N. Y. 402, 90 N. E. 958; *Schwab v. Potter Co.* (1909), 194 N. Y. 409, 87 N. E. 670.

Strict construction.—*People ex rel. Third Ave. R. R. Co. v. Newton* (1889), 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174; *Stein v. Marks* (1904), 44 Misc. 140, 147, 89 N. Y. Supp. 921.

What powers are implied.—*Brooklyn Heights R. R. Co. v. City of Brooklyn* (1897), 152 N. Y. 244, 46 N. E. 509; *People ex rel. Tiffany v. Campbell* (1894), 144 N. Y. 166, 38 N. E. 990; *Legrand v. Manhattan Mercantile Assn.* (1880), 80 N. Y. 638; *O'Grady v. N. Y. Mut. Live-Stock Ins. Co.* (1897), 16 App. Div. 567, 44 N. Y. Supp. 946.

The power to borrow money to protect its assets is an incidental power of every corporation. *Hyde v. Equitable Life Assurance Soc.* (1908), 61 Misc. 518, 527, 116 N. Y. Supp. 219; *Jacobs v. Monaton R. I. Corp.* (1914), 212 N. Y. 48, 105 N. E. 968.

Powers not implied.—Those merely convenient and useful but not essential, having in view the nature and object of the incorporation. *Gause v. Commonwealth Trust Co.* (1909), 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967. One corporation cannot organize another. *Schwab v. Potter Co.* (1909), 194 N. Y. 409, 87 N. E. 670.

Doctrine of ultra vires.—History and limitations. *Bath Gas-Light Co. v. Claffy* (1896), 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *Kent v. Quicksilver Mining Co.* (1879), 78 N. Y. 159, 185; *Sheldon Hat-Blocking Co. v. Eickemeyer Hat-Blocking Co.* (1882), 90 N. Y. 607; *Rider Raft Co. v. Roach* (1884), 97 N. Y. 378; *Whitney Arms Co. v. Barlow* (1875), 63 N. Y. 62; *Nelligan v. Campbell* (1892), 47 N. Y. St. Rep. 576, 20 N. Y. Supp. 234; *Steinway v. Steinway & Sons* (1895), 17 Misc. 43, 40 N. Y. Supp. 718; *Brisay v. Star Co.* (1895), 13 Misc. 349, 35 N. Y. Supp. 99.

Ultra vires acts.—Accommodation indorsement. *Fox v. Rural Home Co.* (1895), 90 Hun 365, 35 N. Y. Supp. 896, *affd.* (1899), 157 N. Y. 584, 51 N. E. 1090; *Nat. Bank v. German-Am. Warehousing Co.* (1889), 116 N. Y. 281, 22 N. E. 567; *A. D. Farmer & Son Co. v. Humboldt Pub. Co.* (1899), 27 Misc. 314, 57 N. Y. Supp. 821; *Bacon v. Montauk Brewing Co.* (1909), 130 App. Div. 737; *Jacobus v. Jamestown Mantel Co.* (1914), 211 N. Y. 154. Insurance by publishing company. *Brisay v. Star Co.* (1895), 13 Misc. 349, 35 N. Y. Supp. 99. Speculative contracts by savings bank. *Jemison v. Citizens' Savings Bank* (1890), 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708.

A corporation cannot use its property to meet the individual obligations of its officers or stockholders; and this rule applies although the individual whose debt is paid is the owner of practically all the stock. *Republican Art Printery, Inc. v. David* (1916), 173 App. Div. 726, 159 N. Y. Supp. 1010.

An individual has no right to make use of a corporation owned by himself to pay his individual debts. Such a disposition of the assets of a corporation is not only *ultra vires* but forbidden by statute. *Republican Art Printery, Inc. v. David* (1916), 173 App. Div. 726, 159 N. Y. Supp. 1010.

Defense of ultra vires not available unless pleaded.—*Bacon v. Montauk Brewing Co.* (1909), 130 App. Div. 737, 115 N. Y. Supp. 617. Where *ultra vires* is predicated upon a foreign statute, the statute must be pleaded. *Strodl v. Farish-Staford Co.* (1911), 145 App. Div. 406, 130 N. Y. Supp. 35.

Injunction to restrain ultra vires business. *Burden v. Burden* (1896), 8 App. Div. 160, 40 N. Y. Supp. 499, *affd.* (1899), 159 N. Y. 287, 54 N. E. 17.

Distinction between corporations.—The courts, in considering the effect of *ultra*

vires acts, have always recognized the distinction between business and trading corporations and corporations whose purposes are largely fiduciary. *Gause v. Commonwealth Trust Co.* (1909), 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967.

Power foreign to charter.—*Jemison v. Citizens' Savings Bank* (1890), 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708.

Contracts within apparent scope of powers.—*Sistare v. Best* (1882), 88 N. Y. 527. When corporate contract is not on its face beyond the scope of corporate power, it will be presumed to be valid, in the absence of averment and proof to the contrary. *Jacobs v. Monaton R. I. Corp.* (1914), 212 N. Y. 48, 105 N. E. 968.

Estoppel of corporation from pleading ultra vires. *Bath Gas-Light Co. v. Claffy* (1896), 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *Linkauf v. Lombard* (1893), 137 N. Y. 417, 33 N. E. 472, 20 L. R. A. 948; *Woodruff v. Erie Railway Co.* (1883), 93 N. Y. 609; *Castle v. Lewis* (1879), 78 N. Y. 131; *Whitney Arms Co. v. Barlow* (1875), 63 N. Y. 62; *Cunningham v. Massena Springs, etc., R. R. Co.* (1892), 63 Hun 439, 18 N. Y. Supp. 600, *affd.* (1893), 138 N. Y. 614, 33 N. E. 1082; *Tonawanda R. R. Co. v. N. Y., L. E. & W. R. R. Co.* (1886), 42 Hun 496; *Metropolitan Trust Co. v. N. Y., L. E. & W. R. R. Co.* (1887), 45 Hun 84; *Peck v. Doran & Wright Co.* (1890), 57 Hun 343, 10 N. Y. Supp. 401; *Schurr v. N. Y. & Brooklyn Investment Co.* (1892), 45 N. Y. St. Rep. 645, 18 N. Y. Supp. 454; *Pocantico Water-Works Co. v. Low* (1897), 20 Misc. 484, 46 N. Y. Supp. 633.

Limitation on doctrine of estoppel.—Where the act or contract of a corporation is not within the scope of its powers to perform under any circumstances the doctrine of estoppel cannot be invoked to make it good. *Brisay v. The Star Company* (1895), 13 Misc. 349, 35 N. Y. Supp. 99; *Jemison v. Citizens Saving Bank* (1890), 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708.

Estoppel of person recovering benefits of contract.—*Diamond Match Co. v. Roerber* (1887), 106 N. Y. 473, 13 N. E. 419.

Estoppel of stockholders by lapse of time from questioning acts of corporation. *Warren v. Bigelow Blue-Stone Co.* (1893), 74 Hun 304, 26 N. Y. Supp. 649; *Sheldon Hat-Blocking Co. v. Eickemeyer Hat-Blocking Co.* (1882), 90 N. Y. 607. Where acts are neither *mala prohibita* nor *mala in se* and pecuniary benefits have been accepted thereunder, with knowledge. *Treadwell v. United Verde Copper Co.* (1909), 134 App. Div. 394, 119 N. Y. Supp. 112.

Agency.—The general rules of law relating to contracts and property rights apply to corporations as well as to individuals, and the principles of the law of agency apply to both alike; thus the stockholders may ratify the acts of its officers, although such acts were not within the power of its officers. *Martin v. Niagara Falls Paper Co.* (1890), 122 N. Y. 165, 25 N. E. 303; *Welch v. Importers and Traders Nat'l Bank* (1890), 122 N. Y. 177, 25 N. E. 269.

Construction of statutes vesting privileges in corporations.—It is a well established rule of construction of statutes vesting privileges in corporations that the specification of certain powers operates as a restraint to such objects only and is an implied prohibition of the exercise of other and distinct powers. *Rept. of Atty. Genl.* (1907) 291.

Authorized provisions.—A certificate of incorporation containing provisions that stockholders may be entitled to one vote irrespective of the number of shares they own, is proper. *Rept. of Atty. Genl.* (1910) 406.

Change of number of directors.—A provision in a certificate of incorporation that the number of directors fixed by the certificate shall not be changed except by the unanimous consent of all the stockholders is authorized by this section. *Ripin v. United States W. L. Co.* (1911), 71 Misc. 510, 130 N. Y. Supp. 20, *affd.* (1911), 145 App. Div. 916, 130 N. Y. Supp. 20, *affd.* (1912), 205 N. Y. 442, 98 N. E. 855.

Classification of directors.—Certificate may provide for the classification of di-

rectors and the term for which each class should hold office. *Bord v. Atlantic Terra Cotta Co.* (1910), 137 App. Div. 671, 122 N. Y. Supp. 425.

Right to vote.—Certificate of business corporation may divide stock into common and preferred and deny to preferred stockholders the right to vote in consideration of the preference. *People ex rel. Brown v. Koenig* (1909), 133 App. Div. 756, 118 N. Y. Supp. 136.

Unauthorized provisions.—The Secretary of State is not required to file under the Business Corporations Law a certificate of incorporation, which contains a provision that the stockholders, both present and future, will sell and deliver to it all milk produced upon their farms from cows owned or controlled by them, with the exception of milk consumed at home and that delivered to a cheese factory located in the vicinity of said farms. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 600.

Sale of all corporate property.—Provision in certificate that business corporation may sell its whole property by two-thirds vote is unauthorized. *People ex rel. Barney v. Whalen* (1907), 119 App. Div. 749, 104 N. Y. Supp. 555, *affd.* (1907), 189 N. Y. 560, 82 N. E. 1131.

Provisions in certificate limiting right to vote on certain questions.—The Secretary of State is not required to file a certificate of incorporation which provides that the stockholders of record are not entitled to vote upon (a) the question whether any of the premises owned by the corporation shall be sold, exchanged, mortgaged, leased or otherwise disposed of or encumbered, and the terms and conditions upon which such sale, exchange, mortgage, lease or other disposition shall be effected; and (b) the question whether the business of the corporation shall be discontinued, and its affairs liquidated and its assets converted into cash and disposed of according to law, and placing the disposition of these questions in the hands of the holders of certificates of indebtedness of the corporation to be issued by it after its organization, for such provisions are not authorized by law. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 238.

See generally *Ripin v. U. S. Woven Label Co.* (1912), 205 N. Y. 442, 98 N. E. 855, cited under section 26 of the Stock Corporation Law.

§ 11. **Grant of general powers.**—Every corporation as such has power, though not specified in the law under which it is incorporated:

1. [*Right of succession.*] To have succession for the period specified in its certificate of incorporation or by law, and perpetually when no period is specified.

Reference.—Extension of existence. Section 37 post.

Construction.—This section and section 12 have always been understood as having no reference to the internal affairs or business transactions of corporations, but as intended to limit each corporation to the general business for which it was incorporated. *Moses v. Soule* (1909), 63 Misc. 203, 118 N. Y. Supp. 410.

2. [*Seal.*] To have a common seal, and alter the same at pleasure.

References.—May be impressed. General Construction Law, § 43. If seal is not adopted, seal of officers is deemed corporate seal. *Id.* 45.

Contracts valid though not sealed. *Hoag v. Lamont* (1875), 60 N. Y. 96; *Leinkauff v. Calman* (1888), 110 N. Y. 50, 17 N. E. 389; *Whitford v. Laidler* (1883), 94 N. Y. 145. The corporate seal, when attached to an agreement, constitutes prima facie evidence that the agreement was signed by authority; but the presumption may be rebutted. *Gause v. Commonwealth Trust Co.* (1908), 124 App. Div. 438, 108 N. Y. Supp. 1080, *affd.* (1909), 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967; *Logan v. Fidelity-Phenix F. Ins. Co.* (1914), 161 App. Div. 404, 146 N. Y. Supp. 678.

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3. [*Acquisition and disposition of property.*] To acquire by grant, gift, purchase, devise or bequest, to hold and to dispose of such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law.

Limitation on power to take by devise or bequest. See Decedent Estate Law, §§ 17-20.

Sub. cited.—Matter of Bogart (1899), 43 App. Div. 582, 60 N. Y. Supp. 496; Matter of Morgan (1907), 56 Misc. 235, 244, 107 N. Y. Supp. 393; Rector, etc., of St. George's Church v. Morgan (1915), 88 Misc. 702, 152 N. Y. Supp. 497.

4. [*Officers and agents.*] To appoint such officers and agents as its business shall require, and to fix their compensation, and

References.—Directors. Stock Corporation Law, § 25. Other officers. Stock Corporation Law, § 30, and cases cited. Inspectors of election. Stock Corporation Law, § 31.

Executive committee or directors may be appointed. Sheridan Electric Light Company v. Chatham Nat'l Bank (1891), 127 N. Y. 517, 23 N. E. 467.

5. [*By-laws.*] To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, if it has any, and the calling of meetings of its members. Such by-laws may also fix the amount of stock, which must be represented at meetings of the stockholders in order to constitute a quorum, unless otherwise provided by law. By-laws duly adopted at a meeting of the members of the corporation shall control the action of its directors. No by-law adopted by the board of directors regulating the election of directors or officers shall be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election. Subdivisions four and five of this section shall not apply to municipal corporations.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 11, as amended by L. 1892, ch. 687, and L. 1895, ch. 672.

References.—Directors may make by-laws. Section 34, post. May adopt at special election. Section 30, post. By-laws may prescribe powers and duties of officers. Stock Corporation Law, § 30. Manner of appointing inspectors, Id. § 31. Manner of transferring stock, Id. §§ 50, 51. May require action of directors to be taken by more than a majority of a quorum. Section 43, post.

"By-laws."—The term "by-laws" may be used generically to include constitution, by-laws, rules and regulations. The corporate will is expressed through its by-laws which may be considered as the expression of its continued will, subject to the power to alter or amend unless that power is limited by law or by contract. Thompson v. Wyandanch Club (1911), 70 Misc. 299, 127 N. Y. Supp. 195. The distinction between authority to make a by-law and that to incorporate the agreement of the incorporators in the certificate of incorporation is marked and matters may be incorporated in the certificate which could not be provided for by by-law. Ripin v. U. S. Woven Label Co. (1912), 205 N. Y. 442, 98 N. E. 855.

Power to amend.—While every corporation has a right to make and change its by-laws in a manner not inconsistent with law, it cannot impair the obligation of outstanding contracts, or impose upon a party contracting obligations which he never assumed. Rockwell v. Knights Templar, etc., Assn. (1909), 134 App. Div. 736, 119 N. Y. Supp. 515.

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Injunction against amendment.—A meeting at which it is proposed to amend by-laws will not be enjoined where it does not appear that anything proposed to be done at the meeting will be injurious to the interests of the corporation or its stockholders. *Gilleran v. Springfield, etc., Soc.* (1914), 161 App. Div. 597, 146 N. Y. Supp. 828.

The term "existing law" as used in this subdivision refers not only to statutes but also to the decisions of the courts. *Raub v. Gerken* (1908), 127 App. Div. 42, 44, 111 N. Y. Supp. 319.

Force of by-laws.—*Presb. Church v. Mayor* (1826), 5 Cow. 538; *McDermott v. Board of Police* (1857), 5 Abb. Pr. 422.

In nature of corporate act.—Can only be enacted within state under whose law corporation is organized. *Mitchell v. Vermont Copper Mining Co.*, 40 N. Y. Super. Ct. 406, *affd.* (1876), 67 N. Y. 280.

Must be reasonable.—*People ex rel. Gray v. Medical Soc.* (1857), 24 Barb. 570; *Matthews v. Associated Press* (1893), 136 N. Y. 333, 32 N. E. 981.

By-laws are private regulations.—By-laws of business corporations are as to third persons private regulations binding as to the corporation and its members or third persons having knowledge of them, but of no force to limit the liability of the corporation for acts of its agents within apparent scope of their authority. *Rathbun v. Snow* (1890), 123 N. Y. 343, 349, 25 N. E. 379, 10 L. R. A. 355.

Publication requisite as to certain by-laws.—By-laws relating to election of directors is invalid unless published, and directors elected pursuant thereto are not entitled to administer the affairs of the company. *Matter of Empire State Supreme Lodge* (1907), 53 Misc. 344, 103 N. Y. Supp. 465, *affd.* (1907), 118 App. Div. 616, 103 N. Y. Supp. 1124.

Failure to adopt by-law for election of directors.—If a by-law for the election of directors has not been adopted and published as provided by this section, a valid election may, however, be held under §§ 28 and 29 on the call of any member of the corporation. *Matter of David Jones Co.* (1893), 67 Hun 360, 22 N. Y. Supp. 318.

Vested rights cannot be impaired by by-laws. *Kent v. Quicksilver Mining Co.* (1879), 78 N. Y. 159.

Membership may be restricted by by-law. *People v. Holstein-Friesian Assn.* (1886), 41 Hun 439; *People v. Franciscus Benevolent Soc.* (1862), 24 How. Pr. 216.

Ordinary engagements of officers cannot be restricted by by-laws, so as to affect persons having no knowledge of the limitation. *Rathbun v. Snow* (1890), 123 N. Y. 349, 25 N. E. 379, 10 L. R. A. 355.

Authority to execute contract.—A by-law providing that no contract shall be made "by any officer" unless authorized by the board of directors refers only to such contracts as would be made by an officer, and does not limit the authority of a managing agent intrusted with the sale of the company's securities to make a contract verbally authorized by those controlling the corporation as an incident to the sale. *Sherman v. Dwight* (1910), 138 App. Div. 595, 123 N. Y. Supp. 89.

By-law requiring member to join in strike.—By-laws of a society which forbid a member to work at his trade at such price as he chooses to accept and compel him to join in a strike are void as against public policy. *People v. Benevolent Society* (1875), 3 Hun 361.

By-law imposing a fine upon members of a milk association for not furnishing a certain quantity of milk held void. *Monroe Dairy Ass'n v. Webb* (1899), 40 App. Div. 49, 57 N. Y. Supp. 572.

When member may have by-law declared void.—*Thomas v. M. M. P. Union* (1890), 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175.

By-law objected to by minority stockholder.—A minority stockholder of a manufacturing corporation is not entitled to have a new by-law annulled and set aside on the claim that it is unreasonable and beyond the corporate powers when it

appears that the by-law deals to a large extent with the ordinary business of the corporation and is not void as a whole, and it does not appear that the trustees have threatened any specific act in subversion of the charter to the injury of stockholders. *Burden v. Burden* (1899), 159 N. Y. 287, 54 N. E. 17.

Expulsion of director.—In the absence of any specific statutory authority or provision in the articles of incorporation, or in the by-laws duly adopted by the stockholders, the directors of a business corporation have no power to expel a fellow-director from the board, and hence, no power to pass a valid amendment to the by-laws under which the directors may assume to exercise that power. *Raub v. Gerken* (1908), 127 App. Div. 42, 111 N. Y. Supp. 319.

By-law regulating transfer of stock.—The provisions of this section authorizing a corporation to make by-laws regulating the transfer of its stock only authorize the corporation to prescribe the officers by whom the stock shall be transferred and the mode of its transfer; they do not authorize an imposition upon the stock of a penalty limiting the unconditional right of transferring it. *Kinnan v. Sullivan Country Club* (1898), 26 App. Div. 213, 50 N. Y. Supp. 95. See also *Driscoll v. West Bradley, etc., Co.* (1874), 59 N. Y. 96. But a by-law which provides that a stockholder shall not sell his stock without first giving a stated period within which the corporation and the other stockholders may have opportunity to purchase, is permissible. *Moses v. Soule* (1909), 63 Misc. 203, 118 N. Y. Supp. 410, *affd.* (1909), 136 App. Div. 904, 120 N. Y. Supp. 1136. And a by-law which provides that stock is transferable only on the books of the company cannot prevent the passing of legal and equitable title where the certificate of stock is indorsed in blank and delivered. *Union Bank v. U. S. Exchange Bank* (1911), 143 App. Div. 128, 127 N. Y. Supp. 661.

Modification of salary by-law.—A by-law of a corporation fixing the salary of its president may be validly modified by an agreement whereby the president accepts a lower salary in consideration of being continued in office. *Bowler v. American Box Strap Company* (1898), 22 Misc. 335, 49 N. Y. Supp. 153.

By-law fixing quorum.—The power granted the corporation to prescribe by its by-laws the amount of stock which must be represented at a meeting of the stockholders to constitute a quorum is expressly limited to acts where it is not otherwise provided by law; it is therefore held that a by-law requiring a majority of the stockholders to be present in order to constitute a quorum did not apply to the election of directors since § 20 of the stock corporation law provides that they should be elected by a plurality of the votes of the stockholders voting at the election. *Matter of Rapid Transit Ferry Co.* (1897), 15 App. Div. 530, 44 N. Y. Supp. 539.

Restriction of members of press association from receiving news covering same territory, held valid. *Matthews v. Associated Press* (1893), 136 N. Y. 333, 32 N. E. 981.

Right of corporation to purchase its own stock cannot be considered among the prohibitions prescribed by this section. *Moses v. Soule* (1909), 63 Misc. 203, 118 N. Y. Supp. 410, *affd.* (1909), 136 App. Div. 904, 120 N. Y. Supp. 1136.

A by-law which provides for the repayment of the amount paid by a shareholder in a stock corporation to the corporation upon his shares, when he resigns from the company, is invalid. *Picalora v. Gulf Co-operative Co.* (1910), 68 Misc. 331, 123 N. Y. Supp. 980.

By-laws may control the actions of directors. *Levin v. Mayer* (1914), 86 Misc. 116, 149 N. Y. Supp. 112.

Section cited.—*Matter of N. Y. Electrical Workers' Union v. Sullivan* (1907), 122 App. Div. 764, 107 N. Y. Supp. 886.

§ 12. Enlargement of limitations upon the amount of the property of

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nonstock corporations.—If any general or special law heretofore passed, or any certificate of incorporation, shall limit the amount of property a corporation other than a stock corporation may take or hold, such corporation may take and hold property of the value of ten million dollars or less, or the yearly income derived from which shall be one million dollars or less, notwithstanding any such limitations. In computing the value of such property, no increase in value arising otherwise than from improvements made thereon shall be taken into account. (*Amended by L. 1909, ch. 276 and L. 1911, ch. 581.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 12, as added by L. 1892, ch. 687, and amended by L. 1894, ch. 400; originally revised from L. 1889, ch. 191, as amended by L. 1890, ch. 553, but broadened in its scope.

References.—Non-stock corporation defined. See §§ 2, 3, ante.

Debts to be deducted in estimating value of property which corporation can hold. *Wetmore v. Parker* (1873), 52 N. Y. 450.

Right of religious corporation to hold income of trusts as its absolute property; not restricted to payment of salaries of clergy.—Under a bequest to the trustees of the Diocesan Convention of New York of a sum in trust to invest and reinvest the same and pay over the income to the St. George's Protestant Episcopal Church in the city of New York, a religious society incorporated in 1811 and having all the powers granted under the present Religious Corporations Law, for the support of the ministry of said church, said corporation is entitled to hold the income from said trust fund as its absolute property and to use it for any and all of its lawful purposes, and is not restricted to the payment of the salaries of the clergy. *Rector, etc., of St. George's Church v. Morgan* (1915), 88 Misc. 702, 152 N. Y. Supp. 497.

Section cited.—*Matter of Morgan* (1907), 56 Misc. 235, 244, 107 N. Y. Supp. 393.

§ 13. **Acquisition of additional real property.**—When any corporation, except a life insurance corporation, shall have sold or conveyed any part of its real property, the supreme court may, notwithstanding any restriction of a general or special law, authorize it to purchase and hold from time to time other real property, upon satisfactory proof that the value of the property so purchased does not exceed the value of the property so sold and conveyed within the three years next preceding the application.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 13, as amended by L. 1892, ch. 687, and L. 1906, ch. 228; originally revised from L. 1882, ch. 290. The amendment of 1906 inserted the exception of life insurance corporations.

§ 14. **Acquisition of property without the state.**—Any domestic corporation transacting business in other states or foreign countries may acquire and dispose of such property as shall be requisite for such corporation in the convenient transaction of its business. Any domestic corporation establishing or maintaining a charitable, philanthropic or educational institution within this state may also carry on its work and establish or maintain one or more branches of such institution or an additional institution or additional institutions in any other state, the District of Columbia or in any part of the territories or dependencies of the United States of America or in any foreign country and for either of said purposes may take by devise or bequest, hold, purchase, mortgage, sell and convey or

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otherwise dispose of such real and personal property without this state as may be requisite therefor. But nothing in this section contained shall be construed as exempting from taxation property to any additional amount than is now allowed to such corporation under existing laws. .

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 14, as amended by L. 1892, ch. 687, and L. 1903, ch. 178; originally revised from L. 1872, ch. 146, as amended by L. 1883, ch. 361. The amendment of 1903 added all of the section after the first sentence.

Power dependent on will of foreign state or country. *Demarest v. Flack* (1891), 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854. See § 15 and notes.

§ 15. **Certificate of authority of a foreign corporation.**—No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "title," "casualty," "surety," "fidelity," "bonding," "savings," "investment," "loan," or "benefit," as a part of its name. (*Amended by L. 1917, ch. 594, in effect May 21, 1917.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 15, as added by L. 1892, ch. 687, and amended by L. 1901, chs. 96, 538, and L. 1904, ch. 490.

Note.—The consolidators recommended that a clause should be added as follows:

"If any such corporation, having authority to do business in this state, shall apply to remove into the United States court any action brought against it in any court of this state, by a domestic corporation or a resident of this state, where the cause of action arose within this state, its authority to transact business in this state shall cease, and the secretary of state shall revoke the certificate of authority of any such corporation to do business in this state, and notify such corporation to discontinue transacting business in this state when it shall appear to him that the corporation has made such application, and thereafter such corporation shall discontinue transacting business in this state."

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References.—Foreign corporation defined, § 3, ante. License fees to be paid by foreign corporation, Tax Law, § 181. Actions by and against foreign corporations, see Code Civ. Pro. §§ 1779–1780. Unlawful use of corporate name, Penal Law, § 666. Unauthorized use of term “bank,” “savings,” etc., Id. § 302. Prohibition against use of sign or word indicating bank, Banking Law, § 141, use of word “savings,” Id. § 279. Restriction as to use of name by insurance corporation, Insurance Law, § 10.

Power of state to require certificate.—Phila. Fire Assn. v. New York (1886), 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. 108; Christian Union v. Yount (1879), 101 U. S. 352, 25 L. ed. 88; Bank of Augusta v. Earle (1839), 13 Pet. (U. S.) 519, 10 L. ed. 274; Pembina Mining Co. v. Penn. (1888), 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. 737; Norfolk R. R. Co. v. Penn. (1890), 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958; Charlotte R. R. Co. v. Gibbs (1891), 142 U. S. 386, 391, 35 L. ed. 1051, 12 Sup. Ct. 255; Minn. R. R. Co. v. Beckwith (1888), 129 U. S. 26, 28, 32 L. ed. 585, 9 Sup. Ct. 207; Horn Silver Mining Co. v. New York (1891), 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. 403; People v. Formosa (1892), 131 N. Y. 478; Demarest v. Flack (1891), 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854.

Application.—Section applies only to foreign stock corporations other than moneyed corporations. South Bay Co. v. Howey (1906), 113 App. Div. 382, 98 N. Y. Supp. 909, revd. on other grounds (1907), 190 N. Y. 240, 83 N. E. 26; Strout Farm Agency v. Hunter (1914), 85 Misc. 476, 480, 148 N. Y. Supp. 924.

The provisions of this section prohibit actions in this state by foreign stock corporations doing business here without being licensed to do so relates only to actions upon contracts made in this state. Bremer v. Ring (1911), 146 App. Div. 724, 131 N. Y. Supp. 487.

Activities in this state insufficient to make out the transaction of business within the meaning of this section of the General Corporation Law and kindred statutes may yet be sufficient to bring a corporation within the state so as to render it amenable to process. Tanza v. Susquehanna Coal Co. (1917), 220 N. Y. 259, 115 N. E. 915, affg. (1916), 174 App. Div. 866, 159 N. Y. Supp. 1145. International Text Book Co. v. Tone (1917), 220 N. Y. 313, 318, 115 N. E. 914, revg. (1914), 162 App. Div. 930, 147 N. Y. Supp. 1117.

Purpose.—The purpose of the statute is not to restrict trade, drive business energy outside the limits of the state or to facilitate the repudiation of contract obligations and it is not merely a revenue device, but its legitimate purpose is to protect our own corporations from unfair competition on the part of foreign corporations coming within this state to do business by making them equally amenable to our laws with domestic corporations. Angidile Computing Scale Co. v. Gladstone (1914), 164 App. Div. 370, 149 N. Y. Supp. 807; System Co. v. Advertiser's Cyc. Co. (1910), 121 N. Y. Supp. 611; Wood & Schick v. Ball (1907), 190 N. Y. 217, 83 N. E. 21.

The intent of this section is to prohibit a foreign corporation from engaging in business in this state without obtaining a license and to prohibit the maintenance of any action on a contract made in this state in violation of the provisions of this section; it prohibits both the making of a contract, and an action thereon until the statute has been complied with. Portland Co. v. Hall & Grant Construction Co. (1907), 121 App. Div. 779, 106 N. Y. Supp. 649.

It is the policy of the State, no matter what the penalty is for disobedience of that policy, to keep foreign corporations from doing business here without a license. Opinion of Attorney General (1917), 10 State Dept. Rep. 492.

“It is manifest that it is the policy of the state of New York that a business corporation should obtain a certificate from the secretary of state that it is authorized to do business in that state, and that no such license shall be given to any corporation having a name so similar to that of a domestic corporation as to

cause confusion." *Mutual Export & Import Corporation v. Mutual Export & Import Corporation of America* (1917), 241 Fed. 137.

Corporations entitled to certificate.—*Demarest v. Flack* (1891), 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; *U. S. Vinegar Co. v. Schlegel* (1894), 143 N. Y. 537, 38 N. E. 729.

Regulation of foreign corporations.—The transactions of a foreign corporation doing business in this state are dependent upon our statute law and generally, in the absence of a statutory rule, upon the rule of comity. *Martyne v. American Union Fire Ins. Co.* (1915), 216 N. Y. 183, 110 N. E. 502, affg. (1915), 168 App. Div. 380, 153 N. Y. Supp. 433.

Compliance is a condition precedent to the right of a foreign stock corporation to do business in this state. "The procuring of a license must precede the transaction of business or the contracts of the corporation are not lawful." *Wood & Selick v. Ball* (1907), 190 N. Y. 217, 83 N. E. 21; *Bean v. Flint* (1912), 204 N. Y. 153, 97 N. E. 490.

Where the defendant corporation was and for many years has been doing business in this state and has been licensed so to do, the court, under section 1780(4) of the Code of Civil Procedure, has jurisdiction of the action though plaintiff had never procured authority to do business in this state. *Barney v. Smith Car Co. v. Bliss Co.* (1917), 100 Misc. 21, 164 N. Y. Supp. 800.

Inadvertence in procuring certificate no excuse.—The failure to procure a certificate required by this section is available by an individual in an action brought against him by a foreign corporation, although it appears that the foreign corporation had paid its license fee to the state treasurer and that its failure to procure the certificate was the result of inadvertence. *Emmerich Co. v. Sloane* (1905), 108 App. Div. 330, 95 N. Y. Supp. 39, 1129.

Contract made before procuring certificate.—It was held in *Neuchatel Asphalt Co. v. Mayor* (1898), 155 N. Y. 373, 49 N. E. 1043, that such a contract might be thereafter enforced if a certificate was obtained before commencing action; but the amendment of 1901 expressly supersedes this decision. The case of *Dunbarton Flax Spinning Co. v. Greenwich & J. Ry. Co.* (1903), 87 App. Div. 21, 83 N. Y. Supp. 1054, decided since the amendment, seems to be erroneous. The rule is correctly stated as follows: A foreign corporation cannot maintain an action in the courts of this state unless it procures from the secretary of state, prior to the making of the contract upon which the action is brought, a certificate authorizing it to do business in his state; it is not sufficient that the corporation procure the required certificate prior to the commencement of the action on the contract. *South Amboy Terra Cotta Co. v. Poerschke* (1904), 45 Misc. 358, 90 N. Y. Supp. 333.

Under this section as it existed prior to the amendment made by ch. 538 of the Laws of 1901, a foreign stock corporation could, upon obtaining the necessary certificate, enforce a contract made in the course of business transacted by it before procuring such certificate. The amendment of 1901 modified the law so that no such foreign corporation could maintain an action in this state upon a contract unless "prior to the making of such contract it shall have procured such certificate." It was held that if this amendment was intended to affect the right of action upon a contract made prior to the taking effect of such act, it was to that extent unconstitutional as impairing the obligation of a contract. *Lewis Publishing Co. v. Lenz* (1903), 86 App. Div. 451, 83 N. Y. Supp. 841.

State not to contract with unlicensed corporation.—When a foreign corporation not licensed to do business in this State has deposited with its proposal for the construction of a State highway, a certain check under its special agreement with the State, the State Commission of Highways may retain the deposit as the agreement is valid. *Opinion of Attorney General* (1917), 10 State Dept. Rep. 492.

Assigned contract.—It was formerly held that the section did not apply to the assignee of a foreign corporation. *O'Reilly, Skelly and Fogarty Co. v. Greene* (1896), 18 Misc. 423, 41 N. Y. Supp. 1056, and the case seems to have been followed in *Boxwood & Lining Co. v. Vicennes Paper Co.* (1904), 45 Misc. 1, 90 N. Y. Supp. 836, *affd.* (1904), 98 App. Div. 623, 90 N. Y. Supp. 1089; but the amendment of 1901 seems to supersede these cases.

Effect of compliance.—A foreign corporation which has obtained a certificate to do business in this state is entitled to the equal protection of our laws. *People ex rel. Browning, King & Co. v. Stover* (1911), 145 App. Div. 259, 130 N. Y. Supp. 92, *affd.* (1911), 203 N. Y. 613, 96 N. E. 1126. It places the corporation on the same basis as a domestic corporation. *Lancaster v. Amsterdam Improvement Co.* (1894) 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; but it does not make it a legal resident within the meaning of § 984 of the Code of Civil Procedure relating to the place of commencing actions in a county in which one of the parties resides. *Shepard & Morse Lumber Co. v. Burleigh* (1898), 27 App. Div. 99, 50 N. Y. Supp. 135.

Where a foreign railroad corporation was authorized to do business in the State, pursuant to section 15 of the General Corporation Law, and has officers residing here and has a local bank account, its certificate never having been revoked, it is presumed to be subject to service of a summons in this State in the absence of clear and convincing proof on its part that it is not transacting business here. A foreign corporation by being admitted to do business here becomes entitled to all the rights and subject to all the liabilities of a domestic corporation. *Burke v. Galveston, Houston and Henderson R. R. Co.* (1916), 173 App. Div. 221, 159 N. Y. Supp. 379.

A State officer should not enter into a contract with a foreign corporation not licensed to do business in this State. *Opinion of Attorney General* (1917), 10 State Dept. Rep. 492.

When foreign corporation exempted from compliance with statute.—A foreign corporation owing no debt to this state for its corporate existence, having its place of business in and conducting its business from another state, except as it may use incidental and very limited agencies in this state for the sale of its goods, may properly be exempted from regulations, restrictions and burdens which with justice would be imposed on a foreign corporation coming into our state and taking advantage of its protection and laws for the purpose of here prosecuting its business under the same general methods and perhaps to the same degree as in the state where it was organized. *Hovey v. DeLong Hook & Eye Co.* (1914), 211 N. Y. 420, 105 N. E. 667.

Unless a foreign corporation is engaged in business within the state it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable the court to say that the corporation is here, and when once it is here it may be served. The jurisdiction does not fall because the cause of action sued upon has no relation in its origin to the business here transacted. *Tanza v. Susquehanna Coal Co.* (1917), 220 N. Y. 259, *affg.* (1916), 115 N. E. 915, 174 App. Div. 866, 159 N. Y. Supp. 1145.

The power of a state to exclude a foreign corporation is subject to the limitation that freedom of interstate commerce is not to be impaired. Such a corporation may come here without a license when the purposes of interstate business require its presence, and statutes calling for a license will be construed in subordination to that rule. *International Text Book Co. v. Tone* (1917), 220 N. Y. 313, 115 N. E. 914, *revg.* (1914), 162 App. Div. 930, 147 N. Y. Supp. 1117.

"Doing business"; (a) what constitutes, in general.—Ordinary and not incidental business meant. *Kline Bros. & Co. v. German Union Fire Ins. Co.* (1911), 147

App. Div. 790, 132 N. Y. Supp. 181, *affd.* (1913), 210 N. Y. 534, 103 N. E. 1125. Having places of business and carrying on or pursuing business or objects within this state. *Fresno Homes Packing Co. v. Tude & Skidmore* (1908), 60 Misc. 79, 82, 113 N. Y. Supp. 1132, *affd.* (1909), 132 App. Div. 930, 117 N. Y. Supp. 1134; *Angldile Computing Scale Co. v. Gladstone* (1914), 164 App. Div. 370, 149 N. Y. Supp. 807. Implies corporate continuity of conduct in the state. *Penn. Collieries Co. v. McKeever* (1905), 183 N. Y. 103, 75 N. E. 935, 2 L. R. A. (N. S.) 127; *Lederwerke v. Capitelli* (1915), 92 Misc. 269, 155 N. Y. Supp. 651; *Haddam Granite Co. Inc. v. Brooklyn Heights R. R. Co.* (1909), 131 App. Div. 685, 116 N. Y. Supp. 96.

The subletting to different tenants, of a building in the city of New York leased to a foreign corporation under a lease delivered in this state, constitutes "doing business in this state." *Cassidy's Limited v. Rowan* (1917), 99 Misc. 274, 163 N. Y. Supp. 1079.

(b) *Illustrative cases.*—Having office in this state and making contracts therein to supply labor and material in construction of elevators in buildings in the state. *Portland Co. v. Hall & Grant Const. Co.* (1907), 121 App. Div. 779, 106 N. Y. Supp. 649. Employing district manager in this state to take charge of ordinary and usual business without limitation as to territory. *Chicago Crayon Co. v. Slattery* (1910), 68 Misc. 148, 123 N. Y. Supp. 987. Goods sold and delivered in this state is *prima facie* evidence. *Warner Instrument Co. v. Sweet* (1909), 65 Misc. 57, 119 N. Y. Supp. 166. Manufacturing and selling in this state. *South Bay Company v. Howey* (1907), 190 N. Y. 240, 83 N. E. 26. Maintenance of numerous offices within the state, employment of superintendents in charge of such offices who have power to employ and dismiss assistants, the giving of instruction at such offices and keeping bank accounts within the state. *International Textbook Co. v. Connelly* (1910), 67 Misc. 49, 124 N. Y. Supp. 603. Having an office in this state for the sale of land in a foreign state, where the transactions relating to the agreement of sale take place in this state. *Mahar v. Harrington Park Villa Sites* (1911), 146 App. Div. 756, 131 N. Y. Supp. 514, *revd.* on other grounds (1912), 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210.

(c) *What does not constitute.*—Having neither capital invested nor an office for the transaction of business in this state, but selling and delivering goods by an agent doing a commission business in this state under an agreement terminable by either party on sixty days' notice. *Lederwerke v. Capitelli* (1915), 92 Misc. 269, 155 N. Y. Supp. 651; *Brown Seed Co. v. Richardson* (1907), 53 Misc. 520, 103 N. Y. Supp. 243; *Crummer Co. v. Associated Mfrs. Ins. Co.* (1901), 67 App. Div. 151, 73 N. Y. Supp. 668, *affd.* (1903), 173 N. Y. 633, 66 N. E. 1106; *Waller v. Rothfield* (1901), 36 Misc. 177, 73 N. Y. Supp. 141. Consigning goods to persons in this state who sell them in their own names as factors, collect the proceeds and personally account for same. *Bertha Zink & Mineral Co. v. Clute* (1894), 7 Misc. 123, 27 N. Y. Supp. 342. Maintaining salesroom in this state where only samples are kept, taking orders here addressed to home office, whence goods were shipped to buyer in this state. *Burrows Co. v. Caplin* (1908), 127 App. Div. 317, 111 N. Y. Supp. 498. Having no office in this state but shipping goods from its factory to customers in this state, upon orders sent by its agents and customers. *Vaughn Machine Co. v. Lighthouse* (1901), 64 App. Div. 138, 71 N. Y. Supp. 799; *Acom Brass Mfg. Co. v. Rutenberg* (1911), 147 App. Div. 533, 132 N. Y. Supp. 600; *Hargraves Mills v. Harden* (1890), 25 Misc. 665, 56 N. Y. Supp. 937. Procuring orders in this state subject to approval at the home office. *St. Albans. Beef Co. v. Aldridge* (1906), 112 App. Div. 803, 99 N. Y. Supp. 398; *Page Co. v. Sherwood* (1911), 146 App. Div. 618, 131 N. Y. Supp. 322; *American Case & Register Co. v. Griswold* (1910), 68 Misc. 379, 125 N. Y. Supp. 4, *revd.* (1911), 143 App. Div. 207, 128 N. Y. Supp. 206. The making of contract in this state, no sales being made or business done. *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*

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(1903), 41 Misc. 242, 84 N. Y. Supp. 38, *affd.* (1903), 87 App. Div. 633, 84 N. Y. Supp. 1121; *Singer Mfg. Co. v. Granite Spring Water Co.* (1910), 66 Misc. 595, 123 N. Y. Supp. 1088. Occasional shipments of goods to this state pursuant to orders taken by agents in this state. *Novelty Tufting Machine Co. v. Hutkoff* (1907), 56 Misc. 522, 107 N. Y. Supp. 88. Making two sales in this state. *Ozark Cooperage Co. v. Quaker City Cooperage* (1906), 112 App. Div. 62, 98 N. Y. Supp. 113. Single transaction. *Penn Collieries Co. v. McKeever* (1905), 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127; *Haddam Granite Co. Inc. v. Brooklyn Heights R. R. Co.* (1909), 131 App. Div. 685, 116 N. Y. Supp. 96; *Mahar v. Harrington Park Villa Sites* (1911), 146 App. Div. 756, 131 N. Y. Supp. 514, *revd.* on other grounds 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210. *Kline Bros. & Co. v. German Union Fire Ins. Co.* (1911), 147 App. Div. 790, 132 N. Y. Supp. 181, *affd.* (1913), 210 N. Y. 534, 103 N. E. 1125. Delivering and installing furnaces in this state under contract in form of proposition made in this state but accepted in foreign state. *White Furnace Co. v. Miller Transfer Co.* (1909), 131 App. Div. 559, 115 N. Y. Supp. 625; *N. Y. Architectural Terra Cotta Co. v. Williams* (1905), 102 App. Div. 1, 92 N. Y. Supp. 808, *affd.* (1906), 184 N. Y. 579, 77 N. E. 1192. Mere owning and leasing real estate in this state held for investment. *Singer Mfg. Co. v. Granite Spring Water Co.* (1910), 66 Misc. 595, 123 N. Y. Supp. 1088. Disposition of capital stock. *Southworth v. Morgan* (1911), 143 App. Div. 648, 652, 128 N. Y. Supp. 196, *revd.* on other grounds (1912), 205 N. Y. 293, 98 N. E. 490. Disposing of stocks and bonds of foreign corporation and borrowing upon its obligations in this state. *Union Trust Co. v. Sickels* (1908), 125 App. Div. 105, 109 N. Y. Supp. 262; *Commercial Coal Co. v. Polhemus* (1908), 128 App. Div. 247, 112 N. Y. Supp. 646. Application for insurance mailed to home office and policy mailed from there to this state. *Stone v. Penn Yan K. P. & B. Ry. Co.* (1910), 197 N. Y. 279, 90 N. E. 843; *Huntington v. Sheehan* (1912), 206 N. Y. 486, 100 N. E. 41.

Where plaintiff, a foreign corporation, engaged in the business of giving instruction by correspondence, has no place of business within this state but agents only, whose sole duty is to solicit pupils whose applications for membership must be sent to the home office for acceptance, no contracts being closed here and no instruction given in this state, the subscribers receiving their instruction from text books, papers and letters sent from the home office, such corporation is engaged in interstate commerce and is not within the purview of this section of the General Corporation Law prohibiting an action by a foreign corporation upon any contract made by it within this state unless before the making of the contract it has procured from the secretary of state the certificate prescribed by law. *International Text Book Co. v. Tone* (1917), 220 N. Y. 313, 115 N. E. 914, *revg.* (1914), 162 App. Div. 930, 147 N. Y. Supp. 1117.

Maintenance of office in this state.—It is not necessary that a foreign corporation maintain an office in this state in order to transact business here and to come within the prohibition of this section. *Woodridge Heights Construction Co. v. Gippert* (1915), 92 Misc. 204, 155 N. Y. Supp. 363.

The "principal office" of a foreign corporation, at which a notice of claim for personal injuries may be served under the Labor Law, is not synonymous with its principal place of business which it is required to designate in its certificate filed in this State under the General Corporation Law, and parol evidence is admissible to show where its principal office is. *Mason & Hanger Co. v. Sharon* (1916), 231 Fed. 861.

The defendant maintains an office in this state under the direction of a sales agent, with a number of salesmen, and with clerical assistants, and through these agencies systematically and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York. To do these things is to do business within this state in such a sense and in such a degree as to subject

the corporation doing them to the jurisdiction of our courts. *Tanza v. Susquehanna Coal Co.* (1917), 220 N. Y. 259, affg. (1916), 115 N. E. 915, 174 App. Div. 866, 159 N. Y. Supp. 1145.

Presumption as to place of sale.—Where a complaint by a foreign corporation for goods sold is silent as to the place of sale, it is to be presumed that the sale was made and completed in a foreign state and a denial in the answer of any knowledge or information as to whether the plaintiff was duly incorporated or was lawfully doing business within the state presents no defense. *Aiken, Lambert & Co. v. Haskins* (1899), 27 Misc. 629, 59 N. Y. Supp. 486, affd. (1900), 48 App. Div. 638, 63 N. Y. Supp. 1104.

The place where the alleged contract was made is not an immaterial allegation in a motion for a dismissal of a complaint where it is shown that the plaintiff, a foreign corporation, is doing business in the State of New York and sues upon a contract made in the State of New York; compliance with this section is a part of the cause of action. *Warner Instrument Co. v. Sweet* (1909), 65 Misc. 57, 119 N. Y. Supp. 166.

Contracts and actions not within terms of section.—Made without the state. *Am. Broom & Brush Co. v. Addickes* (1897), 19 Misc. 36, 42 N. Y. Supp. 871; *Novelty Mfg. Co. v. Connell* (1895), 88 Hun 254, 34 N. Y. Supp. 717; *Tallapoosa Lumber Co. v. Holbert* (1896), 5 App. Div. 559, 39 N. Y. Supp. 432; *Shelby Steel Tube Co. v. Burgess Gun Co.* (1896), 8 App. Div. 444, 40 N. Y. Supp. 871; *Batchelder & Lincoln Co. v. Knopf* (1900), 54 App. Div. 329, 66 N. Y. Supp. 513; *Aiken, Lambert Co. v. Haskins* (1899), 27 Misc. 629, 59 N. Y. Supp. 486, affd. (1900), 48 App. Div. 638, 63 N. Y. Supp. 1104; *Hargraves Mills v. Harden* (1898), 25 Misc. 665, 56 N. Y. Supp. 937. Made before Dec. 31, 1892. *Providence Steam Co. v. Connell* (1895), 86 Hun 319, 33 N. Y. Supp. 482; *Atlantic Construction Co. v. Krenslor* (1899), 40 App. Div. 268, 57 N. Y. Supp. 983. Replevin action. *American Typefounders Co. v. Conner* (1894), 6 Misc. 391, 26 N. Y. Supp. 742. Judgment creditors' action. *Schlitz Co. v. Ester* (1895), 86 Hun 22, 33 N. Y. Supp. 143, affd. (1899), 157 N. Y. 714, 53 N. E. 1126. Enjoining use of trade name. *Hoerel Sandblast Machine Co. v. Hoerel* (1915), 167 App. Div. 548, 153 N. Y. Supp. 35. Action by foreign insurance company to compel agent to account for premiums. *Factors Fire Ins. Co. v. Whilden* (1915), 92 Misc. 558, 156 N. Y. Supp. 362. Note made in another state. *Gt. Northern Moulding Co. v. Bonewvir* (1908), 128 App. Div. 831, 113 N. Y. Supp. 60.

Where in an action against several defendants, one of which is a foreign corporation, a levy was made upon the property of defendants under a warrant of attachment, and defendants recovered judgment in the action, they, notwithstanding that the corporation defendant has not obtained leave to do business within this state, may maintain an action upon the undertaking given to obtain the attachment to recover the damages caused thereby. *Sterling Manufacturing Co. v. National Surety Co.* (1916), 94 Misc. 604, 149 N. Y. Supp. 979.

Mechanic's lien.—A foreign corporation not authorized to transact business in the state may file a mechanic's lien against the owner of a house in the state in the construction of which its goods have been used, where it appears that the goods were delivered by it within the state to a domestic corporation, which in turn furnished them to the owner. *Matter of Simonds Furnace Company* (1900), 30 Misc. 209, 61 N. Y. Supp. 974.

Appointment of receiver.—A non-resident stockholder of an insolvent foreign corporation of which a receiver has been appointed in the state of its domicile, and which has never obtained the certificate required by this section, may, under §§ 1811 and 1812, of the Code of Civil Procedure (now §§ 307 and 308 of this chapter), maintain an action to procure the appointment of an auxiliary receiver

for its property in this state. *Walter v. F. E. McAllister Co.* (1897), 21 Misc. 747, 48 N. Y. Supp. 26.

Penalty for failure to procure certificate.—The only penalty which is prescribed by the General Corporation Law for a disregard of this provision is contained in the same section, viz., that no such corporation "shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate." The latter provision does not wholly invalidate a contract the only infirmity in which is the disability on the part of a foreign corporation to sue thereon in this state. It remains a valid and effective instrument in all other respects. The statute imposes only on a foreign corporation, which has not complied with these provisions, the penalty of being unable to maintain any action upon a contract made by it; such penalty is not imposed upon the other party to the contract. *Mahar v. Harrington Park Villa Sites* (1912), 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210.

Where a receiver of a foreign corporation which had never obtained a certificate authorizing it to do business in this state completed a contract which had previously been made by the corporation, a complaint in an action by assignees of the receiver to recover the agreed price should be dismissed, because of the failure of the corporation to obtain a certificate. *Meyers v. Spangenberg & McLean Co.* (1909), 65 Misc. 475, 120 N. Y. Supp. 174.

Effect of failure to procure on mortgage.—Failure of a foreign corporation to obtain a certificate to do business in this State does not invalidate a mortgage upon its property. *In re Heffron Co.* (1914), 216 Fed. 642.

Valid attachment by foreign corporation requires affidavit of procurement of certificate. *Sawyer Lumber Co. v. Bussell* (1895), 84 Hun 114, 31 N. Y. Supp. 1107.

Liability of stockholders of foreign corporation, enforcement in this state, when not allowable. *Marshall v. Sherman* (1895), 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757; *Cleveland, Lorain, etc., R. R. Co. v. Kent* (1895), 87 Hun 329, 34 N. Y. Supp. 427.

Injunction.—A foreign corporation cannot be restrained from doing any business in this state on the ground that it has not obtained a certificate authorizing it to transact business. *Motor Boat Pub. Co. v. Motor Boating Co.* (1907), 57 Misc. 108, 107 N. Y. Supp. 468.

Where a foreign corporation fails to comply with the statute and a domestic corporation adopts a similar corporate name and establishes a good business thereunder, it is entitled to an injunction restraining the foreign corporation from using its name within this state, even though both parties were innocent of any wrong purpose. *Mutual Export & Import Corporation v. Mutual Export & Import Corporation of America* (1917), 241 Fed. 137.

Action may be maintained in federal courts.—The contract cannot be enforced in the state courts and that is the only penalty prescribed. However, since the Court of Appeals of the state has not held such a contract void, the federal courts will enforce such a contract until such construction has been placed upon it by the state courts or the Legislature enacts a law declaring such contracts void. *Johnson v. New York Breweries Co.* (1910), 178 Fed. 513; *New York Breweries Co., Limited v. Johnson* (1909), 171 Fed. 582; *Richmond Cedar Works v. Buckner* (1910), 181 Fed. 424; *Groten Bridge & Mfg. Co. v. American Bridge Co.* (1907), 151 Fed. 871.

A failure to take out a license does not prohibit a foreign corporation from bringing a suit in equity in the federal courts to enjoin the use of its corporate name by a New York corporation. Nor is such a suit precluded in the state courts. *United States L. & H. Co. of Me. v. U. S. L. & H. Co., of N. Y.* (1910), 181 Fed. 182.

The only penalty imposed by the statute upon a foreign corporation for failure to procure a license to do business in this state is that it cannot recover upon contracts made in New York. *Mutual Export & Import Corporation v. Mutual Export & Import Corporation of America* (1917), 241 Fed. 137.

Non-compliance with section no shield against supervision.—The fact that a foreign corporation has failed to file the necessary certificate to do business within the state cannot be interposed by it as a shield against proper supervision. *People ex rel. Solomon v. Brotherhood of Painters* (1915), 169 App. Div. 595, 155 N. Y. Supp. 438, revd. (1916), 218 N. Y. 115, 112 N. E. 752.

Non-compliance no defense in action against foreign corporation.—This section was not enacted for the benefit of foreign corporations. If a corporation fails to obtain the license required it cannot take advantage of its failure to obey the statute to defeat an action brought against it in this state. *Gaul v. Kiel & Arhe Co.* (1910), 199 N. Y. 472, 92 N. E. 1069.

The only penalty imposed by this section for failure to obtain authority to transact business in this state is that the offending corporation shall not maintain any action to enforce its contracts. Where such a corporation has been made a defendant it may litigate any question arising out of the transaction that has been made the basis of the complaint. *Jones v. Wells Fargo Express Co.* (1914), 83 Misc. 508, 145 N. Y. Supp. 601.

Failure of foreign incorporated college to register.—Sureties for the rent of a room leased to a student by a foreign incorporated college cannot escape liability because the college is not registered in this state. *President & Fellows of Harvard College v. Kempner* (1909), 131 App. Div. 488, 116 N. Y. Supp. 437.

Recovery on counterclaim where corporation is defendant.—The provisions of this section prohibiting a foreign corporation maintaining an action in this state upon any contract made by it in this state until it shall have procured a certificate of authority, does not prevent a foreign corporation, doing business in the state of New York without having procured such certificate, from recovering in a suit brought against it in this state upon a counterclaim growing out of the transaction upon which the plaintiff sues. *Alsing v. New England Quartz Co.* (1901), 66 App. Div. 473, 73 N. Y. Supp. 347, *affd.* (1903), 174 N. Y. 536, 66 N. E. 1110.

Compliance with section in obtaining certificate; how established.—Compliance with this section in an action by a foreign corporation is sufficiently established by an allegation that the plaintiff "was then and still is duly authorized to do business in the State of New York." *United Building Material Co. v. Odell* (1910), 67 Misc. 584, 125 N. Y. Supp. 1148, *affd.* (1910), 141 App. Div. 921, 126 N. Y. Supp. 1148.

A foreign stock corporation doing business in this state must allege and prove that it had obtained the license to do business provided by this section, prior to the making of the contract upon which the action is brought, and if it fails to do this, neither it nor the assignee can maintain any action on such contract. Proof of compliance with this section must be made by the plaintiff and in that respect it differs from proof of non-compliance with section 181 of the Tax Law, providing for a license tax on foreign corporations which is a matter of defense and must be pleaded and proved by the defendant. *Manufacturers' Commercial Co. v. Blitz* (1909), 131 App. Div. 17, 115 N. Y. Supp. 402.

Pleading; complaint in action in contract.—The requirement that a money corporation shall not do business within this state without first having procured a certificate of compliance with the requirements of law, and prohibiting such corporation from maintaining any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured said certificate, is a condition precedent to the right of such corporation

lawfully to do business in this state; and an allegation in the complaint that the condition precedent has been performed is essential in order to set forth a cause of action. *Wood & Selick v. Ball* (1907), 190 N. Y. 217, 83 N. E. 21, affg. (1906), 114 App. Div. 743, 100 N. Y. Supp. 119; *Portland Co. v. Hall & Grant Construction Co.* (1908), 123 App. Div. 495, 496, 118 N. Y. Supp. 821.

The procuring of the certificate is a condition precedent to the right to do business, and must therefore be alleged in the complaint and proven as part of the plaintiff's case. *Schnaier & Co. v. Grigsby* (1909), 132 App. Div. 854, 117 N. Y. Supp. 455, affd. (1910), 199 N. Y. 577, 93 N. E. 1125.

The provision of this section, preventing a foreign corporation, not authorized to do business in this state, from bringing an action upon a contract made here, must be pleaded. *Barney & Smith Car Co. v. Bliss Co.* (1917), 100 Misc. 21, 164 N. Y. Supp. 800.

It is error to dismiss the complaint, before evidence is taken, in an action on a promissory note brought by a foreign corporation against a domestic corporation on the ground that there is no allegation that the plaintiff was authorized to do business in this state within the provisions of this section, although the note set forth was payable at a bank in this state, if there be no allegation of the time and place of its delivery, the consideration, or where the transaction out of which it arose took place, or that the plaintiff is doing business in this state or has any office therein. *Alpha Portland C. Co. v. Schratwieser F. C. Co.* (1911), 146 App. Div. 571, 131 N. Y. Supp. 142.

Where, in an action by a foreign corporation for goods sold in another state, neither the complaint nor the answer alleges that the plaintiff was doing business in this state, or that the goods were sold or delivered therein, the dismissal of the complaint, on the ground that plaintiff was doing business within the state and had not obtained the certificate required by section 15 of the General Corporation Law, is error. *Stafford Manufacturing Co. v. Newman* (1912), 75 Misc. 636, 133 N. Y. Supp. 1073.

Where neither the complaint nor the answer in an action for rent alleged that the plaintiff's assignor, a foreign corporation, was doing in this State, evidence offered by defendant, that the corporation was doing business at the time of the execution of the lease without having the certificate required by section 15 of the General Corporation Law, is properly excluded. *Singer Sewing Machine Co. v. Foster* (1912), 75 Misc. 641, 133 N. Y. Supp. 1072.

Where the allegations of a complaint in an action on contract, that plaintiff is a foreign corporation and duly authorized to do business in this state, is specifically denied by the answer, it will be assumed that plaintiff is a stock corporation, in the absence of allegation and proof on the point, and plaintiff cannot recover without both pleading and proving its compliance with sections 15 and 16 of the General Corporation Law. *Strout Farm Agency v. Hunter* (1914), 85 Misc. 476, 148 N. Y. Supp. 924.

Where the complaint of a foreign stock corporation in an action on contract fails to allege, as required by this section, that prior to the making of the alleged contract plaintiff procured a certificate of its compliance with all requirements of law to authorize it to do business in this state, a motion for the dismissal of the complaint should be granted. *Talmage's Sons Co. v. American Dock Co.* (1916), 93 Misc. 535, 157 N. Y. 445.

Failure to procure certificate as defense.—There seems to be considerable conflict in the authorities as to the necessity of an affirmative allegation in the complaint that the certificate has been procured, and as to the manner in which a defendant may take advantage of the failure to procure it. The earlier cases all held that failure to comply with section 15 is a matter of affirmative defense and need not be alleged in complaint. *O'Reilly, Skelly & Fogarty Co. v. Greene* (1896), 17 Misc. 302,

40 N. Y. Supp. 360, *affd.* (1896), 18 Misc. 423, 41 N. Y. Supp. 1056; *Abram French Co. v. Marx* (1894), 10 Misc. 384, 31 N. Y. Supp. 122; *Nicoll v. Clark* (1895), 13 Misc. 128, 34 N. Y. Supp. 159; *Aiken, Lambert & Co. v. Haskins* (1899), 27 Misc. 629, 59 N. Y. Supp. 486, *affd.* (1900), 48 App. Div. 638, 63 N. Y. Supp. 1104; and the bringing of an action in the state by a foreign corporation is not evidence that the contract upon which the action is based was made in the state. *Lukens Iron & Steel Co. v. Payne* (1897), 13 App. Div. 11, 42 N. Y. Supp. 376.

Upon an application by a foreign corporation doing business in this state for an order of arrest, the moving papers need not show affirmatively that the corporation has complied with the provisions of § 181 of the Tax Law relative to the payment of a license fee and the obtaining of a receipt therefor. The above section and § 181 of the Tax Law are mere revenue regulations, compliance with which is made necessary in order to acquire the right to do business here and to enforce causes of action in our courts. They may possibly be matters of defense, but are not essential to be stated as part of the cause of action, or right to sue. The objection of non-compliance, if available at all, should be raised by demurrer or by answer as the case demands, and if raised by neither is deemed to have been waived. *Parmele Co. v. Haas* (1902), 171 N. Y. 579, 64 N. E. 440, *revg.* (1902), 67 App. Div. 457, 73 N. Y. Supp. 986.

The defendant in an action brought by a foreign corporation cannot raise the objection that the plaintiff has failed to obtain a certificate of authority as required in the above section unless the defense is affirmatively set forth in the answer. An averment that the defendant has no knowledge or information sufficient to form a belief as to whether or not the plaintiff is a foreign corporation is not sufficient to permit of proof as to the failure to obtain such certificate. *International Bank v. Dennis* (1902), 76 App. Div. 327, 78 N. Y. Supp. 497.

The complaint in an action brought by a foreign stock corporation upon a contract made in this state which does not allege compliance with this section as to obtaining a certificate of authority to do business is demurrable. *Welsbach Co. v. Norwich Gas & Electric Co.* (1904), 96 App. Div. 52, 89 N. Y. Supp. 284, *affd.* (1906), 180 N. Y. 533, 72 N. E. 1152.

In an action by a foreign corporation a defendant must show, in order to succeed upon the plea that the plaintiff was not authorized to do business within the state, that the plaintiff was doing such business and that the contract sued on was so made in the state. *St. Albans Beef Co. v. Aldridge* (1906), 112 App. Div. 803, 99 N. Y. Supp. 398.

If a complaint fails to allege that the corporation has complied with this section the defense is available on a motion for non-suit after the evidence is in. *Wood & Selick v. Ball* (1906), 114 App. Div. 743, 100 N. Y. Supp. 119, *affd.* (1907), 190 N. Y. 217, 83 N. E. 21; superseding *Wright & Co. v. Falkner* (1906), 52 Misc. 100, 101 N. Y. Supp. 807.

Where a party, suing upon a contract made in this state, alleges that it is a foreign corporation, there is a presumption that it is a foreign stock corporation. *Portland Co. v. Hall & Grant Construction Co.* (1908), 123 App. Div. 495, 496, 108 N. Y. Supp. 821.

A complaint in an action by a foreign corporation is not demurrable for failure to allege compliance with this section unless it appears on its face that the foreign corporation was doing business in this state, and that it made the contract sued upon in this state. Where it does not appear upon the face of the complaint that the plaintiff was doing business in this State, or that it made the contract sued upon in this State, and there is no allegation of compliance with this section, but such facts develop from the proof on the trial, and the plaintiff, having complied with the statute, offered in evidence a certificate from the Secretary of State to that effect, which was received, and no motion made to strike it out, the

trial court has no power, after taking the case from the jury, to strike out the certificate admitted and dismiss the complaint for failure to comply with the statute. *Frick Company v. Pultz* (1914), 162 App. Div. 209, 147 N. Y. Supp. 732.

Where a complaint in an action by a foreign corporation to recover the purchase price of goods sold in this State does not allege that the plaintiff is a foreign stock corporation "doing business" in this State, and does not show upon its face that it comes within the provisions of this section, it is the duty of the defendants, if they wish to rely upon the statutory defense, to plead the necessary facts. They may not plead defects in the goods delivered and then upon the trial assert the statute as a defense. *Angildile Computing Scale Co. v. Gladstone* (1914), 164 App. Div. 370, 149 N. Y. Supp. 807.

Waiver of failure to comply.—In an action by a foreign corporation against a like corporation, upon a contract made in this state, the defendant may waive its right to object to the jurisdiction of the court on the ground that plaintiff has never procured authority to do business in this state and defendant's disclaimer of any intention to move for a dismissal of the case for lack of jurisdiction is a waiver of any such right of objection. *Barney & Smith Car Co. v. Bliss Co.* (1917), 100 Misc. 21, 164 N. Y. Supp. 800.

Demurrer, when objection appears on face of complaint.—Before the obtaining of a certificate becomes a material fact in connection with an action, two things must concur, the corporation must be a foreign stock corporation, other than a moneyed corporation, doing business in this state, and the contract which is the basis of the action must have been made within the state. If the existence of these conditions precedent appears upon the face of the complaint, then such complaint is demurrable unless it contains a further allegation that the provisions of the statute above referred to have been complied with. *Acorn Brass Mfg. Co. v. Rutenberg* (1911), 147 App. Div. 533, 132 N. Y. Supp. 600.

Unlawful use of trade name.—If a foreign corporation by reason of careless and unlawful conduct has lost the right to protect its own name, conversely its competitor should be granted an injunction to prevent the use of a name which is misleading. A foreign corporation may restrain the use by a domestic corporation of a trade name similar to its own when such name is chosen by the domestic corporation with notice of the name and business of the foreign corporation, even though the latter has obtained no authorization to do business in New York. *Mutual Export & Import Corporation v. Mutual Export & Import Corporation of America* (1917), 241 Fed. 137.

Section cited.—*People ex rel. Scott v. Reid* (1909), 135 App. Div. 89, 119 N. Y. Supp. 866; *People v. American Ice Co.* (1910), 135 App. Div. 180, 120 N. Y. Supp. 41.

§ 16. **Proof to be filed before granting certificate.**—Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter of certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice-president or other acting head, particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the state and such designation

must specify such office or place of business of the said person so designated, and if it is within a city the street and street number if any, or other suitable designation of the particular locality. Such designation shall be accompanied with the written consent of the person designated and shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state or until the filing in the same office of a written revocation of said consent executed by the person so designated. If the person so designated dies or removes from the place where the corporation has its principal place of business within the state, or files such revocation of his consent, and the corporation does not within thirty days after such death or removal or revocation of consent designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation, may, after such death or removal, or revocation of consent, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him. The secretary of state may require the execution of any such designation, revocation or consent, to be authenticated as he deems proper and he may refuse to file it without such authentication.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 16, as added by L. 1892, ch. 687, and amended by L. 1895, ch. 672; Code Civ. Pro. § 432, subd. 2, in part, incorporated.

References.—See § 15, and notes. Service of process on foreign corporation, Code Civ. Pro. § 432. Service of summons by publication, Id. §§ 438, 439. Superintendent of banks to receive service of process against foreign banking corporation, Banking Law, § 28. Superintendent of insurance to receive service of process against foreign insurance corporation, Insurance Law, § 30.

Purpose.—The purpose of this section, construed with the preceding section, is that when a foreign corporation, "doing business in this state," in competition with domestic corporations, has made a contract within this state, it will be denied the aid of our courts in its enforcement unless it has complied with the statute and has become, in practical effect, a domestic corporation for all purposes. In return for the privilege of suing upon local contracts in the courts of this state the foreign corporation must place itself in a situation where it can be sued with legal convenience within this state. *Eclipse Silk Mfg. Co. v. Hiller* (1911), 145 App. Div. 568, 129 N. Y. Supp. 879.

Pleading and proof.—Where the allegation of a complaint in an action on contract, that plaintiff is a foreign corporation and duly authorized to do business in this state, is specifically denied by the answer, it will be assumed that plaintiff is a stock corporation, in the absence of allegation and proof on the point and plaintiff cannot recover without both pleading and proving its compliance with this section and section 15. *Strout Farm Agency v. Hunter* (1914), 85 Misc. 476, 148 N. Y. Supp. 924.

By filing proof a corporation does not change its residence. *Douglas v. Phenix Ins. Co.* (1893), 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118; *Shepard & Morse Lumber Co. v. Burleigh* (1898), 27 App. Div. 99, 50 N. Y. Supp. 135. And it will be estopped to deny that it is not a corporation and that its designation of a person to receive service is a nullity. *Wolski v. Booth & Flinn, Ltd.* (1916), 93 Misc. 651, 157 N. Y. Supp. 294.

Statement as to principal place of business.—The statement of a foreign corporation seeking to obtain permission to do business here that its principal place of business in this state is the city of Ogdensburg, in the county of St. Lawrence, and that the person designated upon whom process may be served within this state has an office at No. 82 Ford street, in the city of Ogdensburg, is a sufficient compliance with this section. Rept. of Atty. Genl. (1912) 57.

The designation of two persons in the alternative so that process may be served upon either of them greatly facilitates the service of papers upon a corporation and satisfies every requirement of the statute. Rept. of Atty. Genl. (1909) 293.

Revocation of certificate.—Where a person, designated by a foreign corporation pursuant to this section upon whom service of process may be made, has been absent from home for a period of over thirty days, the secretary of state may revoke the certificate of such foreign corporation, if it appear that the person designated has departed with an intent to evade the statute. Rept. of Atty. Genl. (1908) 166.

Effect of revoking appointment.—A foreign corporation which was duly doing business in this state in full compliance with the provisions of this section and subsequently withdrew, revoking the appointment of its agent and removing its office and property from the state, by its continuance of an action commenced before its withdrawal, does not so continue its business within this state so as to make it subject to a suit commenced by service upon the secretary of state. *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.* (1907), 150 Fed. 666.

Right to annul a charter of a foreign corporation for violation of the statutes of this state.—There seems to be no authority conferred upon the secretary of state to revoke a certificate issued to a foreign corporation to do business in this state except for failure to designate a person named in certain contingencies upon whom process may be served. Nor is it necessary that a special act of the Legislature be passed to annul the right of such a corporation to transact business in this state under the certificate issued to it by the secretary of state. Since the action is authorized in behalf of the state to redress violations of our statutes by the foreign corporation having no right to do business within this state, except by license from it which it may grant or revoke at will, it may well be argued that when the Legislature authorized an action to be brought on account of such violation, the court may, on proof of showing willful, systematic, and continued violations of our laws annul or declare a forfeiture of the right of the corporation to do business here, following and adopting, by analogy, the remedy prescribed in an action against a domestic corporation for violation of its corporate rights or any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers. See General Corporation Law, sections 131, 134. *People v. American Ice Co.* (1910), 135 App. Div. 180, 120 N. Y. Supp. 41.

Presumption as to continuance of business.—Where the certificate issued to a foreign corporation has not been revoked, and it has officers residing in this state and a local bank account, it is presumed to be subject to service of a summons in this state in the absence of clear and convincing proof on its part that it is not transacting business here. *Burke v. Galveston, etc., R. Co.* (1916), 173 App. Div. 221, 159 N. Y. Supp. 379.

Agency of person designated not limited to actions arising out of business transacted in this state.—Where a foreign corporation doing business in this state

has designated a person as an agent upon whom process against the corporation may be served as provided in the statute the agency of such person is not limited to actions which arise out of business transacted in this state. Where the plaintiff is a resident of this state the service of a summons upon such agent for a cause of action arising in another state is valid and is not an invasion of the rights of the corporation guaranteed by the Federal Constitution. *Bagdon v. Philadelphia & Reading Coal and Iron Co.* (1916), 217 N. Y. 432, 111 N. E. 1075, revg. (1915), 170 App. Div. 594, 156 N. Y. Supp. 847.

Personal service of summons.—In an action in this state for personal injuries suffered by the plaintiff in Pennsylvania while an employee of defendant foreign corporation, personal service of the summons within this state upon the person designated by the defendant should not be set aside. *Smolik v. Pennsylvania & Reading Coal & Iron Co.* (1915), 222 Fed. 148.

Personal service on cashier, director or managing agent.—Where a designation of a person upon whom service of the summons in an action against a foreign corporation may be made as provided by this section is not in force, or if neither the person designated nor an officer specified in section 432(1) of the Code of Civil Procedure can be found with due diligence, and the corporation has property within this state, etc., personal service of the summons may be made by delivering a copy thereof to the cashier, a director, or a managing agent of the corporation within the state. *Jackson v. Schuylkill Silk Mills* (1915), 92 Misc. 442, 156 N. Y. Supp. 219.

The Code of Civil Procedure contemplates that before service of a summons is made on the managing agent of a foreign corporation diligent efforts should be made to serve the officers of the corporation or its designated agent. Service upon the managing agent can be resorted to only after efforts to reach the corporation more directly have failed. Therefore, service upon agents of receivers of a foreign railroad corporation was properly set aside on the ground that the papers do not show that the plaintiff could not in the exercise of due diligence have made service on the receivers within this state. *Gursky v. Blair* (1916), 318 N. Y. 41, 112 N. E. 431, revg. (1915), 170 App. Div. 976, 155 N. Y. Supp. 1111.

Service to make discovery concerning property.—It is not sufficient service of the order in supplementary proceedings, by which a foreign corporation is required to make discovery on oath concerning its property, to deliver such order to a person designated by the corporation as required by this section, but such service must be made in accordance with section 2452 of the Code upon an officer of the corporation. *Matter of Meyer v. Consolidated Ice Co.* (1909), 196 N. Y. 471, 90 N. E. 54, affg. (1909), 132 App. Div. 265, 116 N. Y. Supp. 906.

Notice under employers' liability act may be served upon a foreign corporation at its principal place of business within this state. *Sherman v. Mason & Hanger Co.* (1914), 162 App. Div. 327, 147 N. Y. Supp. 609 (1914).

Statute of limitations.—A foreign corporation, which has designated a person in this state upon whom service of summons may be made, may take advantage of the defense of the statute of limitations. *Wehrenberg v. N. Y., New Haven & H. R. R. Co.* (1908), 124 App. Div. 205, 108 N. Y. Supp. 704.

Failure to designate person to receive service as provided by this section; effect on right to serve director. See *Kowalchek v. Buck Run Coal Co.* (1916), 173 App. Div. 653, 160 N. Y. Supp. 98. **Failure to file designation.** *Tansa v. Susquehanna Coal Co.* (1917), 220 N. Y. 259, 115 N. E. 915, affg. (1916), 174 App. Div. 866, 159 N. Y. Supp. 1145.

Section cited.—*Portland Co. v. Hall & Grant Construction Co.* (1907), 121 App. Div. 779, 106 N. Y. Supp. 649; *American Oil & Supply Co. v. Western Gas Construction Co.* (1917), 239 Fed. 505.

§ 17. **Reincorporation of foreign moneyed corporations.**—Any moneyed corporation duly organized by or under the laws of any state of the United States, and having an office or doing business in this state, may file, if a banking corporation or authorized to make loans upon pledges or deposits, in the office of the superintendent of banks, and if an insurance corporation in the office of the superintendent of insurance, the documents described in section eighteen of this chapter, and such documents shall be recorded as original certificates of incorporation are required by law to be recorded. The fees for filing and recording such documents, together with the tax, if any, required by law to be paid before the incorporation of a domestic company of the same class, must be paid before filing.

Source.—L. 1900, ch. 733, § 1.

References.—Licenses for foreign banking corporations, Banking Law, § 144; rights and privileges under licenses, Id. § 146; when foreign banking corporation may transact business in this state, Id. § 145. Certificate of authority for foreign insurance corporations, Insurance Law, § 50; certificates of authority of agents, Id. §§ 31, 32; deposit of securities, funds and capital, Id. §§ 26, 27; restrictions as to business, Id. §§ 25, 56; charter and verified statement to be filed, Id. § 29.

§ 18. **Papers to be filed upon reincorporation.**—The documents to be filed by any such corporation shall include,

1. A copy of its charter, certificate of incorporation, or other document constituting it a body corporate, with such amendments, if any, as are desired by the corporation or are required by the laws of New York, authenticated as an original certificate of incorporation is required to be authenticated;

2. A declaration of its desire to become a corporation of this state and of its submission to the laws of this state, duly executed by the authority of the body in which its corporate powers are vested.

3. A certificate of the superintendent of that department in which these papers are filed that the charter, certificate of incorporation or other constituent document, with its proposed amendments, if any, as filed, is in all respects consistent with the laws of this state relating to domestic corporations of the same class; that the corporation applicant has complied with all conditions imposed by its laws upon domestic corporations of the same class beginning business in this state, with the exception of any provisions concerning the residence of a majority of the incorporators, trustees, or directors of such corporation; that its name is not the same with the name of any domestic corporation, nor likely to be confounded with any such name, and that it has paid all fees and taxes due from it to the state, including the tax, if any, imposed by this state upon the original incorporation of a company of the same class.

Source.—L. 1900, ch. 733, § 2.

§ 19. **When reincorporation effected and effect thereof.**—From the date of filing these documents the corporation shall become and be a corpora-

§§ 20, 21.

General provisions.

L. 1909, ch. 28.

tion of this state, and shall be subject to all the laws of this state applicable to corporations of the same class; but its existence and powers as such corporation shall terminate if it shall fail at any time for one month to maintain an office within the state at which an authorized officer or agent shall be present at all reasonable business hours, prepared to exhibit the books of the company to the proper authorities of this state and to receive service of process; or if it shall fail within two years to terminate its corporate existence derived from any other state, by surrender of its charter of by dissolution.

Source.—L. 1900, ch. 733, § 3.

§ 20. Acquisition of real property in this state by certain foreign corporations.—Any foreign corporation doing business in this state and created under the laws of the United States, or of any state or territory thereof, or of any foreign state or nation which borders the United States of America and which by its laws confers similar privileges on corporations created by the laws of the state of New York, may acquire and hold such real property in this state as may be necessary for its corporate purposes in the transaction of its business in this state, and convey the same by deed or otherwise in the same manner as a domestic corporation. (*Amended by L. 1910, ch. 68.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 17, as amended by L. 1892, ch. 687; originally revised from L. 1887, ch. 450.

Construction.—Sections 20 and 21 are not a limitation on a corporation that has procured a certificate under § 15. *Lancaster v. Amsterdam Improvement Co.* (1894), 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 522.

Transfer or mortgage of property by foreign corporation.—The State may prescribe the mode and manner in which a foreign corporation doing business in this State shall convey by deed or mortgage its real property situate within the State, and prescribe the preliminary action, if any, to be taken by such corporation through its directors and stockholders before executing such a mortgage or the subsequent action to be taken by them, if any, in order to validate it. *In re Heffron Co.* (1914), 216 Fed. 642, 647.

Consent of stockholders.—Section 6 of the Stock Corporation Law requiring consent of stockholders to mortgage of corporate property, does not apply to foreign corporations owning property in this State. *In re Heffron Co.* (1914), 216 Fed. 642.

Eminent domain.—Section 17 of the former law, held not broad enough to confer the right of eminent domain. *Whitaker v. Kilby* (1907), 55 Misc. 337, 106 N. Y. Supp. 511.

§ 21. Acquisition by foreign corporation of real property in this state.—Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or, upon any judgment or decree for debts due it, or, upon any settlement to secure such debts, any real property within this state covered by or subject to such mortgage, judgment, decree or settlement, and may take by devise any real property situated within this state and hold the same for not exceeding five years from the date of such purchase, or from the time when the right to the possession thereof

vests in such devisee, and conveyed it by deed or otherwise in the same manner as a domestic corporation.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 18, as amended by L. 1892, ch. 687, and L. 1894, ch. 136; originally revised from L. 1877, ch. 158.

Foreign corporation entitled to remainder.—A devise of real estate was in trust for two lives with remainder to the issue of the beneficiaries and in case of failure, to a foreign library corporation. At the time of the testator's death the foreign corporation was not authorized to take land within the state by devise. The act of 1894, amending the above section by authorizing a foreign corporation to take by devise, was enacted prior to the expiration of the trust. It was held that the remainder to the foreign corporation was contingent upon an uncertain future event and did not, therefore, vest until the happening of such event; therefore since the corporation was qualified to take by devise before the remainder vested, such devise was valid. *Richards v. Hartshorne* (1906), 110 App. Div. 650, 97 N. Y. Supp. 754. See also, *Farmers' Loan & Trust Co. v. Shaw* (1908), 127 App. Div. 656, 107 N. Y. Supp. 337.

Application to foreign religious corporation.—The provision of this section that "any foreign corporation . . . may take by devise any real property situated within this state . . . and convey it by deed or otherwise in the same manner as a domestic corporation," does not require a foreign religious corporation to obtain permission of the court before conveying its real property in this state as is required of a domestic corporation. *Muck v. Hitchcock* (1914), 212 N. Y. 283, 106 N. E. 75.

§ 22. Prohibition of banking powers.—No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph company, or a corporation incorporated prior to the year eighteen hundred and fifty, to promote the welfare of emigrants, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise. (*Amended by L. 1911, ch. 771.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 19, as amended by L. 1892, ch. 687, and L. 1904, ch. 236; originally revised from R. S., pt. 1, ch. 18, tit. 3, § 4.

References.—Prohibition against encroachments on certain banking powers, Banking Law, § 140; trust company, Id. § 223; investment company, Id. § 302.

Certificates of deposit irredeemable within twenty years and bearing interest, held to be in violation of the provisions from which this section was derived *N. Y. Life Ins. & Trust Company v. Beebe* (1852), 7 N. Y. 364.

Discount of commercial paper by a corporation not expressly incorporated for banking purposes, held in violation of § 4 of Title 3 of ch. 18 of pt. 1 of the R. S. *N. Y. State Loan & Trust Co. v. Helmer* (1879), 77 N. Y. 64. See also *Pratt v. Short* (1880), 79 N. Y. 437.

Special account upon deposit.—A contract by a business corporation, organized under the act of 1875 for the manufacture of salt, to receive money in special account upon deposit is ultra vires, and in violation of this section, and the depositor's right of action for money so received by corporation accrues at once. *Chapman v. Lynch* (1898), 156 N. Y. 551, 51 N. E. 275.

A domestic corporation formed by the consolidation of two business corporations which solicits deposits of money to be made with it upon which it pays interest and against which purchases may be charged or which may be withdrawn in cash at any time is a form of banking and is prohibited by this section, and section 107 of the Banking Law. Rept. of Atty. Genl. (1912), Vol. 2, p. 185.

Application to agents.—A foreign transportation corporation is prohibited by the provisions of this section from issuing, buying and selling drafts or bills of exchange or issuing evidences of debt for circulation as money. Rept. of Atty. Genl. (1911), Vol. 2, p. 544. The provisions of this section, investing transatlantic steamship companies with power and authority to receive money for transmission and to transmit the same by draft, traveler's check, money order or otherwise, extend and apply to the *bona fide* agents, whether individual or corporate, of such company. If, however, it appears that the relationship of principal and agent is merely fictitious, the so-called agents are amenable to the provisions of law prohibiting the exercise of such powers. Rept. of Atty. Genl. (1911), Vol. 2, p. 544.

Loaning money to customers.—A business corporation is prohibited by this section and section 140 of the Banking Law from loaning money to its customers. *Ernst v. Terminal Clearing House Association* (1914), 86 Misc. 295, 149 N. Y. Supp. 181, affd. (1915), 167 App. Div. 902, 151 N. Y. Supp. 1114.

A corporation organized for the purpose of increasing the business of retail merchants, which proposes to issue checks, stamps or other evidences of debt, and to sell them to merchants who in turn can place them in a bank to be eventually paid out of a fund which has been set aside by the corporation, thereby violates the provisions of this section. Atty. Genl. Opin. (1915), 5 State Dep. Rep. 530.

§ 23. **Qualification of members as voters.**—Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation; and at every meeting of a non-stock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote. The stockholders of a stock corporation, by a by-law adopted by a vote at any annual meeting, or at any special meeting duly called for such purpose, may prescribe a period, not exceeding forty days prior to meetings of the stockholders, during which no transfer of stock on the books of the corporation may be made. Except in cases of express trust, or in which other provision shall have been made by written agreement between the parties, the record holder of stock which shall be held by him as security, or which shall actually belong to another, upon demand therefor and payment of necessary expenses thereof, shall issue to such pledger or to such actual owner of such stock, a proxy to vote thereon. No member of a corporation shall sell his vote or issue a proxy to vote to any person for any sum of money or any thing of value. The books and papers containing the record of membership of the corporation shall be produced at any meeting of its

members upon the request of any member. If the right to vote at any such meeting shall be challenged, the inspectors of election, or other persons presiding thereat, shall require such books, if they can be had, to be produced as evidence of the right of the person challenged to vote at such meeting, and all persons who may appear from such books to be members of the corporation may vote at such meeting in person or by proxy, subject to the provisions of this chapter.

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Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 20, in part, as added by L. 1892, ch. 687, and amended by L. 1901, ch. 355; originally a substitute for many former laws on the same subject. Prior to the amendment of 1901, every stockholder was entitled to one vote for every share held by him for ten days immediately preceding the election.

Consolidators' note.—This section was added to L. 1890, ch. 563, by L. 1892, ch. 687. This section as amended contained provisions that could well be placed in separate sections, and in furtherance of clearness and so as to enable the different provisions to be more readily found, this has been done. Thus, the matter relating to cumulative voting commencing with the words "The certificate of incorporation" and ending "according to the provisions of this section," has been taken out of § 23, "old" § 20, and placed in the consolidated law as § 24.

Again, the matter relating to voting trust agreements, which was added to the section by L. 1901, ch. 355, commencing with the words "A stockholder may, by agreement" and ending with the words "daily, during business hours," has also been taken out of § 23 and placed in the consolidated law as § 25. These changes work no change of substance but will result in bringing these important provisions into a form where they will be readily seen and found.

References.—Selling vote or proxy to vote a misdemeanor, Penal Law, § 668. Inspectors of election, see Stock Corporation Law, § 31. Stock-book, Id. § 32. Meeting for election of directors, Stock Corporation Law, § 25.

Right to vote is incidental to ownership of stock itself and may not be taken from holder *in invitum*. *Elger v. Boyle* (1910), 69 Misc. 273, 126 N. Y. Supp. 946.

Corporate shareholder may vote, *Oelberman v. N. Y. & Northern R. R. Co.* (1894), 77 Hun 332, 29 N. Y. Supp. 545; *In re Buffalo, N. Y. & Erie R. R. Co.* (1896), 74 N. Y. St. Rep. 345, 37 N. Y. Supp. 1048; but cannot divert the income to the prejudice of minority stockholders. *Farmers' Loan & Trust Co. v. N. Y. & N. R. R. Co.* (1896), 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76.

Transfer books govern between stockholder and corporation.—As between himself and third parties, the person who appears upon the transfer books to be a stockholder, may have parted with all his interest in the stock, but as between himself and the corporation, such person, and he only, is treated as a stockholder. *Rosevelt v. Brown* (1854), 11 N. Y. 148; *Chemical National Bk. v. Colwell* (1892), 132 N. Y. 250, 30 N. E. 644; *Tucker v. Gilman* (1890), 121 N. Y. 189, 24 N. E. 302.

Personal interest of shareholder does not prevent vote on measure. *Gamble v. Queens County Water-Works Co.* (1890), 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

Beneficial interest requisite to right to vote. *Matter of Elias* (1896), 17 Misc. 718, 40 N. Y. Supp. 910.

Delinquent stockholder.—A corporation has no more power by its by-laws to refuse to permit delinquent stockholder to vote upon a stock than it has to refuse him the privilege of making a transfer of the stock. It is one of those rights which go with the purchase of the stock. It makes no difference in this record whether the stockholder agrees to take the stock subject to the by-laws

of the corporation or not. *Kinnan v. Sullivan Co. Club* (1898), 26 App. Div. 213, 50 N. Y. Supp. 95.

Election of directors.—Only stockholders of record or those holding proxies are entitled to vote at an election of directors. *Matter of Utica Fire Alarm Telegraph Co.* (1906), 115 App. Div. 821, 101 N. Y. Supp. 109.

Right to vote for directors is the right to protect property from loss and make it effective in earning dividends, and to deprive a stockholder of the right to vote is to deprive him of an essential attribute of his property. *Lord v. Equitable Life Assn. Society* (1909), 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

Administrator may vote. Formal transfer unnecessary. *Matter of No. Shore S. I. Ferry Co.* (1872), 63 Barb. 556.

Original subscriber need not have his holdings entered in stock-book before he can act as stockholder. *Hamilton Trust Co. v. Clomes* (1897), 17 App. Div. 152, 45 N. Y. Supp. 141, *affd.* (1900), 163 N. Y. 423, 57 N. E. 614.

Manner of voting in absence of provision in certificate or by-laws. *Matter of Rochester Dist. Tel. Co.* (1886), 40 Hun 172.

Giving option does not divest owner of stock of the right to vote. *Matter of Newcomb* (1891), 42 N. Y. St. Rep. 442, 18 N. Y. Supp. 16.

Mailing certificate too late for its receipt before the closing of transfer-books. *Matter of Glen Salt Co.* (1897), 17 App. Div. 234, 45 N. Y. Supp. 568, *affd.* (1898), 153 N. Y. 688, 48 N. E. 1104.

Sale of proxy by restricted transfer of stock is illegal. *Id.*

Adoption of new stock-book where stock-book is inaccessible. *Matter of Argus Co.* (1893), 138 N. Y. 557, 34 N. E. 388; *Socorro Mountain Mining Co. v. Preston* (1896), 17 Misc. 220, 40 N. Y. Supp. 1040.

Denial of voting rights to preferred stockholders.—Unless expressly forbidden by statute, the articles of incorporation may divide the stock into common and preferred, and may provide that the preferred stockholders shall be deprived of voting power in consideration of the preferences over the common stock which is given them. Such a provision is but an arrangement between two classes of stockholders which does not concern the public and does not violate any rule of the common law or any rule of public policy. *People ex rel. Browne v. Koenig* (1909), 133 App. Div. 756, 118 N. Y. Supp. 136.

Building, loan and investment company cannot restrict the right to vote to a class of stockholders. *Rept. of Atty. Genl.* (1894) 108. See also *Rept. of Atty. Genl.* (1912) 18.

Foreign receiver.—Receiver of a foreign insolvent corporation which holds a controlling interest in the stock of a domestic corporation will be permitted to vote the stock under the principle of comity. *American & British Mfg. Co. v. International P. Co.* (1916), 173 App. Div. 319, 159 N. Y. Supp. 582.

Voting trust agreement.—See *Union Trust Co. v. Oliver* (1915), 214 N. Y. 517, 525, 108 N. E. 809.

§ 24. **Cumulative voting.**—The certificate of incorporation of any stock corporation may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting. The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hun-

dred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provision of this section.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 20, in part, as added by L. 1892, ch. 187, and amended by L. 1901, ch. 355. The system of "cumulative" voting authorized by this section was originally derived from L. 1875, ch. 611, § 26.

Agreement for cumulative voting.—Where stockholders of several corporations agree to form a new company which shall issue its stock for that of the old companies and the agreement provides for cumulative voting and a certain number of directors which shall make that cumulative voting effective, the new company by accepting title to the stock of the old companies did not take and ratify the agreement of the stockholders and become bound hereby; and the corporation and its stockholders will not be restrained from reducing the number of its directors, so as to render cumulative voting ineffective, at the suit of a minority stockholder. *Bond v. Atlantic Terra Cotta Co.* (1910), 137 App. Div. 671, 122 N. Y. Supp. 425, revg. (1910), 66 Misc. 546, 122 N. Y. Supp. 425.

§ 25. **Voting trust agreements.**—A stockholder may, by agreement in writing, transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years upon terms and conditions stated, pursuant to which such person or persons shall act; every other stockholder, upon his request therefor, may, by a like agreement in writing, also transfer his stock to the same person or persons and thereupon may participate in the terms, conditions and privileges of such agreement; the certificates of stock so transferred shall be surrendered and canceled and certificates therefor issued to such transferee or transferees in which it shall appear that they are issued pursuant to such agreement and in the entry of such transferee or transferees as owners of such stock in the proper books of said corporation that fact shall also be noted and thereupon he or they may vote upon the stock so transferred during the time in such agreement specified; a duplicate of every such agreement shall be filed in the office of the corporation where its principal business is transacted and be open to the inspection of any stockholder, daily, during business hours.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 20, in part, as added by L. 1892, ch. 687, and amended by L. 1901, ch. 355. The provision was added by the amendment of 1901.

Voting trust agreement.—Whether a voting trust agreement made pursuant to this section is revocable, depends upon the facts. *Knickerbocker Investment Co. v. Voorhees* (1905), 100 App. Div. 414, 91 N. Y. Supp. 816.

Voting trust certificates are negotiable.—*Union Trust Co. v. Oliver* (1915), 214 N. Y. 517, 108 N. E. 809.

§ 26. **Proxies.**—Every member of a corporation, except a religious corporation, entitled to vote at any meeting thereof may so vote by proxy.

No officer, clerk, teller or bookkeeper of a corporation formed under or subject to the banking law shall act as proxy for any stockholder at any meeting of any such corporation.

Every proxy must be executed in writing by the member himself, or by

his duly authorized attorney. No proxy hereafter made shall be valid after the expiration of eleven months from the date of its execution unless the member executing it shall have specified therein the length of time it is to continue in force, which shall be for some limited period. Every proxy shall be revocable at the pleasure of the person executing it; but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which proxies may be executed.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 21, as added by L. 1892, ch. 637.

Reference.—Unlawful use of proxy at corporate election, Penal Law, § 668.

Proxy need not be a stockholder.—Matter of Light Hall Mfg. Co. (1888), 47 Hun 258.

Irrevocable proxy to secure debt prohibited. Matter of Germicide Co. (1892), 65 Hun 606, 20 N. Y. Supp. 495.

Blanks in proxies.—Matter of White (1887), 45 Hun 680; Matter Townshend (1892), 46 N. Y. St. Rep. 135, 18 N. Y. Supp. 905.

No particular form of proxy is specified by this section except that it is required to be in writing. Lord v. Equitable Life Assurance Soc. (1908), 57 Misc. 417, 108 N. Y. Supp. 67, affd. (1908), 126 App. Div. 937, 110 N. Y. Supp. 1135, revd. (1909) 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 426.

Stock held in partnership.—Where stock is held under a partnership agreement for a period of years, it seems that the provisions of this section as to proxy do not apply to an agreement whereby one of the partners is authorized to vote on the stock during such period. Hey v. Dolphin (1895), 92 Hun 230, 36 N. Y. Supp. 627.

Agreement as to proxies of foreign corporation.—The state having declared in this section its general policy as to proxies in relation to domestic corporations, it would seem that the courts of this state would not enforce an agreement relating to a proxy of a foreign corporation to be voted on in this state, which is in violation of the general policy thus declared. Sullivan v. Parkes (1902), 69 App. Div. 221, 230, 74 N. Y. Supp. 787.

Directors acting as proxy.—The prohibition in section 26 of the General Corporation Law against the service of an officer of a corporation subject to the Banking Law as proxy for a stockholder, forbids directors as such from acting in that capacity. Rept. of Atty. Genl. (1912), Vol. 2, p. 285.

Section cited.—Farmers' Loan & Trust Co. v. Shaw (1907), 56 Misc. 201, 206, 107 N. Y. Supp. 337, affd. (1908), 127 App. Div. 656, 111 N. Y. Supp. 1118.

§ 27. Challenges.—Every member of a corporation offering to vote at any election or meeting of the corporation shall, if required by an inspector of election or other officer presiding at such election or meeting, or by any other member present, take and subscribe the following oath: "I do solemnly swear that in voting at this election, I have not either directly, indirectly or impliedly received any promise or any sum of money or any thing of value to influence the giving of my vote or votes at this meeting or as a consideration therefor." Any person offering to vote as proxy for any other person shall present his proxy and, if so required, take and subscribe the following oath: "I do solemnly swear that I have not, either directly, indirectly or impliedly, given any promise or any sum of money or any thing of value to induce the giving of a proxy to me to vote at this

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election, or received any promise or any sum of money or any thing of value to influence the giving of my vote at this meeting, or as a consideration therefor." The inspectors or persons presiding at the election may administer such oath, and all such oaths and proxies shall be filed in the office of the corporation.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 22, as added by L. 1892, ch. 687, and amended by L. 1895, ch. 672, and L. 1901, ch. 355.

§ 28. **Effect of failure to elect directors.**—If the directors shall not be elected on the day designated in the by-laws, or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 23, as amended by L. 1892, ch. 687; originally a substitute for many laws on the same subject.

Application of section.—The appellate division of the first department held in *Bank of Metropolis v. Faber* (1899), 38 App. Div. 159, 53 N. Y. Supp. 542, that the provisions of this section in relation to the holding over of directors did not apply to a corporation organized under the manufacturing act of 1848, ch. 40, upon the ground that the provisions of the general corporation law are confined to corporations organized under it or controlled by it. Precisely the reverse was held by the appellate division of the second department in *Tysen v. Fritz* (1899), 44 App. Div. 562, 60 N. Y. Supp. 923. The editors believe that the latter decision is the proper construction of the statute.

Provisions in statutes and by-laws requiring election on specified date are directory. *Beardsley v. Johnson* (1890), 121 N. Y. 224, 24 N. E. 380; *Vanderburg v. Broadway, etc., R. R. Co.* (1883), 29 Hun 348.

Directors named in certificate.—Where the certificate of incorporation named directors and provided that they should remain such until the first annual meeting, and a first annual meeting is thereafter had, there is no presumption that they continued as directors after that meeting. *Dunn v. Neustadt* (1911), 72 Misc. 1, 129 N. Y. Supp. 161.

Statute of limitations.—Where stockholders remained directors until their death, the Statute of Limitations did not begin to run against them until that time. *Murray v. Smith* (1915), 166 App. Div. 528, 152 N. Y. Supp. 162.

§ 29. **Mode of calling special election of directors.**—If the election has not been held on the day so designated, the directors shall forthwith call a meeting of the members of the corporation for the purpose of electing directors, of which meeting notice shall be given in the same manner as of the annual meeting for the election of directors.

If such meeting shall not be so called within one month or, if held, shall result in a failure to elect directors, any member of the corporation may call a meeting for the purpose of electing directors by publishing a notice of the time and place of holding such meeting at least once in each week for two successive weeks immediately preceding the election, in a newspaper published in the county where the election is to be held and in such other manner as may be prescribed in the by-laws for the publication of notice of the annual meeting, and by serving upon each member, either personally or by mail, directed to him at his last known post-office address, a copy of such notice at least two weeks before the meeting.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 24, as added by L. 1892, ch. 687; originally revised from R. S., pt. 1, ch. 18, tit. 4, § 8; L. 1885, ch. 489, § 3.

References.—Notice of election, Stock Corporation Law, § 25. By-laws regulating election to be published, § 11, subd. 5, ante.

Application.—If there is no by-law providing for the election of directors a valid election may be had pursuant to this and the following sections. *Matter of David Jones Co.* (1893), 67 Hun 360, 22 N. Y. Supp. 318.

§ 30. Mode of conducting special election of directors.—Such meeting shall be held at the office of the corporation, or if it has none, at the place in this state where its principal business has been transacted, or if access to such office or place is denied or can not be had, at some other place in the city, village or town where such office or place is or was located.

At such meeting the members attending shall constitute a quorum. They may elect inspectors of election and directors and adopt by-laws providing for future annual meetings and election of directors, if the corporation has no such by-laws, and transact any other business which may be transacted at an annual meeting of the members of the corporation.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 25, as added by L. 1892, ch. 687; originally revised from L. 1885, ch. 489, §§ 3, 4.

References.—Qualifications, §§ 23, 26, ante. Inspectors, Stock Corporation Law, § 31.

Members attending meeting may elect directors, adopt by-laws and transact any other business which may be transacted at an annual meeting of a corporation. *Matter of Rapid Transit Ferry Company* (1897), 15 App. Div. 530, 44 N. Y. Supp. 539.

§ 31. Qualification of voters and canvass of votes at special election.—In the absence at such meeting of the books of the corporation showing who are members thereof, each person, before voting, shall present his sworn statement setting forth that he is a member of the corporation; and if a stock corporation, the number of shares of stock owned by him and standing in his name on the books of the corporation, and, if known to him, the whole number of shares of stock of the corporation outstanding. On filing such statement, he may vote as a member of the corporation; and if a stock corporation, he may vote on the shares of stock appearing in such statement to be owned by him and standing in his name on the books of the corporation.

The inspectors shall return and file such statements, with a certificate of the result of the election, verified by them, in the office of the clerk of the county in which such election is held, and the persons so elected shall be the directors of the corporation.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 26, as added by L. 1892, ch. 587; originally revised from L. 1885, ch. 489, § 3.

References.—Stock-book, Stock Corporation Law, § 32. Certificate of election, Stock Corporation Law, § 31.

§ 32. Powers of supreme court respecting elections.—The supreme court shall, upon the application of any person or corporation aggrieved by or

complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 27, as amended by L. 1892, ch. 687; originally revised from R. S., pt. 1, ch. 18, tit. 4, § 5.

Application.—The power to review corporate elections applies to insurance corporations. Notice to the corporation and the directors, of legality of whose election is challenged, is sufficient. *Matter of Empire State Supreme Lodge* (1907), 118 App. Div. 616, 103 N. Y. Supp. 465, affg. (1907), 53 Misc. 344, 103 N. Y. Supp. 465.

History of section.—See *Matter of Ringler & Co.* (1912), 204 N. Y. 30, 97 N. E. 593, revg. (1911), 145 App. Div. 361, 130 N. Y. Supp. 62.

Purpose.—This section was clearly enacted in order that courts might have power to proceed in a summary manner to test the title of officers of corporations without recourse to the more cumbersome proceedings in a writ of *quo warranto*. The Supreme Court now has the power to inquire into any corporate election of directors or officers, whether the same is made by the stockholders or by trustees or directors to fill vacancies. *Matter of Ringler & Co.* (1912), 204 N. Y. 30, 97 N. E. 593, revg. (1911), 145 App. Div. 361, 130 N. Y. Supp. 62.

Who may apply.—*Matter of Syracuse, Chen. & N. Y. R. R. Co.* (1883), 91 N. Y. 1; *Matter of Argus Co.* (1893), 138 N. Y. 557, 34 N. E. 388.

Mandamus not authorized by this section. *People ex rel. Pritzel v. Simonson* (1891), 61 Hun 338, 16 N. Y. Supp. 118.

New election is only relief that can be granted, Id. When ordered. *People ex rel. Thorn v. Pangburn* (1896), 3 App. Div. 456, 38 N. Y. Supp. 217; *Matter of Argus Co.* (1893), 138 N. Y. 557, 34 N. E. 388; *Rudolph v. Southern Beneficial League* (1889), 23 Abb. N. C. 190, 7 N. Y. Supp. 135.

Foreign corporation.—Validity of election of officers will not be determined in injunction proceeding. *Washington Lighting Co. v. Dimmick* (1899), 41 App. Div. 596, 58 N. Y. Supp. 682.

Right of member to vote.—Upon a proceeding under this section to establish an election of directors, the supreme court may determine the rights of members to vote at such election. *Matter of Mutual Fire Ins. Co.* (1900), 30 Misc. 633, 64 N. Y. Supp. 351, revd. on another point (1900), 51 App. Div. 163, 64 N. Y. Supp. 646, modfd. (1900), 164 N. Y. 10, 58 N. E. 29.

Forfeiture of stock.—Where a stockholder is not permitted to vote upon the ground that his stock was forfeited for non-payment, the court may inquire into the validity of the forfeiture, and, if invalid, order a new election. *Matter of N. Y., etc., Town Site Co.* (1911), 145 App. Div. 623, 130 N. Y. Supp. 414.

Election of one trustee may be annulled by this section. *Matter of Northern Dispensary* (1899), 26 Misc. 147, 56 N. Y. Supp. 784.

Notice of discharge of receiver.—In ordering a new election, the court should require members to be notified that a receiver formerly in charge of the affairs of the corporation has been discharged. *Matter of N. Y. Electrical Worker's Union v. Sullivan* (1907), 122 App. Div. 764, 770, 107 N. Y. Supp. 886.

Effect of determination.—An order made upon notice to the borrower in a proceeding instituted by the lender under the above section, adjudging that the lender, having the legal title to the stock, might lawfully be elected a director,

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is not *res adjudicata* upon the question of the ownership of the stock. *Farmer v. Farmer & Son Type Founding Co.* (1903), 83 App. Div. 218, 82 N. Y. Supp. 228.

The validity of an equitable claim upon stock will not be determined in a proceeding brought under this section. *Matter of Utica Fire Alarm Telegraph Co.* (1906), 115 App. Div. 821, 101 N. Y. Supp. 109.

Improper use of temporary injunction.—Where a reorganization committee holding a majority of the stock has been restrained from voting by temporary injunction and the injunction is subsequently set aside, an election held during the time the injunction was in force will be set aside since it represents only the wishes of a minority. *Matter of Townsend* (1898), 24 Misc. 80, 53 N. Y. Supp. 289.

Power of court generally.—See *Matter of Glen Salt Co.* (1897), 17 App. Div. 234, 45 N. Y. Supp. 568, *affd.* (1897), 153 N. Y. 688, 48 N. E. 1104. Court may determine whether a transfer appearing on the books was a sale or only a pledge of the shares. *Strong v. Smith* (1878), 15 Hun 222.

When stockholder not entitled to intervene in a proceeding for the annulment of election of directors.—The statute does not intend to authorize a stockholder to institute a proceeding of this nature if he was not a stockholder at the time of the alleged election of directors. *Matter of Scheel* (1909), 134 App. Div. 442, 119 N. Y. Supp. 295.

Election of officers in fraternal benefit association, see *Matter of Supreme Council of The Catholic R. & B. Ass'n.* (1911), 142 App. Div. 307, 127 N. Y. Supp. 143.

Peacemakers' Court of Seneca Nation of Indians has no jurisdiction of a proceeding under this section. *People ex rel. Jamieson v. John* (1913), 80 Misc. 418, 141 N. Y. Supp. 225.

No appeal to the appellate division lies from an interlocutory order of the court, in a proceeding to review the validity of a corporate election of directors under this section, which appoints a referee to take the testimony of witnesses and report the same to the court with his opinion. *Matter of Silaski* (1916), 175 App. Div. 199, 161 N. Y. Supp. 513.

Cited.—*Ehret v. Ringler Co.* (1911), 144 App. Div. 480, 129 N. Y. Supp. 551; *Matter of Springfield Society v. Gilleran* (1914), 212 N. Y. 336, 106 N. E. 110.

§ 33. Stay of proceedings in actions collusively brought.—If an action is brought against a corporation by the procurement or default of its directors, or any of them, to enforce any claim or obligation declared void by law, or to which the corporation has a valid defense, and such action is in the interest or for the benefit of any director, and the corporation has by his connivance made default in such action, or consented to the validity of such claim or obligation, any member of the corporation may apply to the supreme court, upon affidavit, setting forth the facts, for a stay of proceedings in such action, and on proof of the facts in such further manner and upon such notice as the court may direct, it may stay such proceedings or set aside and vacate the same, or grant such other relief as may seem proper, and which will not injuriously affect an innocent party, who, without notice of such wrongdoing and for a valuable consideration, has acquired rights under such proceedings.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563), § 28, as amended by L. 1892, ch. 687; originally revised from L. 1885, ch. 489, § 2.

Collusive defaults.—See *Matter of Gardner* (1895), 86 Hun 30, 33 N. Y. Supp. 326; *Matter of Virgel* (1899), 26 Misc. 320, 57 N. Y. Supp. 58.

§ 34. Quorum of directors and powers of majority.—The affairs of every corporation shall be managed by its board of directors, at least one of whom shall be a citizen of the United States and a resident of this state. Unless otherwise provided a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. The members of a corporation may in by-laws fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number. Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation. (*Amended by L. 1917, ch. 538, in effect May 17, 1917.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 29, as amended by L. 1892, ch. 687; L. 1901, ch. 214, and L. 1904, ch. 737; originally revised from many former statutes. The amendment of 1904 added the provision as to the by-laws fixing the number of directors to constitute a quorum at less than a majority.

Consolidators' note.—The words "by law" appear in the section in parentheses. We have marked them for omission, as they were undoubtedly left in by inadvertence. It was probably intended that the words "by law" were to be stricken out when the section was amended by L. 1904, ch. 737, and parentheses were used to indicate that such was the intent, instead of brackets.

References.—By-laws made by members control, § 11, subd. 5, ante. Quorum and powers, § 43, post. By-laws for holding election, effect of failure of directors to adopt, Stock Corporation Law, § 27. Qualifications of directors, Id. § 25. Acts of directors, when void, Id. § 27. Change of number of directors, Id. § 26. Misconduct by directors; punishment, Penal Law, §§ 665, 889; definition of director as used in Penal Law, Id. § 667.

Board of directors.—The board of directors represents the corporate body. The directors are not ordinary agents in the immediate control of the stockholders. The directors hold their offices charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. The corporation is the owner of the property, but the directors in the performance of their duty possess it and act in every way as if they owned it. They are trustees clothed with the power of controlling the property and managing the affairs of a corporation without let or hindrance. As to third persons they are its agents, but as to the corporation itself, equity holds them liable as trustees. *Continental Securities Co. v. Belmont* (1912), 206 N. Y. 7, 99 N. E. 138, 51 L. R. A. (N. S.) 112, *People ex rel. Marice v. Powell* (1911), 201 N. Y. 194, 94 N. E. 634.

A meeting of a board of directors must be duly—lawfully—assembled. This requires that each director shall have notice of the meeting, or shall duly waive such notice. *Republican Art. Printery, Inc. v. David* (1916), 173 App. 726, 731, 159 N. Y. Supp. 1010.

Powers of directors generally.—Powers of those entrusted with corporate management are largely discretionary and courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference. *Leslie v. Lorillard* (1888), 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 466; *Burden v. Burden* (1899), 159 N. Y. 287, 307, 54 N. E. 17.

Limitations on powers of majority.—*Gamble v. Queens Co. Water-Works Co.* (1890), 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Farmers' Loan & Trust Co. v. N. Y. & N. Railway Co.* (1896), 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76; *Meyer v. Staten Island R. R. Co.* (1887), 7 N. Y. St. Rep. 245; *Ziegler v. Hoagland* (1889), 52 Hun 385, 5 N. Y. Supp. 305.

When the corporation itself is forbidden by law to do an act, the prohibition extends to the board of directors and to each director, separately and individually. *People v. Knapp* (1912), 206 N. Y. 373, 99 N. E. 841.

A by-law of a private corporation, requiring the unanimous vote of its directorate to a sale of its business as a going concern, or to a sale of any machinery or stock on hand in bulk, or otherwise than in the usual course of business, does not violate this section which provides that unless otherwise provided the action of a majority of a board of directors at a lawful meeting shall be the act of the board. *Levin v. Mayer* (1914), 86 Misc. 116, 149 N. Y. Supp. 112.

Aliens, as directors of trust company.—A person, not a citizen of the United States, is eligible to act as a director in a trust company providing at least one director of said company is a citizen of this state. Rept. of Atty. Genl. (1912) 20.

Acts of directors binding.—The corporate acts of directors within the powers of the corporation in lawful and legitimate furtherance of its purposes, in good faith and the exercise of an honest judgment, are valid and conclude the corporation and the stockholders. *Pollitz v. Wabash R. R. Co.* (1912), 207 N. Y. 113, 100 N. E. 721.

The right of the president of a corporation to represent it and speak for it is a limited one. Corporations act, and must act, by their respective boards of directors, managers or trustees, under the statute creating them. Hence a petition in bankruptcy, executed and filed by the president without the authority of the board of directors, is not sufficient. So of an assignment for benefit of creditors thus executed. In re *Jefferson Casket Co.* (1910), 182 Fed. 689.

Obligations of directors as trustees.—*Butts v. Wood* (1867), 37 N. Y. 317; *Hun v. Carey* (1880), 82 N. Y. 65; *Beveridge v. N. Y. El. R. R. Co.* (1889), 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; *Munson v. Syracuse, Geneva & Corning R. R. Co.* (1886), 103 N. Y. 58, 8 N. E. 355; *Barr v. N. Y., L. E. & W. R. R. Co.* (1891), 125 N. Y. 263, 26 N. E. 145; *Rudd v. Robinson* (1889), 54 Hun 339, 7 N. Y. Supp. 535, revd. (1891), 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473; *McNaughton v. Osgood* (1886), 41 Hun 109, revd. (1889), 114 N. Y. 574, 21 N. E. 1044; *Steinway v. Steinway* (1896), 2 App. Div. 301, 37 N. Y. Supp. 742, affd. (1899), 157 N. Y. 710, 53 N. E. 1132; *Snow v. Church* (1887), 13 App. Div. 108, 42 N. Y. Supp. 1072; *Hennessy v. Muhleman* (1899), 27 Misc. 232, 57 N. Y. Supp. 114, revd. (1899), 40 App. Div. 175, 57 N. Y. Supp. 854; *Hale v. Mason* (1899), 160 N. Y. 561, 55 N. E. 202. Money received by virtue of office must be turned over to corporation. *McClure v. Law* (1899), 161 N. Y. 78, 55 N. E. 383.

The directors of a corporation who failed to administer its affairs honestly and with reasonable prudence not through excusable neglect, but by actual misfeasance in appropriating corporate funds to their own use, are personally liable to the receiver of a corporation for the damages which their misconduct has occasioned to the corporation. *Bowers v. Male* (1906), 186 N. Y. 28, 78 N. E. 577, affg. (1906), 111 App. Div. 209, 97 N. Y. Supp. 722.

Illegality of personal profit.—The illegality of a profit made by a director arises almost wholly by reason of some undisclosed and secret bias on his part against the interest of the corporation. If profit is made in a transaction honest in itself, open and aboveboard, and is consummated after a full and fair statement of facts to the board of directors at a meeting and to the stock holders at a meeting, there is no reason for criticism or for charging such director with any profits that he may make. *Billings v. Shaw* (1913), 209 N. Y. 265, 103 N. E. 142.

Transactions with corporation.—A corporation may deal with a director, *Nathan v. Whitehill* (1893), 67 Hun 398, 22 N. Y. Supp. 63; *Gamble v. Queens Co. Water-Works Co.* (1890), 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Matter of Commissioners of State Reservation* (1890), 122 N. Y. 177, 25 N. E. 269; *Kinsman v. Fisk* (1894), 83 Hun 494, 31 N. Y. Supp. 1045, but director is bound to explain the transactions. *Sage v. Culver* (1895), 147 N. Y. 241, 41 N. E. 513; *Farmers' Loan & Trust Co. v. N. Y. & N. Railway* (1896), 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76. Contracts with a director, even if fraudulent, are only voidable. *Skinner v. Smith* (1892), 134 N. Y. 240, 31 N. E. 911; *Central Trust Co. v. N. Y. City & N. R. R. Co.* (1886), 18 Abb. N. C. 381; *Strobel v. Brownell* (1895), 16 Misc. 657, 40 N. Y. Supp. 702; *Keans v. N. Y. & College Pt. Ferry Co.* (1896), 17 Misc. 272, 40 N. Y. Supp. 366, *affd.* (1896), 19 Misc. 19, 42 N. Y. Supp. 771; *Goss v. Goss* (1911), 147 App. Div. 698, 132 N. Y. Supp. 76, *affd.* (1913), 207 N. Y. 742, 101 N. E. 1099. But contract will be set aside at instance of corporation. *Barnes v. Brown* (1880), 80 N. Y. 527; *Munson v. Syracuse, Geneva & Corning R. R. Co.* (1886), 103 N. Y. 58, 8 N. E. 355. The corporation must, however, return what it has received under a contract as to which bad faith is not shown. *Duncomb v. N. Y., Housatonic & N. R. R. Co.* (1881), 84 N. Y. 190. Where a director purchases property under circumstances which would prevent his holding it as against the corporation, the legal title is in him, and the property cannot be taken under execution against the corporation. *Cornell v. Clark* (1887), 104 N. Y. 451, 10 N. E. 888. The court may by order authorize a director to purchase corporate property sold in proceedings for sequestration. *Webster v. Kings County Trust Co.* (1895), 145 N. Y. 275, 39 N. E. 964. Directors who are all the stockholders may assign the corporate property to themselves. *Skinner v. Smith* (1890), 56 Hun 437, 10 N. Y. Supp. 81, *affd.* (1892), 134 N. Y. 240, 31 N. E. 911.

Directors of a corporation who, without knowledge of its hopeless insolvency loan moneys to it for what they believe to be merely temporary embarrassment upon the faith of securities, in pursuance of a resolution of the board and subsequently deposited with one of them as collateral to the loan are entitled to retain such securities as against receivers of a corporation subsequently appointed. *Converse v. Sharpe* (1899), 37 App. Div. 399, 55 N. Y. Supp. 1080, *affd.* (1900), 161 N. Y. 571, 56 N. E. 69.

Purchase of stock and bonds by directors.—*Seymour v. Spring Forest Cemetery Assn.* (1895), 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *Duncomb v. N. Y., Housatonic & N. R. R. Co.* (1881), 84 N. Y. 190; *Stark v. Soule* (1887), 9 N. Y. St. Rep. 555; *Harpending v. Munson* (1883), 91 N. Y. 650; *Preston v. Loughran* (1890), 58 Hun 210, 12 N. Y. Supp. 313.

Transactions with another corporation in which they are also directors.—Contracts voidable at instance of corporation, but not of a stockholder, unless fraudulent. *Burden v. Burden* (1899), 159 N. Y. 287, 54 N. E. 17, *affg.* (1896), 8 App. Div. 160, 40 N. Y. Supp. 499; *Hart v. Ogdensburg & Lake Champlain R. R. Co.* (1895), 89 Hun 316, 35 N. Y. Supp. 566; *Wallace v. Long Island R. R. Co.* (1877), 12 Hun 460. Notes discounted at bank. *Casco Nat. Bank v. Clark* (1893), 139 N. Y. 307, 34 N. E. 908; *Merchants' Nat. Bank v. Clark* (1893), 139 N. Y. 314, 34 N. E. 910. Contracts which are grossly inequitable, burdensome and unconscionable may be repudiated by corporation. *Globe Woolen Co. v. Utica Gas & Electric Co.* (1912), 151 App. Div. 184, 136 N. Y. Supp. 24. Ratification by stockholders. *Pollitz v. Wabash R. R. Co.* (1912), 207 N. Y. 113, 100 N. E. 721. Common directors of lessor and lessee. *Brooklyn Heights R. R. Co. v. Brooklyn City R. R. Co.* (1912), 151 App. Div. 465, 135 N. Y. Supp. 990.

Personal liability.—Manner of executing contracts. *Lake Shore Nat. Bank v. Butler Colliery Co.* (1889), 51 Hun 63, 3 N. Y. Supp. 771. False prospectus. *Morgan v. Skiddy* (1875), 62 N. Y. 319. Acts of other directors. *Arthur v. Griswold*

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(1874), 55 N. Y. 400. Inducing stockholder to sell stock by false representation as to financial condition of company. *Von Au v. Magenheimer* (1906), 126 App. Div. 257, 110 N. Y. Supp. 629, *affd.* (1909), 196 N. Y. 510, 89 N. E. 1114. Two directors transferring all corporate assets to third for nominal consideration. *Culler v. Friedland* (1912), 152 App. Div. 124, 136 N. Y. Supp. 659.

Directors charged with knowledge of entries in books. *Hanover Nat. Bank v. Am. Dock & Trust Co.* (1896), 148 N. Y. 612, 43 N. E. 72.

Notice of meetings necessary.—*Round Lake Assn. v. Kellogg* (1892), 47 N. Y. St. Rep. 668, 20 N. Y. Supp. 261, *affd.* (1894), 141 N. Y. 348, 36 N. E. 326; *People ex rel. Swinburne v. Albany Medical College* (1882), 26 Hun 348, *affd.* (1883), 89 N. Y. 635; *People ex rel. Stephens v. Greenwood Lake Assn.* (1892), 44 N. Y. St. Rep. 914, 18 N. Y. Supp. 491.

Compensation.—*Fitchett v. Murphy* (1899), 26 Misc. 544, 56 N. Y. Supp. 322, *revd. on other grounds* (1899), 46 App. Div. 181, 61 N. Y. Supp. 182; *Jackson v. N. Y. C. R. R. Co.* (1874), 2 T. & C. 653, *affd.* (1874), 58 N. Y. 623; *Talcott v. Olcott Mfg. Co.* (1880), 11 Wk. Dig. 141; *Gill v. N. Y. Cab Co.* (1888), 48 Hun 524, 1 N. Y. Supp. 202. Distributing surplus earnings under guise of compensation. *Godley v. Crandall & Godley Co.* (1914), 212 N. Y. 121, 106 N. E. 818, L. R. A. 1915 D 632. Court may inquire into reasonableness of compensation voted. *Carr v. Kimball* (1912), 153 App. Div. 825, 139 N. Y. Supp. 253, *affd.* (1915), 215 N. Y. 634 109 N. E. 1068. Payment of salary irrespective of earnings. *Williams v. McClare* (1914), 85 Misc. 184, 148 N. Y. Supp. 93. Agreement of officers as to salary for term of years irrespective of stock held by them. *Abbott v. Harbeson Textile Co.* (1914), 162 App. Div. 405, 147 N. Y. Supp. 1031. Board of directors not limited in voting salaries by statements in prospectus of promoter. *Metzger v. Knox* (1912), 77 Misc. 271, 136 N. Y. Supp. 681, *affd.* (1912), 153 App. Div. 911, 137 N. Y. Supp. 1129. Resolution by de facto directors as to salaries, ratified by stockholders. *Lewis v. Matthews* (1914), 161 App. Div. 107, 146 N. Y. Supp. 424.

Resignations.—*Sturges v. Vanderbilt* (1878), 73 N. Y. 384; *Chemical Nat. Bank v. Colwell* (1890), 29 N. Y. St. Rep. 726, 9 N. Y. Supp. 288; *Manhattan Co. v. Kaldenberg* (1900), 165 N. Y. 1, 58 N. E. 790.

Removal.—Without some statute or provision of the charter authorizing his removal or suspension, a director cannot be removed or suspended from office until the end of his term, at least without cause. Quo warranto is the remedy of a director illegally removed and whose place has been filled by the election of another. *People ex rel. Manice v. Powell* (1911), 201 N. Y. 194, 94 N. E. 634.

Expulsion of member should be by majority vote. *Matter of Reed* (1916), 95 Misc. 695, 160 N. Y. Supp. 907.

§ 35. Directors as trustees in case of dissolution.—Upon the dissolution of any corporation, its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses.

Such trustees shall have authority to sue for and recover the debts and property of the corporation, by their name as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders or members, to the extent of its property and effects that shall come into their hands.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 30, as amended by L. 1892, ch. 687; originally revised from R. S., pt. 1, ch. 18, tit. 3, §§ 9, 10.

References.—Voluntary dissolution. See §§ 170–195, post. Dissolution by action on part of people, a creditor or stockholder, §§ 100–115, post.

Application of section.—Upon the voluntary dissolution of a corporation under § 57 of the Stock Corporation Law the directors become trustees of the creditors and stockholders with full power to settle the affairs of the corporation and collect and pay its outstanding debts, and as such trustees they may recover dividends declared in favor of debenture stockholders from the assets of the corporation. *Janeway v. Burn* (1904), 91 App. Div. 185, 86 N. Y. Supp. 628, *affd.* (1905), 180 N. Y. 560, 73 N. E. 1125.

Section applies to real property as well as to personal property. *Heath v. Barmore* (1872), 50 N. Y. 302, 305.

Inapplicable to foreign corporation for which a liquidator has been appointed in a foreign country. *Wamsley v. Horton & Co.*, 12 App. Div. 312, 42 N. Y. Supp. 767 (1896), *affd.* (1897), 153 N. Y. 687, 48 N. E. 1107. But where foreign corporation doing business in this state dissolves and directors transfer all assets to persons residing here, without setting aside fund for payment of creditors, as required by law of state where it was incorporated, and where by law of that state a simple creditor cannot sue the corporation after its dissolution, the creditors may reach the assets in this jurisdiction. *Atlantic Dredging Co. v. Beard* (1911), 145 App. Div. 342, 130 N. Y. Supp. 4, *affd.* (1911), 203 N. Y. 584, 96 N. E. 415.

Action for tort against corporation does not abate upon its dissolution but survives as against trustees holding the corporate property for the purpose of distribution. The term "creditors" includes all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted. *Marstaller v. Mills* (1894), 143 N. Y. 398, 38 N. E. 370; *Hepworth v. Union Ferry Co.* (1891), 62 Hun 257, 16 N. Y. Supp. 692.

An action against the directors of a stock corporation after a voluntary dissolution to recover damages for negligent injury cannot be maintained pursuant to this section. Such a proceeding is governed by § 57 of the Stock Corporation Law. *Cunningham v. Glauber* (1908), 61 Misc. 443, 115 N. Y. Supp. 259, *affd.* (1909), 133 App. Div. 11, 117 N. Y. Supp. 866.

Action for libel against directors of dissolved corporation.—An action for libel, which has abated because of the dissolution of the corporation committing it, may be continued and revived against the former directors of the defunct corporation, in order to reach the assets of that corporation in their hands as the trustees created by this section for the benefit of stockholders. *Shayne v. Eve. Post Pub. Co.* (1901), 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777.

Property a trust fund.—As the property of a corporation is a trust fund in the hands of its directors for the payment of its debts, they may not transfer the same in disregard of the rights of their *cestui que trustent*, no matter how honest their motive. *Darcy v. Brooklyn & N. Y. Ferry Co.* (1908), 127 App. Div. 167, 111 N. Y. Supp. 514, *affd.* (1909), 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. 267.

Duties and liabilities of directors upon dissolution.—Upon the dissolution of a corporation, the directors become trustees for the benefit of all who may be entitled to share in its assets and, to this end, are entitled to take possession of the assets and distribute them *pro rata* among its creditors; they are accountable however only for what they receive. In the case of contested claims against the corporation, the action should be prosecuted against the corporation, which is expressly continued in existence for that purpose by section 57 (old) of the Stock Corporation Law. Whether or not the trustees can properly be joined as defen-

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dants in such an action in order to conclude them as to the existence of its debt and its amount, is a question which has not been determined; but the action in any event should be against the corporation, and an action does not lie against the trustees alone. *Cunningham v. Glauber* (1909), 133 App. Div. 10, 117 N. Y. Supp. 866.

May ask court for advice.—It seems, that since directors of a corporation are subject to the control of the court, they may apply for advice and instruction and for leave to distribute the trust funds in their hands, in which case, the court may require notice to be given. *Darcy v. Brooklyn & N. Y. Ferry Co.* (1908), 127 App. Div. 167, 170, 111 N. Y. Supp. 514, *affd.* (1909), 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. 267.

Action by temporary receiver to compel directors to account as liquidating trustees for the proceeds of unpaid obligations of another corporation. *Mayer v. Metropolitan Traction Co.* (1914), 165 App. Div. 497, 150 N. Y. Supp. 1026.

Illegal distribution.—Receiver *pendente lite* will not be appointed after dissolution and distribution of assets where the corporation has no property, even though the distribution was illegal. *Tapley Co. v. Keller* (1909), 133 App. Div. 54, 117 N. Y. Supp. 817.

Collection of claims due previous to appointment of receiver.—Where the superintendent of banks refuses to renew the license of a loan association and an action to dissolve the same has been begun, the association may collect claims due it previous to the appointment of a receiver. *Rept. of Atty. Genl.* (1910) 825.

§ 36. **Forfeiture for non-user.**—If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 31, as amended by L. 1892, ch. 687; originally revised from R. S., pt. 1, ch. 18, tit. 3, § 7.

Application.—The provisions of this section apply to a corporation whether incorporated under the general statute or by special act. *People v. Stilwell* (1913), 157 App. Div. 839, 142 N. Y. Supp. 881.

Section is self-executing and no action or judicial proceeding is necessary to declare or complete the loss of corporate powers by a corporation which has not commenced the transaction of business or undertaken the discharge of its corporate duties within two years after the date of its incorporation. *People v. Stilwell* (1913), 157 App. Div. 839, 142 N. Y. Supp. 881.

Extension of period for commencement of business.—Provision in the charter of corporation that certain persons named should be appointed examiners to open books for subscriptions to the capital stock of the company "at such times and places as they or a majority of them shall determine" did not extend the period limited by this section for the commencement of business. *People v. Stilwell* (1913), 157 App. Div. 839, 142 N. Y. Supp. 881.

Legislature may dissolve without action.—The legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used. The statute under consideration provided that unless a railroad corporation constructed at least one mile of its road within three years, the powers, rights and franchise shall be deemed "forfeited and terminated." The language of the court is *dicta*, however, for the final holding was merely that the corporation not having complied with

the statute could not take private property for the further construction of its road. *Brooklyn Steam Transit Company v. Brooklyn* (1879), 78 N. Y. 524.

Under the decision in *Matter of Brooklyn, Winfield & Newton R. R. Co.* (1878), 72 N. Y. 245, the forfeiture clause was "Its corporate existence and power shall cease," and the court held that the clause was self-executing. The question also arose in this case under an attempt of the railroad to acquire additional private property. It is doubtful if either of these cases are authority for the proposition that the corporation is for all purposes dissolved.

To effect a dissolution of a corporation there must be the judgment of a court of competent jurisdiction declaring it to be dissolved and until such judgment creditors may proceed by suit against the corporation unless restrained by injunction. *Kincaid v. Dwinelle* (1875), 59 N. Y. 548.

A corporation may be dissolved by forfeiture through abuse or neglect of its franchise; but such forfeiture unless there be special provision by statute can only be enforced by the sovereign in some proceeding instituted in its behalf. *Denike v. N. Y. R. Lime & Cement Co.* (1880), 80 N. Y. 599.

A corporation cannot cease to exist of its own will; its life continues until either the charter period has expired or the court has declared a dissolution. *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737.

Grounds for dissolution.—Where the state seeks by action to destroy the life of a corporation it must show some grave misconduct on the part of the latter, some sin against the law of its being, not merely formal or incidental or affecting only private interests, but material, and serious, and which has produced or tends to produce injury to the public. *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33.

Avoiding forfeiture.—A full and complete user of every right and privilege granted to a corporation need not be shown in order to avoid a forfeiture or expiration of its charter. A very slight user may be sufficient. *Rept. of Atty. Genl.* (1907) 261.

§ 37. **Extension of corporate existence.**—Any domestic corporation at any time before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by law, or in any certificate of extension of corporate existence, by the consent of the stockholders owning two-thirds in amount of its capital stock, or if not a stock corporation, by the consent of two-thirds of its members, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president, and by the secretary or an assistant secretary of the corporation, and if a corporation formed under or subject to the banking law shall be filed in the office of the superintendent of banks, if an insurance corporation, in the office of the superintendent of insurance, and otherwise in the office of the secretary of state, and shall by such officer be duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with a certificate of such officer of such filing and record, or a duplicate original of such certificate, shall be filed and sim-

ilarly recorded and indexed in the office of the clerk of the county wherein the corporation has its principal place of business, and shall be noted in the margin of the record of the original certificates of such corporation, if any, in such offices, and thereafter the term of the existence of such corporation shall be extended as designated in such certificate.

The certificate of incorporation of any corporation whose duration is limited by such certificate or by law, may require that the consent of the stockholders owning a greater percentage than two-thirds of the stock, if a stock corporation, or of more than two-thirds of the members, if a non-stock corporation, shall be requisite to effect an extension of corporate existence as authorized by this section. (*Amended by L. 1913, ch. 306.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 32, in part, as amended by L. 1893, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The amendment of 1905 added the last sentence.

Consolidators' note.—This section has been repeatedly amended. (L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 359, and L. 1905, ch. 256.) As a consequence it has become very long, involved and difficult to understand. In order to obviate this difficulty the section has been divided into five sections with appropriate headings. Section 37 contains the matter heretofore included in the first sentence of § 32, together with the matter added to the section by the amendment of 1905 (ch. 256), which constitutes the second paragraph of the section. This change works no change of substance and is made so that the section may be more easily understood.

Re-organization of a business corporation under § 4 of the Business Corporation Law will not operate as an extension of its corporate existence, as fixed by its charter. *People ex rel. Haberman v. James* (1896), 5 App. Div. 412, 39 N. Y. Supp. 313.

Insurance corporations are included within this section since it is specifically provided in section 39, *post*, that in the case of an insurance corporation the certificate therein provided for shall have indorsed upon it the written approval of the superintendent of insurance. This section is not in conflict with section 124 of the Insurance Law. Rept. of Atty. Genl. (1909) 745.

§ 38. **Revival of corporate existence.**—If the term of existence of any domestic corporation shall have expired and it shall be made satisfactorily to appear to the supreme court that such corporation was legally organized pursuant to any law of this state, and that it shall have issued its bonds payable at a date beyond the date fixed in its charter or certificate of incorporation for the expiration of its corporate existence, and such bonds shall be unmatured and unpaid, or, if a bank, incorporated under a general law of this state, that shall have issued any other obligations or shall have incurred any other indebtedness which at the date of the application shall be unsatisfied or unpaid, the supreme court may, upon the application of any person interested and upon such notice to such other parties as the court may require, by order, authorize the filing and recording of a certificate reviving the existence of such corporation, upon such conditions and with such limitations as such order shall specify, and extending such corporate existence for a term not exceeding the term for which it was originally incorporated. Upon filing and recording such certificate in the

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same manner as certificates of extension of corporate existence duly issued before the expiration of the existence of a domestic corporation are authorized by law to be filed and recorded, such corporate existence shall be revived and extended in pursuance of the terms of such order, but such revival and extension shall not affect any litigation commenced after such expiration and pending at the time of such revival. (*Amended by L. 1911, ch. 63.*)

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 32, in part, as amended by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355, and L. 1905, ch. 256. The provisions of this section were added by the amendment of 1901.

State banks are not governed by this section, and where their corporate existence has expired they should reincorporate. Rept. of Atty. Genl. (1911) 13.

§ 39. Approval of certificates of extension or revival; when required.—

In the case of a corporation formed under or subject to the banking law, no certificate of extension or revival shall be filed or recorded unless it shall have indorsed thereon the written approval of the superintendent of banks; or, if an insurance corporation, unless it shall have indorsed thereon the written approval of the superintendent of insurance; and, if a turnpike or bridge corporation, it shall not be filed unless it shall have indorsed thereon or annexed thereto a certified copy of a resolution of the board of supervisors of each county in which such turnpike or bridge is located, approving of and authorizing such extension.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 32, in part, as amended by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256.

See Rept. of Atty. Genl. (1911) 13.

§ 40. Extension when stock is owned by another corporation.—If all the stock of a corporation other than a corporation formed under or subject to the banking law, or an insurance corporation, or a turnpike, plank-road or bridge corporation shall be lawfully owned by another stock corporation entitled by law to take a surrender and merger thereof, the corporate existence of such corporation whose stock is so owned may be extended at any time for the term of the corporate existence of the possessor corporation, by filing in the office or offices in which the original certificate or certificates of incorporation of the first-mentioned corporation were filed—a certificate of such extension executed by its president and secretary and by such corporation owning all the shares of its capital stock.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 32, in part, as amended by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256. The provisions of this section were added by the amendment of 1900.

§ 41. Effect of extension.—Every corporation extending its corporate existence under this chapter or under any general law of the state shall thereafter be subject to the provisions of this chapter and of such general law, notwithstanding any special provisions in its charter, and shall thereafter be deemed to be incorporated under the general laws of the state relating to the incorporation of a corporation for the purpose of carrying

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on the business in which it is engaged, and shall be subject to the provisions of such law.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 32, in part, as amended by L. 1892, ch. 687; L. 1900, ch. 177; L. 1901, ch. 355; L. 1905, ch. 256.

§ 42. When notice of lapse of time unnecessary.—Whenever under the provisions of any of the corporate laws a corporation is authorized to take any action after notice to its members or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if such action be authorized or approved, and such requirements be waived in writing by every member of such corporation, or by his attorney thereunto authorized.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 38, as added by L. 1895, ch. 672.

Observation.—Applies to waiver of notice to “members”—not to “creditors.”

Application.—This section does not apply to the voluntary dissolution of corporations. Such dissolution must conform to the provisions of section 221. It seems, that this section may be applied to proceedings to increase the number of directors, to change the principal place of business, to classify the stock and to extend the corporate existence. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 513.

Waiver of notice.—Where the requirement as to the publication of notice was disregarded in an election of directors but said notice was served on all stockholders personally or by mail and the meeting was in every other respect legal, a waiver signed by each stockholder approving the vote taken pursuant to this section renders such election valid. Rept. of Atty. Genl. (1910) 823.

§ 43. As to acts of directors.—Whenever, under the provisions of any of the corporate laws, a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, such agreement or action may be taken by such directors, regularly convened as a board, and acting by a majority of a quorum, except when otherwise expressly required by law or the by-laws of the corporation and any such agreement shall be executed in behalf of the corporation by such officers as shall be designated by the board of directors, managers or trustees. At any meeting at which every member of the board of directors shall be present, though held without notice, any business may be transacted which might have been transacted if the meeting had been duly called. Except when otherwise required by law or the by-laws of the corporation, special meetings of the members of the corporation may be called in the same manner as the annual meeting thereof.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 39, as added by L. 1895, ch. 672, and amended by L. 1901, ch. 355. Last two sentences added by amendment of 1901.

References.—Quorum of directors. Section 34, ante. Acts of directors, when void, Stock Corporation Law, § 27; change of number of directors, Id. § 26; liability for loans to stockholders, Id. § 29; for unauthorized dividends, Id. § 28. Misconduct by directors; punishment, Penal Law, §§ 665, 889; misconduct relating to increase of capital stock, Id. § 664.

§ 44. Political contributions prohibited; penalty.—No corporation or

joint-stock association doing business in this state, except a corporation or association organized or maintained for political purposes only, shall directly or indirectly pay or use or offer, consent or agree to pay or use any money or property for or in aid of any political party, committee or organization, or for, or in aid of, any corporation, joint-stock or other association organized or maintained for political purposes, or for, or in aid of, any candidate for political office or for nomination for such office, or for any political purpose whatever, or for the reimbursement or indemnification of any person for moneys or property so used. Any officer, director, stockholder, attorney or agent of any corporation or joint-stock association which violates any of the provisions of this section, who participates in, aids, abets or advises or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor and punishable by imprisonment in a penitentiary or county jail for not more than one year and a fine of not more than one thousand dollars. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 41, as added by L. 1906, ch. 239.

Immunity from criminal prosecution.—Persons testifying upon investigations made by the examiners of the department of insurance under section 39 of the Insurance Law, are not thereby immune from criminal prosecution under the provisions of this section. Rept. of Atty. Genl. (1908) 426.

ARTICLE III.

CHANGE OF NAME.

Section 60. Petition by corporation to change name.

61. Contents of petition.
62. Notice of presentation of petition.
63. Order authorizing change.
64. When change to take effect.
65. Substitution of new name in pending action or proceeding.
66. Change of name of business, transportation and membership corporations.

§ 60. Petition by corporation to change name.—A petition to assume another corporate name may be made by a domestic corporation other than

a corporation organized under the business corporations law, the transportation corporations law or the membership corporations law, or organized under any law repealed by either of those laws, whether incorporated by a general or special law, to the supreme court at a special term thereof, held in the judicial district in which its principal business office shall be situated, or, if it be other than a stock corporation, at a special term held in the judicial district in which its certificate of incorporation is filed or recorded, or in which its principal property is situated, or in which its principal operations are or theretofore have been conducted. If it be a banking, insurance or railroad corporation, the petition must be authorized by a resolution of the directors of the corporation, and approved, if a banking corporation, by the superintendent of banks; if an insurance corporation, by the superintendent of insurance, and if a railroad corporation, by the public service commission. The petition to change the name of any other corporation must have annexed thereto a certificate of the secretary of state, that the name which such corporation proposes to assume is not the name of any other corporation appearing on his index of corporations as authorized to do business under the laws of the state of New York, or a name which he deems so nearly resembling it, as to be calculated to deceive. (*Amended by L. 1910, ch. 296, and L. 1917, ch. 177, in effect Sept. 1, 1917.*)

Source.—Code Civ. Pro. § 2411, as amended by L. 1893, ch. 366, and L. 1901, ch. 374. The amendment of 1893 superseded the original section. The amendment of 1901 inserted the words "other than a town or county co-operative insurance corporation" in the second sentence.

Consolidators' note.—Code Civ. Pro. §§ 2411 to 2416 have been consolidated in this article so far as they relate to change of name of a corporation. The portions of these sections relating to the change of the name of an individual have been left in the Code of Civil Procedure. The last sentence has been omitted from § 63, because consolidated in County Law, § 161, subd. 6.

References.—Certificate of incorporation having same name as an existing corporation or a name so nearly resembling it as to be calculated to deceive, cannot be filed or recorded. Section 6, ante. Clerks of counties to report names changed, County Law, § 161. Clerks of courts to report names changed, Judiciary Law, § 254. Secretary of state to publish names changed in session laws, Executive Law, § 34.

Approval by superintendent of banks.—Where an application is made by a trust company to change its name, the approval of the superintendent of banks must be taken into account in the consideration by the court of such application. *Matter of U. S. Mortgage Co.* (1895), 83 Hun 572, 32 N. Y. Supp. 11.

Use of similar name cannot be denied where a corporation desires to reincorporate under same name which it has theretofore borne. *People ex rel. Grand Lodge v. Payn* (1898), 28 Misc. 275, 59 N. Y. Supp. 851, *affd.* (1899), 43 App. Div. 621, 60 N. Y. Supp. 1146, *affd.* (1900), 161 N. Y. 229, 55 N. E. 849. The absence of any element of fraud in the use of the proposed new name bearing similarity to the name of another corporation is not controlling; if there are reasonable grounds to conclude that the granting of the change will result in injury to the complaining corporation, it should be denied. *Matter of U. S. Mortgage Co.* (1895), 83 Hun 572, 32 N. Y. Supp. 11.

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§ 61. **Contents of petition.**—The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, its present name, and the name it proposes to assume, which must not be the name of any other corporation, or a name so nearly resembling it as to be calculated to deceive; and if it be a railroad corporation, a corporation having banking powers or the power to make loans upon pledges or deposits, or to make insurances, that the petition has been duly authorized by a resolution of the directors of the corporation and approved by the proper officer.

Source.—Code Civ. Pro. § 2412, as amended by L. 1893, ch. 366, so far as the section relates to corporations. For remainder of section, see Code Civ. Pro. § 2412, as amended by L. 1909, ch. 65.

§ 62. **Notice of presentation of petition.**—If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for three successive weeks in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if an insurance corporation, by the superintendent of * insurance, or if a railroad corporation, by the public service commission. In the city and county of New York such notice shall be published once in each week for three successive weeks in two daily newspapers published in such county. If the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law the court may dispense with the publication of the notice of the presentation of such petition or require notice of such presentation to be given to such persons and in such manner as the court thinks proper. A copy of the petition and notice of the motion shall be filed with the secretary of state, and the proposed name shall thereupon be reserved for said corporation until three weeks after the date of such motion, and until three weeks after the date of any adjournment of such motion if notice of such adjournment shall be filed with the secretary of state, and no certificate of incorporation of a proposed corporation, having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, shall be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the state of New York having the same name or a name so nearly resembling it as to be calculated to deceive shall be given authority to do business in this state. (*Amended by L. 1910, ch. 296.*)

Source.—Code Civ. Pro. § 2413, as amended by L. 1893, ch. 366; L. 1894, ch. 264; L. 1901, ch. 374; L. 1904, ch. 110, and L. 1906, ch. 89, so far as the section relates to corporations. The amendment of 1901 inserted the words "other than a town

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or county co-operative insurance corporation." The amendment of 1904 added the last sentence. For remainder of section, see Code Civ. Pro. § 2413, as amended by L. 1909, ch. 65.

Waiver of publication of notice.—The requirement that notice of a presentation of a petition for a change in a corporate name be given by newspaper publication, may not be waived by the consent of stockholders and directors of the corporation. Opinion of Atty. Genl. (1913) 31.

§ 63. **Order authorizing change.**—If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed and that the petition has been duly authorized and that notice of the presentation of the petition, if required by law, has been made, the court shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the office of the clerk of the county in which its certificate of incorporation, if any, shall be filed, or if there be none filed, in which its principal office shall be located, or if it has no business office in the county in which its principal property is situated, or in which its operations are or theretofore have been principally conducted, or in the office of the clerk of the county in which the special term granting the order is held; and that a certified copy of such order shall, within ten days after the entry thereof, be filed in the office of the secretary of state; and also, if it be a banking corporation, in the office of the superintendent of banks, or if it be an insurance corporation in the office of the superintendent of insurance, or if it be a railroad corporation, in the offices of the public service commissions. Such order shall also direct the publication, within ten days after the entry thereof, of a copy thereof, in a designated newspaper, in the county in which the order is directed to be entered, once in each week for four successive weeks. The court may dispense with the publication of a copy of such order and require notice to be given to such persons and in such manner as it thinks proper if the petition be made by a domestic corporation organized under or subject to the religious or membership corporations law. (*Amended by L. 1910, ch. 296.*)

Source.—Code Civ. Pro. § 2414, as amended by L. 1893, ch. 366; L. 1895, ch. 946; L. 1901, ch. 374, so far as the section relates to corporations. For remainder of section, see County Law, § 161, subd. 6, and Code Civ. Pro. § 2414, as amended by L. 1909, ch. 65.

Review by courts.—The change of the name of a corporation, pursuant to this section and section 63, will not be interfered with by the courts in the absence of fraud or illegality. The court will respect the determination of those intrusted with the direction of the affairs of the corporation, even if it does not meet with the unanimous approval of stockholders. *Matter of Hinds, Noble & Eldredge* (1916), 172 App. Div. 140, 158 N. Y. Supp. 249, *affd.* (1916), 218 N. Y. 715, 113 N. E. 1058.

Effect of change of corporate name.—A change of corporate name, effected pursuant to the provisions of the General Corporation Law, has no effect whatever

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upon the existence or identity of a corporation or on any right flowing to or from it. Accordingly, the Comptroller upon receipt of proof that a corporation contracting with the State has thus effected a change in its corporate name, should make payment to it under its new name. Surety upon the bond of the contractor will not thereby be released or relieved of any liability. Rept. of Atty. Genl. (1911), Vol. 2, p. 588.

Religious corporations.—Order changing name of a religious corporation may be revoked where it appears that a religious body other than the petitioner, claims to be the real corporation and to be entitled exclusively to the name proposed to be changed. Matter of Abyssinian Bap. Church (1891), 39 N. Y. St. Rep. 764, 13 N. Y. Supp. 919.

§ 64. **When change to take effect.**—If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name. No proceedings had prior to April fourth, eighteen hundred and ninety-four, under sections two thousand four hundred and fourteen and two thousand four hundred and fifteen of the code of civil procedure for the change of the name of a corporation, shall be invalid by reason of the non-filing of an affidavit of the publication of the order changing such name within twenty days from the date thereof.

And no proceedings heretofore had under the provisions of article three, chapter twenty-three, consolidated laws, for the change of the name of a corporation, shall be invalid by reason of the non-filing and recording of such affidavit of the publication of the order changing such name within forty days from the making of such order. (*Amended by L. 1913, ch. 721.*)

Source.—Code Civ. Pro. § 2415, as amended by L. 1887, ch. 194; L. 1893, ch. 366; L. 1894, ch. 264. The amendment of 1894 added the last sentence. For remainder of section, see Code Civ. Pro. § 2415, as amended by L. 1909, ch. 65.

§ 65. **Substitution of new name in pending action or proceeding.**—An action or special proceeding, civil or criminal, commenced by or against a corporation whose name is so changed shall not abate, nor shall any relief, recovery or other proceeding therein be prevented, impeded or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time, obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding.

Source.—Code Civ. Pro. § 2416, as amended by L. 1893, ch. 366.

§ 66. **Change of name of business, transportation and membership corporations.**—Any corporation now existing or hereafter organized under the business corporations law, the transportation corporations law or the membership corporations law, or organized under any law repealed by

either of those laws, may at any time change its name, provided such change has been authorized by vote of the holders of record of at least two-thirds of the entire capital stock issued and outstanding, irrespective of class or classes of stock; or if the corporation is one authorized to issue any or all of its shares without nominal or par value, then by vote of the holders of record of at least two-thirds of the entire number of shares issued and outstanding, irrespective of class or classes of shares; or if it is a non-stock corporation, then by vote of at least two-thirds of its members. Such vote shall be taken at a meeting of the stockholders, shareholders or members specially called for that purpose. The notice of the meeting shall state the time and place thereof, the present name of the corporation and the name it proposes to assume. Such notice shall be signed by the president or vice-president and the secretary and shall be published once a week for two successive weeks in a newspaper published and circulating in the county wherein its principal business office is located, or if it has no business office, in the county in which its principal corporate property is situated, and a copy of such notice shall on or before the day of the first publication be filed in the office of the secretary of state, and a copy shall on or before the first day of publication be either served personally on each stockholder, shareholder or member, or mailed to him at his last known post-office address. The proposed name shall be reserved for such corporation by the secretary of state for a period of forty days from the date of the filing of the copy of the notice in his office. No action shall be taken by the stockholders, shareholders or members to change the name of the corporation unless there shall be presented to the meeting a certificate in duplicate of the secretary of state that the name which such corporation proposes to assume is not the name of any other corporation appearing on his index of corporations as authorized to do business under the laws of the state of New York, or a name which he deems so nearly resembling it as to be calculated to deceive.

No such corporation shall assume a corporate name which shall contain any word or words prohibited by law to a corporation of like character. Unless the corporation is a charitable or benevolent corporation, the name which the corporation proposes to assume shall have such word or words, abbreviation, affix or prefix therein or thereto, as will clearly indicate that it is a corporation as distinguished from a natural person, firm, association or copartnership.

Upon the adoption of a resolution by the stockholders, shareholders or members to change the name of such corporation to the name proposed in said notice, the corporation shall file in the office of the secretary of state and in the office of the clerk of the county in which its principal business office is located, or if it has no business office, in the office of the clerk of the county in which its principal corporate property is situated, a certificate signed, verified and acknowledged by its president or vice-president and secretary. The verification shall be in the form required of a pleading in

a court of record and the acknowledgment shall be in the form required of a deed to be recorded within this state. Such certificate shall state and set forth the resolution adopted by the stockholders, shareholders or members, the date of the adoption of such resolution, the date on which the certificate of incorporation was filed in the office of the secretary of state, the law under which the corporation was organized, the name under which the said corporation was originally incorporated, and any subsequent changes therein, and the name which the corporation desires to adopt. There shall be attached thereto the affidavits of service and publication of the notice of the meeting and the certificate of the secretary of state herein provided for. The corporation shall publish a copy of the resolution adopted at such meeting once a week for two successive weeks in the newspaper in which the notice of the meeting was published. The corporation shall file in the office of the secretary of state within forty days after the copy of the notice of meeting was filed in his office an affidavit of publication of the resolution herein required. On and after the day on which such affidavit is filed, the corporation shall be known by the name adopted in such resolution and by no other name.

Any action or special proceeding, civil or criminal, commenced by or against a corporation whose name is so changed shall not abate, nor shall any relief, recovery or other proceedings therein be prevented, impeded or impaired in consequence of such change of name. The plaintiff in the action or the party instituting the special proceeding, or the people, as the case requires, may at any time obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the action or proceeding. (*Added by L. 1917, ch. 177, in effect Apr. 14, 1917.*)

ARTICLE IV.

SALE OF CORPORATE REAL PROPERTY.

Section 70. Application of this article.

71. Petition.
72. Hearing on application.
73. Order to sell, mortgage or lease.
74. Insolvent corporation.
75. Service of notices.
76. Practice in cases not herein provided for.

§ 70. Application of this article.—Whenever any corporation is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had pursuant to the provisions of this article.

Source.—Code Civ. Pro. § 3390, as added by L. 1890, ch. 95, in part. For remainder of section, see Joint Stock Association Law, § 8.

Consolidators' note.—Code Civ. Pro. §§ 3390–3396, so far as they relate to pro-

ceedings for the sale of the real property of a corporation, have been consolidated in this article, and the portion relating to the sale of the real property of a joint-stock association has been consolidated in Joint-Stock Association Law, § 9.

§ 71. **Petition.**—The proceeding shall be instituted by the presentation to the supreme court of the district or the county court of the county where the real property, or some part of it, is situated, by the corporation applicant, of a petition setting forth the following facts.

1. The name of the corporation and of its directors, trustees or managers, and of its principal officers, and their places of residence.

2. The business of the corporation or the object or purpose of its incorporation and a reference to the statute under which it was incorporated.

3. A description of the real property to be sold, mortgaged or leased, by metes and bounds, with reasonable certainty.

4. That the interests of the corporation will be promoted by the sale, mortgage or lease, of the real property specified, and a concise statement of the reasons therefor.

5. That such sale, mortgage or lease has been authorized, by a vote of at least two-thirds of the directors, trustees or managers of the corporation at a meeting thereof, duly called and held, and a copy of the resolution granting such authority.

6. The market value of the remaining real property of the corporation and the cash value of its personal assets, and the total amount of its debts and liabilities, and how secured, if at all.

7. The application proposed to be made of the moneys realized from such sale, mortgage or lease.

8. Where the consent of the shareholders, stockholders or members of the corporation is required by law to be first obtained, a statement that such consent has been given, and a copy of the consent, or a certified transcript of the record of the meeting at which it was given, shall be annexed to the petition.

9. A demand for leave to mortgage, lease or sell the real estate described.

The petition shall be verified in the same manner as a verified pleading in an action in a court of record.

Source.—Code Civ. Pro. § 3391, as added by L. 1890, ch. 95.

Sale by religious societies.—See *Madison Ave. Bap. Church v. Bap. Church* (1871), 46 N. Y. 131; *Madison Ave. Bap. Church v. Bap. Church* (1878), 73 N. Y. 82.

§ 72. **Hearing on application.**—Upon presentation of the petition, the court may immediately proceed to hear the application, or it may, in its discretion, direct that notice of the application shall be given to any person interested therein, as a member, stockholder, officer or creditor of the corporation or otherwise, in which case the application shall be heard at the time and place specified in such notice, and the court may in any case appoint a referee to take the proofs and report the same to the

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court, with his opinion thereon. Any person, whose interests may be affected by the proceeding, may appear upon the hearing and show cause why the application should not be granted.

Source.—Code Civ. Pro. § 3392, as added by L. 1890, ch. 95, and § 3393, as added by L. 1890, ch. 95, in part. For remainder of § 3393, see § 73.

§ 73. Order to sell, mortgage or lease.—Upon the hearing of the application, if it shall appear, to the satisfaction of the court, that the interests of the corporation will be promoted thereby, an order may be granted authorizing it to sell, mortgage or lease the real property described in the petition, or any part thereof, for such sum, and upon such terms as the court may prescribe, and directing what disposition shall be made of the proceeds of such sale, mortgage or lease.

Source.—Code Civ. Pro. § 3393, as added by L. 1890, ch. 95, in part. For remainder of § 3393, see § 72.

Order invalid where benefit not shown.—*Madison Ave. Bap. Church v. Bap. Church* (1871), 46 N. Y. 131; *Wheaton v. Gates* (1858), 18 N. Y. 395.

Section construed in connection with section 12 of the Religious Corporations Law. *Muck v. Hitchcock* (1914), 212 N. Y. 283, 106 N. E. 75.

§ 74. Insolvent corporation.—If the corporation is insolvent, or its property and assets are insufficient to fully liquidate its debts and liabilities, the application shall not be granted, unless all the creditors of the corporation have been served with a notice of the time and place at which the application will be heard.

Source.—Code Civ. Pro. § 3394, as added by L. 1890, ch. 95.

§ 75. Service of notices.—Service of notices, provided for in this article, may be made either personally or, in case of absence, by leaving the same at the place of residence of the person to be served, with some person of mature age and discretion, at least eight days before the hearing of the application, or by mailing the same, duly enveloped and addressed and postage paid, at least sixteen days before such hearing.

Source.—Code Civ. Pro. § 3395, as added by L. 1890, ch. 95.

§ 76. Practice in cases not herein provided for.—In all applications made under this article, where the mode or manner of conducting any or all of the proceedings thereon is not expressly provided for, the court before whom such application may be pending, shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this article, or of any act authorizing the sale of corporate real property, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

Source.—Code Civ. Pro. § 3396, as added by L. 1890, ch. 95.

ARTICLE V.

JUDICIAL SUPERVISION OF CORPORATION AND OF THE OFFICERS AND MEMBERS THEREOF.

Section 90. Action against officers of corporation for misconduct.

91. Who may bring such an action.

91-a. Actions against officers by corporations, or receiver or trustee.

92. Visitation power over corporation not affected by this article.

§ 90. Action against officers of corporation for misconduct.—An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election, to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply.

L. 1905, ch. 28. Judicial supervision of corporations. § 90.

Source.—Code Civ. Pro. § 1781, as amended by L. 1907, ch. 157, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 33.

References.—Penal liabilities of directors, Penal Law, §§ 664, 665, 668, 667. Liability for unauthorized dividends, Stock Corporation Law, § 28. For loans to stockholders, Stock Corporation Law, § 29. For failure to file annual report, Stock Corporation Law, § 34. For false certificates, reports or public notices, Stock Corporation Law, § 35. Article does not apply to certain corporations, § 300, post. Officers to testify, § 301, post. Injunction restraining creditors, § 302, post. When attorney-general must bring action, §§ 91, 304, post. Receiver may be appointed, § 306, post. Actions under subdivisions 3, 4, § 307, post. A receiver appointed under this article has the powers and is subject to the obligations of a receiver appointed by a court of equity. There seems to be no statute expressly conferring upon such a receiver the powers of a receiver appointed in a proceeding for the voluntary dissolution of a corporation, as is provided by §§ 106, 112, in the case of a receiver appointed in a creditor's action to sequester the property of a corporation or in an action to dissolve the corporation at the suit of the people, a creditor or stockholder.

Application and effect.—Section not limited to directors in office, but suit may be had against ex-directors in proper case. *Jacobus v. Diamond Soda Water Co.* (1904), 94 App. Div. 368, 88 N. Y. Supp. 302. Not limited to trustees who have signified acceptance of office, such acceptance being presumed. *Halpin v. Mutual Brewing Co.* (1897), 20 App. Div. 583, 47 N. Y. Supp. 412. Any trustee may sue for property illegally diverted from corporate purposes. *Piza v. Butler* (1895), 90 Hun 254, 35 N. Y. Supp. 721; *Gildersleeve v. Lester* (1893), 68 Hun 532, 22 N. Y. Supp. 1026.

This section does not create, give rise to or confer upon the parties enumerated in § 91 any new cause of action, except with respect to the removal or suspension of directors, and with that exception, by the provisions of these two sections, the legislature, in the interest and for the protection of creditors, including policyholders and stockholders, merely authorizes the enforcement by the officials and individuals designated in § 91 of causes of action, which have accrued to the corporation and might be enforced by it or by its receiver and by a stockholder in behalf of himself and the other stockholders in the right of the corporation. *People v. Equitable Life Assurance Society* (1908), 124 App. Div. 714, 718, 109 N. Y. Supp. 453.

Application of section considered. *Miller v. Quincy* (1904), 179 N. Y. 294, 72 N. E. 116, revg. (1903), 88 App. Div. 529, 85 N. Y. Supp. 310. Fact that defendant is a director of a foreign corporation held immaterial. *Swan v. Mut. Res. Fund Life Assn.* (1898), 155 N. Y. 9, 49 N. E. 258, affg. (1897), 20 App. Div. 255, 46 N. Y. Supp. 841; *People v. Ballard* (1892), 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *Jacobus v. Diamond Soda Water Co.* (1904), 94 App. Div. 366, 88 N. Y. Supp. 302. As to stockholder's action, see *Loewenstein v. Diamond Soda Water Co.* (1904), 94 App. Div. 383, 88 N. Y. Supp. 313; *Powell v. Hinkley* (1904), 93 App. Div. 138, 87 N. Y. Supp. 2; *Matter of Northern Dispensary* (1899), 26 Misc. 147, 56 N. Y. Supp. 784.

Misconduct rendering directors liable.—Participation in swindling transaction. *Farrow v. Holland Trust Co.* (1893), 74 Hun 585, 26 N. Y. Supp. 502. Refusal to declare dividend in proper case. *Hiscock v. Lacy* (1894), 9 Misc. 578, 30 N. Y. Supp. 860. Money stolen by subordinates with his connivance. *Latimer v. Veader* (1897), 20 App. Div. 418, 46 N. Y. Supp. 823. Mere errors of judgment insufficient. *Hennessy v. Muhleman* (1899), 40 App. Div. 175, 57 N. Y. Supp. 854.

Directors and stockholders of a business corporation engaged in importing, buying, selling or manufacturing laces, have no right to purchase stocks or cotton on margin, and are liable therefor to judgment creditors for losing or wasting the

property of the corporation. *Hemsley & Co. v. Duncan Co.* (1917), 98 Misc. 338, 164 N. Y. Supp. 282.

It is a violation of duty under subdivision 2, on the part of the directors of a corporation to divest it of all its property without affording a reasonable opportunity to its creditors to present and enforce their claims before the transfer should become effective; and such action renders the directors liable for the amount of a claim established against the corporation as having accrued before the transfer. The motives which induce the omission are immaterial. It matters not that they may have supposed that they were not required to do any more than they did for the protection of creditors. Their omission to make adequate provision for the protection of creditors is proof of dereliction, and good faith constitutes no defense. *Darcy v. Brooklyn & N. Y. Ferry Co.* (1909), 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. (N. S.) 267, *affd.* (1908), 127 App. Div. 167, 111 N. Y. Supp. 514; *Buckley v. Starsfield* (1913), 155 App. Div.: 735, 140 N. Y. Supp. 953, *affd.* (1915), 214 N. Y. 679, 108 N. E. 1090.

Directors of a corporation who sell and transfer the assets thereof without compliance with the provisions of the General Corporation Law and the Stock Corporation Law, cannot relieve themselves from personal liability in a suit by a judgment creditor of the corporation by merely alleging that at the time of the transfer of the assets a fund was placed in trust for the payment of all debts, and that plaintiff by failing to present his claim lost his rights. To set aside a fund for the purpose of paying debts, but without paying them, is no defense against a creditor whose judgment has been made worthless by the sale of all the debtor's property, without notice, and the division of the proceeds among the stockholders and directors. *Shalek v. Jetter* (1915), 171 App. Div. 364, 155 N. Y. Supp. 975; *Cullen v. Friedland* (1912), 152 App. Div. 124, 136 N. Y. Supp. 659.

Directors of a defunct corporation, who distribute all of its assets among themselves without a formal dissolution proceeding and notice to creditors, are not liable to such creditors on the ground that they have wrongfully and unlawfully distributed the assets of the corporation, where it does not appear that the creditor would have been entitled to the payment of his claim if the corporation had been regularly dissolved, and there is no proof of fraud or bad faith. *Curran v. Oppenheimer* (1914), 164 App. Div. 746, 150 N. Y. Supp. 369.

Misfeasance in office insufficient to authorize action under this section. Malfeasance with corrupt intent must be shown. *Stokes v. Stokes* (1897), 23 App. Div. 552, 48 N. Y. Supp. 722. No accounting can be ordered until misconduct shown. *Stokes v. Stokes* (1895), 91 Hun 605, 36 N. Y. Supp. 350; *Stokes v. Stokes* (1895), 87 Hun 152, 33 N. Y. Supp. 1024.

Directors who have transferred all the property of their corporation, without providing for the payment of an outstanding judgment, are personally liable to the judgment creditor in a suit brought pursuant to this section. *Darcy v. Brooklyn & N. Y. Ferry Co.* (1908), 127 App. Div. 167, 111 N. Y. Supp. 514, *affd.* (1909), 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. (N. S.) 267.

Transfer of all property to another company, amounting to practical dissolution of corporation may be restrained on suit of attorney-general without a relator. *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, *revd.* (1890), 56 Hun 125, 8 N. Y. Supp. 918.

Action brought to restrain such alienation. *New Britain Nat. Bk. v. Cleveland Co.* (1895), 91 Hun 447, 36 N. Y. Supp. 387, *affd.* (1899), 158 N. Y. 722, 53 N. E. 1128. Stockholder can only sue in behalf of corporation. *Niles v. N. Y. C. and H. R. R. Co.* (1902), 69 App. Div. 144, 74 N. Y. Supp. 617, *affd.* (1903), 176 N. Y. 119, 68 N. E. 142; *Craig v. James* (1902), 71 App. Div. 238, 75 N. Y. Supp. 813; *People v. Powers* (1894), 8 Misc. 628, 29 N. Y. Supp. 950, *affd.* (1894), 83 Hun 449, 31 N. Y. Supp. 1131, *revd.* (1895), 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; *Skinner*

L 1909, ch. 28. Judicial supervision of corporations. § 90.

v. Smith (1890), 56 Hun 437, 10 N. Y. Supp. 81, *affd.* (1892), 134 N. Y. 240, 31 N. E. 911; *McNaughton v. Osgood* (1886), 41 Hun 109, *revd. on another point* (1889), 114 N. Y. 574, 21 N. E. 1044.

Exhaustion of remedies against corporation.—*Milsom Rendering & Fertilizing Co. v. Baker* (1897), 16 App. Div. 581, 44 N. Y. Supp. 999, *affd.* (1897), 153 N. Y. 687, 48 N. E. 1105; *Donnelly v. Pancoast* (1897), 15 App. Div. 323, 44 N. Y. Supp. 104; *Camp Mfg. Co. v. Reamer* (1897), 14 App. Div. 408, 43 N. Y. Supp. 1027, *revg.* *Same v. Harriman* (1896), 18 Misc. 722, 43 N. Y. Supp. 673.

Joinder of two or more causes.—The causes of action in favor of a corporation enumerated in this section are not excluded from the operation of § 484 of the Code of Civil Procedure, which prescribes what causes of action may be joined. *People v. Equitable Life Assurance Society* (1908), 124 App. Div. 714, 728, 109 N. Y. Supp. 453.

A cause of action against the directors of a corporation brought under this section cannot be united with a cause of action against their predecessors or successors in office, unless the acts complained of were done pursuant to a scheme or conspiracy or there be allegations connecting the acts of one set of directors with those of their predecessors or successors. *People v. Equitable Life Assurance Society* (1908), 124 App. Div. 714, 728, 109 N. Y. Supp. 453.

Right of attorney-general to proceed to enforce charitable trust not limited by this section. *People v. Powers* (1894), 83 Hun 449, 29 N. Y. Supp. 950, *revd. on another ground*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502. Limitations on attorney general's right to sue, indicated in *People v. Lowe* (1889), 117 N. Y. 175, 22 N. E. 1016, *revg.* (1888), 47 Hun 577.

Corporation not necessary party defendant in action by trustee to prevent unlawful alienation of corporation's property by cotrustees. *Green v. Compton* (1903), 41 Misc. 21, 83 N. Y. Supp. 588.

Actions by stockholders.—Stockholders can only proceed against the officers for a breach of trust, when the corporation will not sue for their benefit. *Graves v. Gouge* (1875), 1 Wk. Dig. 527; *Young v. Drake* (1876), 8 Hun 61; *Smith v. Rathbun* (1880), 22 Hun 150; *Nelson v. Burrows* (1881), 9 Ab. N. C. 280; *Gray v. N. Y. & Virginia Steamship Co.* (1876), 3 Hun 383; *Stromeyer v. Combes* (1888), 15 Daly 29, 2 N. Y. Supp. 232. But where the corporation is exclusively under the control of the trustees and officers whose acts and management are questioned, a demand that the corporation bring the action is unnecessary. *Sage v. Culver* (1895), 147 N. Y. 241, 41 N. E. 513; *Anderton v. Wolf* (1886), 41 Hun 571. Application unnecessary where action is to protect rights of the individual shareholders suing as distinguished from others of the corporation. *Meyers v. Scott* (1888), 20 N. Y. St. Rep. 35, 2 N. Y. Supp. 753; *Sheridan v. Sheridan Elec. Light Co.* (1886), 38 Hun 396.

In an action by a stockholder against a director of a business corporation to recover damages for negligence, it was alleged, and the evidence tended to prove, that the defendant, knowing the corporation to be insolvent, became a director to facilitate the sale of preferred stock; that defendant was negligent in the performance of his duties as director and permitted another to manage the corporation, including the sale of stock to the plaintiff, which was accomplished by false statements, circulars and reports, of some of which defendant had actual knowledge, and that if defendant had properly performed his duties as director, the plaintiff would not have been led into the investment and loss of his money. Evidence examined, and *held*, that the direction of a verdict in favor of the defendant was error. *Childs v. White* (1913), 153 App. Div. 1, 142 N. Y. Supp. 732.

Where, in a stockholder's action to set aside a contract made by a corporation with its general agent, on the ground of *ultra vires*, there is no allegation of fraud or collusion, and the question of discretion in the exercise by stockholders

of corporate powers is the only one presented, that question cannot be reviewed by the court. Compensation in the nature of a bonus dependent on death or incapacity is not *ultra vires*. *Warner v. Morgan* (1913), 81 Misc. 685, 143 N. Y. Supp. 516.

The liability of directors of a corporation for their acts of nonfeasance is a purely legal one for damages, and the stockholders, as such, have no standing to maintain an action therefor. It is only after the refusal of the corporation or its legal representatives to commence and continue such an action that the stockholders, as the equitable owners of an undivided share of the assets of the corporation, may come into a court of equity and enforce the rights of the corporation against the directors or any others who have depleted, wasted or misappropriated the property of the corporation, and to this end they may prosecute any cause of action legal or equitable. Where stockholders have been forced to come into a court of equity for relief, their action against the directors of their corporation to compel them to answer for their negligence and breach of duty will be sustained under the allegations of the complaint, though the corporation itself might have maintained an action at law for the same relief. *Moran v. Vreeland* (1913), 81 Misc. 664, 143 N. Y. Supp. 522.

Allegation of facts.—In an action against directors of a corporation for negligently wasting property the plaintiff must allege the facts constituting negligence or misconduct. *People v. Equitable Life Assurance Co.* (1908), 124 App. Div. 714, 718, 109 N. Y. Supp. 463.

Where in an action by a trustee in bankruptcy of a corporation against the former officers thereof and the corporation to nullify an alleged alienation of certain realty and moneys of the corporation to one of the defendants, and to recover the realty and money lost to the creditors and wasted through the neglect and failure of the individual defendants to perform their duties as officers and directors to preserve the assets for the payment of the corporate debts, there is no allegation that at the time of the alleged transfer there were any creditors in existence, or that the transaction was in furtherance of a scheme to defraud subsequent creditors, or that the corporation was insolvent or that the conveyance made it insolvent, a motion for judgment on the pleadings should be denied. *Lummi v. Crosby* (1916), 176 App. Div. 315, 162 N. Y. Supp. 444.

The complaint in a stockholder's action against the directors for misfeasance and nonfeasance should allege but two things: First, the cause of action, stated exactly as though the corporation itself was suing; second the facts which entitle the plaintiff to sue in place of the corporation. *Kavanaugh v. Commonwealth Trust Co.* (1905), 181 N. Y. 121, 73 N. E. 562.

Demand to bring action.—Where the directors in control of a corporation are sought to be charged with misfeasance and malfeasance, a demand upon or a refusal of the corporation to bring the action is not necessary. *Seagrist v. Reid* (1916), 171 App. Div. 756, 167 N. Y. Supp. 879.

Suspension or removal of the directors of a corporation can only be had in an action brought by the Attorney-General pursuant to sections 90, 91, and 307 of the General Corporation Law. *Welcke v. Trageser, No. 1* (1909), 131 App. Div. 731, 116 N. Y. Supp. 166.

Illegal removal of director.—A director of a corporation does not stand in the same relation to the corporate body which a private agent holds toward his principal without some statute or provision of the charter authorizing his removal or suspension. A director cannot be removed or suspended from office until the end of his term, at least without cause, and his remedy is *quo warranto* and not *mandamus*. *People ex rel. Manice v. Powell* (1911), 201 N. Y. 194, 94 N. E. 634.

A suit by a creditor, brought under section 91 and subdivision 2 of section 90 of the General Corporation Law, to recover moneys misappropriated by the direc-

ors or other officers of a corporation should be brought by the plaintiff in a representative capacity. An individual action at law cannot be maintained, for the only relief under the statute is a representative suit in equity. Sufficiency of complaint considered. *Davis v. Wilson* (1912), 150 App. Div. 704, 136 N. Y. Supp. 825.

Abatement of action.—An action by a director against his co-directors for mismanagement, etc., abates by reason of the fact that he is not re-elected to office. The action does not survive merely because the former director continues to be a stockholder nor by virtue of section 756 of the Code of Civil Procedure. *Hamilton v. Gibeon* (1911), 145 App. Div. 825, 130 N. Y. Supp. 684.

Appointment of receiver.—Court has power to appoint a receiver of a corporation in an action brought under the provisions of this and the next section. *Goss v. Warp Twisting In Mach. Co.* (1909), 133 App. Div. 122, 177 N. Y. Supp. 228. Where it appears that a corporation is paying dividends both upon its preferred and common stock, a receiver will not be appointed on the application of a minority stockholder who claims that the president of the corporation is violating a contract made by it. *Metzger v. Knox* (1912), 77 Misc. 271, 136 N. Y. Supp. 681, *affd.* (1897), 153 App. Div. 911, 137 N. Y. Supp. 1129.

Where no future or further waste is threatened, court will not appoint a receiver. *Sedgwick v. Seward Dev. Co.* (1911), 144 App. Div. 455, 129 N. Y. Supp. 209.

An order settling issues to be tried by a jury under subdivision 7 of the section in an action against officers for neglect and misconduct, which is alleged to have consisted in wrongfully excluding the plaintiff from participating in the management of the corporation, the jury should not be allowed to determine the damage to the corporation caused by such acts as it is wholly a matter of speculation. *Momand v. Landers* (1916), 174 App. Div. 227, 160 N. Y. Supp. 1053.

Section cited.—*Goss v. Warp Twisting In Mach. Co.* (1909), 133 App. Div. 122, 117 N. Y. Supp. 228; *Schenck Chemical Co. v. Industrial Advertising & Distributing Co.* (1910), 66 Misc. 597, 121 N. Y. Supp. 838; *Flaum v. Kaiser Bros. Co.* (1910), 66 Misc. 586, 590, 122 N. Y. Supp. 100, *affd.* 144 App. Div. 897, 129 N. Y. Supp. 1122; *Schoenkerr v. Van Meter* (1915), 215 N. Y. 548, 109 N. E. 625.

§ 91. Who may bring such an action.—An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state, or, except where the action is brought for the purpose specified in subdivision third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.

Source.—Code Civ. Pro. § 1782, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 35.

References.—See as to exception, § 307, post. Various provisions governing action, §§ 300-316, post. See note to last preceding section.

Application and effect.—Section applies to foreign corporations. *Miller v. Quincy* (1904), 179 N. Y. 294, 72 N. E. 116, *revd.* *Miller v. Barlow* (1903), 88 App. Div. 529, 85 N. Y. Supp. 310. Application of section considered. *Swan v. Mut. Res. Fund Life Assn.* (1898), 155 N. Y. 9, 49 N. E. 258, *affg.* (1897), 20 App. Div. 255, 46 N. Y. Supp. 841; *People v. Ballard* (1893), 136 N. Y. 639, 32 N. E. 611; *People v. Lowe* (1889), 117 N. Y. 175, 22 N. E. 1016, *revd.* (1888), 47 Hun 577; *Piza v. Butler* (1895), 90 Hun 254, 35 N. Y. Supp. 721.

Cause of action several—not joint. *Miller v. Barlow* (1903), 78 App. Div. 331, 79 N. Y. Supp. 964; *Halpin v. Mutual Brewing Co.* (1897), 20 App. Div. 583, 47 N. Y. Supp. 412; (1895), 91 Hun 220, 36 N. Y. Supp. 151; *Gileadsleeve v. Lester* (1893),

68 Hun 532, 22 N. Y. Supp. 1026, *affd.* (1893), 139 N. Y. 608, 35 N. E. 203.

Where it appears that a corporation and its creditors have an apparent cause of action against officers and directors, a petition for voluntary dissolution should be denied and the corporate existence continued until they can have opportunity to sue. *Matter of Great Northern Trading Co.* (1915), 168 App. Div. 536, 153 N. Y. Supp. 213.

Action by attorney-general, without a relator, properly brought where he deems action of trustees subversive to public interests. *People v. Ballard* (1894), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, *revg.* (1890), 56 Hun 125, 8 N. Y. Supp. 918.

Action by creditor.—*Powell v. Hinkley* (1904), 93 App. Div. 138, 87 N. Y. Supp. 2; *New Britain Nat. Bank v. Cleveland Co.* (1895), 91 Hun 447, 36 N. Y. Supp. 387 *affd.* (1899), 158 N. Y. 722, 53 N. E. 1128.

Who may maintain action.—A suit by a creditor to recover moneys misappropriated by directors or officers should be brought by plaintiff in a representative capacity; an individual action at law cannot be maintained. *Davis v. Wilson* (1912), 150 App. Div. 704, 135 N. Y. Supp. 825; but otherwise, where the rights of no other creditors are involved. *Buckley v. Stansfield* (1913), 155 App. Div. 735, 140 N. Y. Supp. 953, *affd.* (1915), 214 N. Y. 679, 108 N. E. 1090.

Sufficiency of complaint considered. *Clubb v. Cook* (1914), 161 App. Div. 775, 147 N. Y. Supp. 94.

A complaint in a suit in equity brought under this section by a creditor of the corporation to compel directors of the corporation to account for their official misconduct and waste of corporate assets, which fails to show that the plaintiff is a judgment creditor, or that it would be impossible or useless to obtain a judgment against the corporation itself, does not state a cause of action. *Steele v. Iaman* (1914), 164 App. Div. 146, 149 N. Y. Supp. 488.

Action against former directors by present director for misappropriation of corporate moneys. *Miller v. Quincy* (1904), 179 N. Y. 294, 72 N. E. 116, *revg.* *Miller v. Barlow* (1903), 88 App. Div. 529, 85 N. Y. Supp. 310; *Jacobus v. Diamond Soda Water Mfg. Co.* (1904), 94 App. Div. 366, 88 N. Y. Supp. 302.

Corporation not necessary party to action by director against codirectors for misappropriation of funds. *Miller v. Barlow* (1903), 78 App. Div. 331, 79 N. Y. Supp. 964; *Green v. Compton* (1903), 41 Misc. 21, 83 N. Y. Supp. 588.

The treasurer of a corporation suing a former treasurer to recover moneys belonging to the corporation and for an accounting, is not a manager or other officer of the corporation, "having a general superintendence of its concerns," within the meaning of this section of the General Corporation Law, and, hence, the complaint fails to state a cause of action under the statute. *Loughlin v. Wocker* (1912), 152 App. Div. 466, 137 N. Y. Supp. 257.

Trustee who has not signified acceptance of office may properly bring action for mismanagement of corporation. *Halpin v. Mut. Brewing Co.* (1897), 20 App. Div. 583, 47 N. Y. Supp. 412. See *Halpin v. Mut. Brewing Co.* (1895), 91 Hun 220, 36 N. Y. Supp. 151.

Stockholder's equitable action.—*Sage v. Culver* (1895), 147 N. Y. 241, 41 N. E. 513; *Rothmiller v. Stein* (1894), 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148, *affg.* (1894), 9 Misc. 167, 29 N. Y. Supp. 707; *Brinckerhoff v. Bostwick* (1882), 88 N. Y. 52, *revg.* (1880), 23 Hun 237; *Greaves v. Gouge* (1877), 69 N. Y. 154; *Gray v. Fuller* (1897), 17 App. Div. 29, 44 N. Y. Supp. 883; *Whitman v. Holmes Pub. Co.* (1900), 33 Misc. 47, 68 N. Y. Supp. 167; *Sayles v. Central Nat. Bank of Rome* (1896), 18 Misc. 165, 41 N. Y. Supp. 1063, *revd.* (1897), 18 App. Div. 580, 46 N. Y. Supp. 194. Stockholder's equitable action where directors refuse to sue. *Loewenstein v. Diamond Soda Water Co.* (1904), 94 App. Div. 383, 88 N. Y. Supp. 313.

Section cited.—*Goss v. Warp Twisting Machine Co.* (1909), 133 App. Div. 122, 117 N. Y. Supp. 228.

L 1909, ch. 28.

Judicial supervision of corporations.

§§ 91-a, 92.

§ 91-a. Actions against officers by corporation, or receiver or trustee.—

The supreme court shall also have and exercise jurisdiction in equity, at the suit of a corporation, or of a receiver, or trustee in bankruptcy thereof, to compel one or more trustees, directors, managers or other officers of the corporation to account for injury to or losses of the funds, assets or property of the corporation, caused by or through any neglect or failure of the defendants to perform, or for violation of, their duties. The court must, upon the application of either party, make an order directing the trial by jury of the issue of negligence, and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure. (*Added by L. 1913, ch. 633.*)

L. 1913, ch. 633, § 2. This act shall take effect immediately, but shall not affect any action begun before its enactment.

Applies to foreign corporations.—*German American Coffee Co. v. Diehl* (1914), 86 Misc. 547, 149 N. Y. Supp. 413, *affd.* (1915), 168 App. Div. 913, 152 N. Y. Supp. 1113.

An action against one guilty director without joining his codirectors is authorized by this section. *German American Coffee Co. v. Diehl* (1914), 86 Misc. 547, 149 N. Y. Supp. 413, *affd.* (1915), 168 App. Div. 913, 152 N. Y. Supp. 1113.

Complaint in suit by trustee in bankruptcy to set aside alleged preferential transfers by officers and directors to creditors in violation of section 66 of the Stock Corporation Law. *Sherwood v. Holbrook* (1917), 98 Misc. 668, 163 N. Y. Supp. 326.

Action to compel accounting.—The effect of this section is to do away with the distinction between strict actions for an accounting of property actually received and for wrongful acts, and to authorize a single comprehensive action in equity in which the directors or officers of a corporation may be called to account for all of their acts while in office, whether the said acts consisted of actual misappropriation of funds or constituted negligence or neglect of duty resulting in damage. *German American Coffee Co. v. Diehl* (1914), 86 Misc. 547, 149 N. Y. Supp. 413, *affd.* (1915), 168 App. Div. 913, 152 N. Y. Supp. 1113.

Joinder of actions.—Prior to the enactment of this section an action at law for damages for the misfeasance or nonfeasance of a director or officer of a corporation could not be joined with an action for equitable relief, but the effect of said statute is to do away with the distinctions theretofore recognized between strict actions for an accounting of property actually received and for wrongful acts and to authorize a single comprehensive action in equity in which the directors or officers of a corporation may be called to account for all their acts while in office. *Sherwood v. Holbrook* (1917), 98 Misc. 668, 163 N. Y. Supp. 326.

Action to set aside preferential transfers under § 66 of Stock Corporation Law.—The language of this section is sufficiently broad to authorize an action in equity by a trustee in bankruptcy of a domestic corporation to set aside alleged preferential payments by its officers and directors to creditors, one of whom was also a director and officer, made at a time when the corporation was insolvent, and in contravention of section 66 of the Stock Corporation Law. *Sherwood v. Holbrook* (1917), 98 Misc. 668, 163 N. Y. Supp. 326.

§ 92. Visitorial power over corporation not affected by this article.—

This article does not divest or impair any visitatorial power over a corporation, which is vested by statute in a corporate body, or a public officer.

§ 100.

Action for sequestration, dissolution, etc.

L. 1909, ch. 28.

Source.—Code Civ. Pro. § 1783, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 34.

ARTICLE VI.

**ACTION FOR SEQUESTRATION, ACTION FOR DISSOLUTION AND ACTION TO
ENFORCE INDIVIDUAL LIABILITY OF OFFICER AND MEMBER
OF CORPORATION.**

- Section 100. Action by judgment creditor for sequestration.
101. Action to dissolve a corporation.
 102. Who may bring action to dissolve a corporation.
 103. Temporary injunction in action authorized by this article.
 104. Temporary receiver.
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 111. Proceedings in such actions.
 112. Distribution of property of corporation by judgment in actions under this article.
 113. Recovery of stock subscriptions.
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 116. Entry of judgment and filing certified copies thereof.

§ 100. Action by judgment creditor for sequestration.—Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the state, and an execution issued thereupon to the sheriff of the county, where the corporation transacts its general business, or where its principal office is located, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment sequestering the property of the corporation, and providing for a distribution thereof, as prescribed in section one hundred and twelve of this chapter.

Source.—Code Civ. Pro. § 1784, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 36.

Consolidators' note.—This article consists of ch. 15, tit. 2, art. 3, of the Code of Civil Procedure, entitled "Actions to procure the dissolution of a corporation and actions to enforce the individual liability of the officers or members of a corporation with or without a dissolution thereof." It has been inserted in the General Corporation Law without change. One or two provisions have been inserted in this article from other statutes, attention to which will be called by appropriate notes.

References.—Judgment creditor's action generally, Code Civ. Pro. §§ 1871–1879. Motions for sequestration to be made in judicial district where principal place of business of corporation is situated, Gen. Rules of Practice, No. 80. A receiver may be appointed, §§ 104, 106, 112, 306, post. Article does not apply to certain corporations, § 300, post. Provisions regulating action, §§ 300–316, post. Powers of receivers, §§ 230–278, post.

Application and effect.—Section not applicable to foreign corporation. *Dreyfus & Co. v. Seale & Co.* (1899), 37 App. Div. 351, 55 N. Y. Supp. 1111, revg. (1896), 18 Misc. 551, 41 N. Y. Supp. 875. Application of section considered. *People v. Buffalo Stone & Cement Co.* (1892), 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240; *Kieley v. Barron & Cooke H. & P. Co.* (1903), 87 App. Div. 317, 84 N. Y. Supp. 306; *Home Bank v. Brewster & Co.* (1897), 15 App. Div. 338, 44 N. Y. Supp. 54; *Watkins v. Watkins & Turner Lumber Co.* (1896), 11 App. Div. 517, 43 N. Y. Supp. 41; *Bien v. Birby* (1896), 18 Misc. 423, 41 N. Y. Supp. 433; *Buckley v. Harrison* (1895), 10 Misc. 687, 31 N. Y. Supp. 999; *Porter v. Industrial Information Co.* (1893), 5 Misc. 262, 25 N. Y. Supp. 328; *The Nat. Broadway Bank v. Wessell Metal Co.* (1891), 59 Hun 470, 13 N. Y. Supp. 744; *Easton Nat. Bank v. Buffalo Chemical Works* (1888), 48 Hun 557, 1 N. Y. Supp. 250; *Morrison v. Menhaden Co.* (1885), 37 Hun 522; *Whitney v. N. Y. & Atl. R. Co.* (1884), 32 Hun 164.

The action may be maintained in a federal court as well as in a state court; and where a federal court in such a state has taken possession of the assets of the corporation the court's jurisdiction is not ousted by the subsequent institution of a suit by the state attorney-general in which receivers are also appointed. *Robinson v. Mutual Reserve Life Ins. Co.* (1908), 162 Fed. 794.

Foreign corporations.—Since the amendment of 1908 (ch. 278) there is now nothing to prevent taking supplementary proceedings against a foreign corporation which sequestration proceedings cannot be brought. *Matter of Meyer v. Consolidated Ice Co.* (1909), 132 App. Div. 265, 116 N. Y. Supp. 906, affd. (1909), 196 N. Y. 471, 90 N. E. 54.

The parties to a judgment creditor's action and those interested may consent to waive the fact that a corporation is a foreign corporation and, having done so and the court having acted upon the waiver, it is not for a third party, who has likewise consented, to interfere with the administration of the property in the hands of a receiver. *Horton v. McNally Co.* (1913), 155 App. Div. 322, 140 N. Y. Supp. 357.

Parties.—In action for sequestration, stockholders and trustees are proper parties if personal liability is claimed against them. *Matter of Murray Hill Bank* (1897), 153 N. Y. 199, 47 N. E. 298; *Bagley & Sewall Co. v. Lenning* (1901), 61 App. Div. 26, 70 N. Y. Supp. 242; *Beals v. Buffalo Const. Co.* (1900), 49 App. Div. 589, 63 N. Y. Supp. 635; *Cummings v. American Gear & Spring Co.* (1895), 87 Hun 598, 34 N. Y. Supp. 541. Persons to whom property is illegally transferred may be made defendants. *Proctor v. Sidney Sash & Furniture Co.* (1896), 8 App. Div. 42, 40 N. Y. Supp. 454. Creditor cannot maintain action until execution has been returned unsatisfied. *Rodbourn v. Utica, Ithaca & E. R. R. Co.* (1882), 28 Hun 369. One creditor may maintain an action, and need not allege that he sues for the benefit of other creditors. *Woodard v. Holland Med. Co.* (1891), 39 N. Y. St. Rep. 411, 15 N. Y. Supp. 128.

No priority of creditors where one obtains judgment under § 48 of Stock Corporation Law, setting aside certain transactions, notwithstanding action brought for benefit of creditors who come in, and no other creditors came in. *Lodi Chemical Co. v. National Lead Co.* (1899), 41 App. Div. 535, 58 N. Y. Supp. 717.

Stockholder's liability for unpaid stock may be enforced by sequestration action against him jointly with the corporation. *Beals v. Buffalo Const. Co.* (1900), 49 App. Div. 589, 63 N. Y. Supp. 635. But receiver may not enforce stockholder's liability. *Farnsworth v. Wood* (1883), 91 N. Y. 308.

Receiver of insurance company represents stockholders, policyholders, and creditors, and is vested with title to all its property. *Raymond v. Security Trust & Ins. Co.* (1904), 44 Misc. 31, 89 N. Y. Supp. 753.

Receiver appointed in sequestration proceedings has priority over one subse-

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quently appointed in proceeding by directors for voluntary dissolution. *Matter of Hoagland Co.* (1901), 36 Misc. 28, 72 N. Y. Supp. 435.

Powers of receiver. See *Hubbell v. Syracuse Iron Co.* (1886), 42 Hun 182.

Corporation proper defendant in action by receiver appointed on sequestration to set aside corporation's fraudulent conveyance. *Hubbell v. Merchants' Nat. Bank* (1886), 42 Hun 200.

Judgment of sequestration not open to collateral attack. *Hunting v. Blum* (1893), 69 Hun 562, 23 N. Y. Supp. 965, *affd.* (1894), 143 N. Y. 511, 38 N. E. 716.

Corporation not dissolved by judgment of sequestration, and action may thereafter be prosecuted against it. *People v. Troy Steel & Iron Co.* (1892), 82 Hun 303, 31 N. Y. Supp. 337; *Kincaid v. Dwinnelle* (1875), 59 N. Y. 548.

Appeals from judgments against the corporation may be carried on notwithstanding judgment of sequestration and appointment of receiver. *Auburn But-ton Co. v. Sylvester* (1893), 68 Hun 401, 22 N. Y. Supp. 891. Judgment and execution as security on appeal. *Rodbourn v. Utica, Ithaca & E. R. Co.* (1882), 28 Hun 369.

§ 101. Action to dissolve a corporation.—In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the laws of the state, and forfeiting its corporate rights, privileges and franchises, may be maintained, as prescribed in the next section:

1. Where the corporation has remained insolvent for at least one year.
2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.
3. Where it has suspended its ordinary and lawful business for at least one year.
4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.

Source.—Code Civ. Pro. § 1785, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 38, and pt. of § 39.

References.—Voluntary dissolution, §§ 170–195, *post*. Actions against persons unlawfully exercising corporate functions, Code Civ. Pro. §§ 1948–1956. Does not apply to certain corporations, § 300, *post*. Receiver may be appointed, §§ 104, 106, 112, 306, *post*. Powers of receivers, §§ 230–278, *post*. Provisions regulating action, §§ 300–316, *post*.

Application of section considered.—*People ex rel. Lehmaier v. Interurban St. R. Co.* (1904), 177 N. Y. 296, 69 N. E. 596. As to method of procedure against corporations for dissolution. *Herring v. N. Y., L. E. & W. R. Co.* (1887), 105 N. Y. 389, 12 N. E. 763. As to necessity of action by attorney-general on recommendation of superintendent of banks. *People v. Mercantile Co-operative Bank* (1900), 53 App. Div. 295, 65 N. Y. Supp. 766. In reference to provisions of Insurance Law. *People v. Equitable Mutual Insurance Corporation* (1896), 1 App. Div. 84, 37 N. Y. Supp. 80, *affg.* (1895), 12 Misc. 556, 33 N. Y. Supp. 708; *Hagmayer v. Alten* (1901), 36 Misc. 59, 72 N. Y. Supp. 623. In general. *Osborne v. Montelac Park* (1895), 89 Hun 167, 35 N. Y. Supp. 610, *affd.* (1897), 153 N. Y. 672, 48 N. E. 1106.

The action may be maintained in a federal court as well as in a state court; and where a federal court in such a state has taken possession of the assets of the

corporation the court's jurisdiction is not ousted by the subsequent institution of a suit by the state attorney-general in which receivers are also appointed. *Robinson v. Mutual Reserve Life Ins. Co.* (1908), 162 Fed. 794.

Pleadings.—Complaint in action by attorney-general for dissolution, demurrable where merely alleging opinion of superintendent of banks that it is inexpedient for defendant to continue in transaction of business. *People v. Manhattan Real Estate & Loan Co.* (1903), 175 N. Y. 133, 67 N. E. 219, revg. (1902), 74 App. Div. 535, 77 N. Y. Supp. 837. Jurisdictional facts must be pleaded. *Osborne v. Montelac Park* (1895), 89 Hun 167, 35 N. Y. Supp. 610.

Priority.—Action by attorney-general for involuntary dissolution of bank takes precedence over action for voluntary dissolution already begun. *Matter of Murray Hill Bank* (1897), 153 N. Y. 199, 47 N. E. 298, affg. (1897), 14 App. Div. 318, 629, 43 N. Y. Supp. 836; *People v. Murray Hill Bank* (1894), 10 App. Div. 328, 41 N. Y. Supp. 804; *People v. Seneca Lake Grape & Wine Co.* (1889), 52 Hun 174, 5 N. Y. Supp. 136.

Effect on pending actions.—Continuance prevented by judgment of dissolution unless their continuance authorized by court rendering such judgment. *People v. Troy Steel & Iron Co.* (1894), 82 Hun 303, 31 N. Y. Supp. 337. But cause of action for injury received in employ of corporation held to survive its dissolution. *Marstaller v. Mills* (1894), 143 N. Y. 398, 38 N. E. 370. Lien must have existed prior to judgment of dissolution to be maintained thereafter. *People v. Mutual Benefit Life Assn.* (1895), 86 Hun 219, 33 N. Y. Supp. 191. See, in general, *Holmgrenhead v. Woodward* (1887), 107 N. Y. 96, 13 N. E. 621; *Sturges v. Vanderbilt* (1878), 73 N. Y. 384; *Auburn Button Co. v. Sylvester* (1893), 68 Hun 401, 22 N. Y. Supp. 891.

Insolvency.—What amounts to. *Brower v. Harbeck* (1854), 9 N. Y. 589; *Nealis v. American Tube & Iron Co.* (1894), 76 Hun 220, 27 N. Y. Supp. 733, affd. (1896), 150 N. Y. 42, 44 N. E. 944; *Lodi Chemical Co. v. Pleasants* (1898), 25 Misc. 97, 54 N. Y. Supp. 668; *Abrams v. Manhattan Consumers Brewing Co.* (1911), 142 App. Div. 392. Means inability to meet obligations promptly. *Olney v. Baird* (1896), 7 App. Div. 95, 40 N. Y. Supp. 202, affg. (1895), 15 Misc. 385, 37 N. Y. Supp. 815. Not where demand notes unpaid until after demand made and refused. *Denike v. N. Y. & R. L. & C. Co.* (1880), 80 N. Y. 599.

Suspension of business.—Where street car company failed to run cars for five days, held, this nonuser not sufficient for action for dissolution. *People v. Atlantic Ave. R. Co.* (1891), 125 N. Y. 517, 26 N. E. 622, affg. (1890), 57 Hun 378, 10 N. Y. Supp. 907. Application of subdivision three considered. *People v. American Steam Boiler Ins. Co.* (1895), 87 Hun 229, 33 N. Y. Supp. 834, revd. on other points (1895), 147 N. Y. 25, 41 N. E. 423. What deemed suspension. *United States Glass Co. v. Vary* (1894), 79 Hun 103, 29 N. Y. Supp. 603, affd. (1897), 152 N. Y. 121, 46 N. E. 312. Wilful nonuser sufficient ground for such action. *People v. Milk Exchange* (1892), 133 N. Y. 565, 30 N. E. 850.

That the gas company had suspended its ordinary and lawful business for more than one year and was liable to a judgment of dissolution and the forfeiture of its corporate rights and privileges, under this section of the General Corporation Law, did not affect its special franchise to maintain a piping system in the village streets, that being a property right which survives the dissolution of the corporation and belongs to its creditors and stockholders upon a distribution of its assets. *Village of Fredonia v. Fredonia Natural Gas Light Co.* (1914), 84 Misc. 150, 145 N. Y. Supp. 820, revd. (1914), 162 App. Div. 924, 146 N. Y. Supp. 1116.

Forfeiture of franchise by gas company.—A franchise to lay and maintain gas pipes and other machinery underground along or across any or all of the streets of a village, and which imposes no obligation on the company to furnish gas to any one, is not forfeited by a failure for three years to so use the streets. Where,

after the gas company had for three years ceased to use its pipes to furnish gas, it had paid the tax imposed upon its special franchise in the streets, the village was estopped from asserting that the company had forfeited its franchise for nonuser. *Village of Fredonia v. Fredonia Natural Gas Light Co.* (1914), 84 Misc. 150, 145 N. Y. Supp. 820, revd. (1914), 162 App. Div. 924, 146 N. Y. Supp. 1116.

Collateral attack.—A party other than the state may not in a collateral proceeding contend that a corporation has by a failure to exercise its corporate powers forfeited its existence; that can only be accomplished by the judgment of a court of competent jurisdiction in an action brought for that purpose by the attorney-general, in the name of the state, under this section. *Village of Fredonia v. Fredonia Natural Gas Light Co.* (1914), 84 Misc. 150, 145 N. Y. Supp. 820, revd. (1914), 162 App. Div. 924, 146 N. Y. Supp. 1116.

§ 102. Who may bring action to dissolve a corporation.—An action specified in the last section, may be maintained by the attorney-general, in the name and in behalf of the people. And whenever a creditor or stockholder of any corporation submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney-general omits, for sixty days after this submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly; and if there be no person in existence upon whom service of the summons can be made under the provisions of section four hundred and thirty-one of the code of civil procedure, service of the summons in such action may be made in such manner as the court upon application by petition may direct. (*Amended by L. 1912, ch. 204.*)

Source.—Code Civ. Pro. § 1786, as amended by L. 1880, ch. 301, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 40; L. 1870, ch. 151, §§ 2, 5.

Application.—Inapplicable to joint stock association. *Snyder v. Lindsey* (1895), 92 Hun 432, 36 N. Y. Supp. 1037, modified as to other points (1899), 157 N. Y. 616, 52 N. E. 592. Application of section considered. *People v. Commercial Bank* (1902), 37 Misc. 16, 74 N. Y. Supp. 806, affd. (1902), 72 App. Div. 635, 76 N. Y. Supp. 1025; *Osborne v. Montelac Park* (1895), 89 Hun 167, 35 N. Y. Supp. 610, affd. (1897), 153 N. Y. 672, 48 N. E. 1106.

Parties.—Action under this section must be brought either by the people or by the party in interest, not on the relation of the party. *People ex rel. Hearst v. Ramapo Water Co.* (1900), 51 App. Div. 145, 64 N. Y. Supp. 532. Parties in general. *Thomas v. Met. Mut. Prot. Union* (1890), 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175, revg. (1900), 49 Hun 171, 2 N. Y. Supp. 195; *Denike v. N. Y. & R. L. R. C. Co.* (1880), 80 N. Y. 599; *People v. Albany & Vermont R. Co.* (1879), 77 N. Y. 323, revg. (1878), 15 Hun 126.

Attorney-general's duty is absolute, and not discretionary, upon receiving report from superintendent of banks that an institution is unsound. *People v. Mercantile Co-operation Bank* (1900), 53 App. Div. 295, 65 N. Y. Supp. 766.

Action without relator may be maintained by attorney-general against banking corporation which superintendent of banks has authorized dissolved. *People v. Manhattan Real Estate & Loan Co.* (1902), 74 App. Div. 535, 77 N. Y. Supp. 837, revd. on another point (1903), 175 N. Y. 133, 67 N. E. 219.

Pendency of proceeding for voluntary dissolution does not preclude attorney-

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General from proceeding under this section. *People v. Seneca Lake, etc., Co.* (1889), 52 Hun 174, 5 N. Y. Supp. 136.

§ 103. Temporary injunction in action authorized by this article.—In an action, brought as prescribed in this article, the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order, restraining the corporation, and its trustees, directors, managers and other officers, from collecting or receiving any debt or demand, and from paying out, or in any way transferring or delivering, to any person, any money, property, or effects of the corporation, during the pendency of the action; except by express permission of the court. Where the action is brought to procure the dissolution of the corporation, the injunction may also restrain the corporation, and its trustees, directors, managers and other officers, from exercising any of its corporate rights, privileges, or franchises, during the pendency of the action; except by express permission of the court. The provisions of title second of chapter seventh of the code of civil procedure, relating to the granting, vacating or modifying of an injunction order, apply to an injunction order, granted as prescribed in this section; except that it can be granted only by the court.

Source.—Code Civ. Pro. § 1787, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 39, and pt. of § 40.

Injunction granted to restrain acts subversive of charter rights. *Burden v. Burden* (1899), 159 N. Y. 287, 54 N. E. 17. Leave to sue, when not required. *Lewisohn Bros. v. Anaconda Copper Mining Co.* (1898), 23 Misc. 31, 50 N. Y. Supp. 263, revd. (1898), 29 App. Div. 552, 51 N. Y. Supp. 1089. Demand on corporation for redress, when required. *Fitchett v. Murphy* (1899), 46 App. Div. 181, 61 N. Y. Supp. 182. Injunction does not work dissolution. *Kincaid v. Dwinelle* (1876), 59 N. Y. 548.

§ 104. Temporary receiver.—In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver, so appointed, before final judgment is a temporary receiver, until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof.

Source.—Code Civ. Pro. § 1788, in part, as amended by L. 1882, ch. 399; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 36 and pt. of § 41. For remainder of § 1788, see § 106, post.

References.—This section applicable to a receiver appointed in proceeding for

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tary dissolution, § 182, post. Certain court officers ineligible for appointment as receiver, Judiciary Law, § 251. Inquiry into qualifications, Code Civ. § 327. Powers, duties and liabilities of receivers, generally, §§ 230-278, post. Functions of receivers, § 277-278, post.

action may be maintained in a federal court as well as in a state court; and a federal court in such an action has taken possession of the assets of the corporation the court's jurisdiction is not ousted by the subsequent institution of an action by the state attorney-general in which receivers are also appointed. *Robin Mutual Reserve Life Ins. Co.* (1908), 162 Fed. 794.

Conflict of state and federal jurisdiction.—When suit in federal court against a corporation and appointment of receiver therein does not prevent state court from revoking charter and appointing receiver of property in its jurisdiction. *People v. N. Y. City Railway Co.* (1907), 57 Misc. 114, 107 N. Y. Supp. 247.

Appointment of receiver wholly statutory; however courts of equity may appoint receivers *pendente lite*, who are officers of the court. *Decker v. Gardner* (1897), 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480. Statute historically construed. *Herring v. N. Y., L. E. & W. R. Co.* (1887), 105 N. Y. 340, 12 N. E. 763; *Rich v. Sanderson* (1898), 35 App. Div. 546, 55 N. Y. Supp. 881.

Priority.—As to whether receiver in involuntary proceedings would dislodge a receiver appointed by the superintendent of banks of possession assumed pursuant to provision of banking law. *Matter of Murray Hill Bank* (1897), 153 N. Y. 199, 213, 47 N. E. 116. *Matter of* (1897), 14 App. Div. 318, 629, 43 N. Y. Supp. 836. Title of general receiver appointed before proceedings for dissolution begun, prior to that of a receiver appointed in latter action. *People v. U. S. Law Blank & Engraving Co.* (1898), 24 Misc. 535, 53 N. Y. Supp. 852. See, in general, *Whitney v. New York & Atlantic R. Co.* (1884), 32 Hun 164. Rights as against lien of a receiver. *Matter of Muefeldt & Haynes Piano Co.* (1896), 12 App. Div. 2, 2 N. Y. Supp. 802.

Right to attorney-general of proceedings for appointment of receiver are inalienable. *Whitney v. New York & Atlantic R. Co.* (1884), 32 Hun 164.

Necessity for temporary receiver must be shown before court will appoint one. *People v. Barron & Cook Co.* (1903), 87 App. Div. 317, 84 N. Y. Supp. 306. As to receiver of mutual insurance company. *People v. Equitable Mutual Insurance Co.* (1896), 1 App. Div. 84, 37 N. Y. Supp. 80. See also *People v. Atlantic Mutual Ins. Co.* (1878), 74 N. Y. 177; *Denike v. N. Y. & R. Lums., etc., Co.* (1880), 80 N. Y. 599. May be contested by officers of corporation in good faith, and they are entitled to expenses therefor. *Barnes v. Newcomb* (1882), 89 N. Y. 108.

When an action for the sequestration of the property of a domestic corporation, a temporary receiver will not be appointed on the complaint alone, unsupported by affidavit or other evidence showing the necessity of the receivership. *Feder v. Standard Churn Manufacturing Co.* (1908), 128 App. Div. 493, 112 N. Y. Supp. 834.

Notice of receiver's appointment must be published before person having property of corporation can be held to account therefor. *Matter of Stonebridge* (1890), 10 N. Y. 441, 10 N. Y. Supp. 727. Lienor not entitled to notice of motion for appointment. *Morrison v. Menhaden Co.* (1885), 37 Hun 522.

Effect of temporary receiver in sequestration proceedings is continued by the court's judgment as permanent receiver, he is not required to file further bond or receive directions from the court. *Jones v. Blum* (1895), 145 N. Y. 333, 39 N. Y. 954.

Individual liability of receiver.—Completion of contracts of corporation may be continued by order appointing temporary receiver and he is not individually liable for materials purchased therefor. *Nason Mfg. Co. v. Garden* (1900), 52 App. Div. 363, 65 N. Y. Supp. 147. Nor for acceptance of draft drawn for goods

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purchased. *Olpherts v. Smith* (1899), 45 App. Div. 514, 66 N. Y. Supp. 976, *affd.* (1903), 173 N. Y. 593, 65 N. E. 1120; *Sager Mfg. Co. v. Smith* (1899), 45 App. Div. 353, 60 N. Y. Supp. 849, *affd.* (1901), 167 N. Y. 600, 60 N. E. 1120. Where not authorized to continue business, defunct corporation not liable to truckman hired by receiver, though he may be individually liable. *Meyer v. Lexow* (1896), 1 App. Div. 116, 37 N. Y. Supp. 67. For rent on unexpired term. *Metropolitan L. Ins. Co. v. Sanborn* (1901), 34 Misc. 531, 69 N. Y. Supp. 1009. Receiver's estate personally liable for expenditures made in preservation of corporate property. *Rogers v. Wendell* (1889), 54 Hun 540, 7 N. Y. Supp. 781.

Powers and duties of receiver.—May sue to set aside fraudulent transfer or creditor may sue on behalf of receiver. *Raymond v. Security Trust & Ins. Co.* (1904), 44 Misc. 31, 89 N. Y. Supp. 753. May apply to court for instructions. *People v. St. Nicholas Bank* (1894), 77 Hun 159, 28 N. Y. Supp. 407. And court may refuse to compel receiver to complete sale contracted by him, if it deems such sale inadvisable. *Matter of Atty-Gen. v. Continental L. Ins. Co.* (1883), 94 N. Y. 199.

No power to appoint a deputy and not liable for deputy's act. *Murray v. Cantor* (1896), 18 Misc. 399, 41 N. Y. Supp. 652. Sale of collateral under direction of court. *Porter v. Frazer* (1894), 6 Misc. 553, 27 N. Y. Supp. 517. To maintain action to determine which of its bonds were secured by mortgage on its property. *Hubbell v. Syracuse Iron Works* (1886), 42 Hun 182. To distribute its assets. *Farmers' L. & T. Co. v. Aberle* (1897), 19 App. Div. 79, 46 N. Y. Supp. 10. *Matter of Atlas Iron Const. Co.* (1897), 19 App. Div. 415, 46 N. Y. Supp. 467. Powers in general. *McClure v. Law* (1899), 161 N. Y. 78, 55 N. E. 388. *Mason v. Henry* (1897), 152 N. Y. 529, 46 N. E. 837. *Matter of Grand Cent. Bank* (1899), 27 Misc. 116, 55 N. Y. Supp. 418, *affd.* (1899), 42 App. Div. 157, 58 N. Y. Supp. 1022; *Regener v. Phillips* (1899), 26 Misc. 311, 56 N. Y. Supp. 174. See also *Mutual Brewing Co. v. College Point Ferry Co.* (1897), 16 App. Div. 149, 45 N. Y. Supp. 101. As to securities deposited with superintendent of insurance. *Matter of Guardian Mut. L. Ins. Co.* (1878), 74 N. Y. 617. *People ex rel. v. Chapman* (1876), 64 N. Y. 557; *Ruggles v. Chapman* (1874), 59 N. Y. 163. May not invest moneys in his hands. *People v. North American L. Ins. Co.* (1882), 89 N. Y. 94, *mod.* (1882), 26 Hun 294.

Powers of auxiliary receiver of foreign corporation. *Buckley v. Harrison* (1895), 10 Misc. 683, 31 N. Y. Supp. 999.

Utmost good faith required from temporary receiver attempting to prevent competition on mortgage foreclosure. *Atkins v. Judson* (1898), 33 App. Div. 42, 53 N. Y. Supp. 504.

Rights of a receiver of the property.—A receiver in a proceeding brought pending a stockholder's action against a foreign corporation and some of its officers to set aside certain alleged fraudulent transfers and to prevent certain other contemplated transfers, does not take title to any property of the judgment-debtor nor does he possess any authority to institute proceedings in order to ascertain what property he is entitled to claim from third persons, where such receiver is appointed by a court in the exercise of its equitable jurisdiction as a so-called common-law receiver *pendente lite* of the property of the corporation, to prevent the unlawful disposition and waste of its property. *Matter of Howell v. German Theatre* (1909), 64 Misc. 110, 117 N. Y. Supp. 1124.

Foreign corporations.—Receiver of property of insolvent foreign corporation situated in this state may be appointed to preserve same *pendente lite* for protection of interests of New York creditors. *Horton v. McNally Co.* (1913), 155 App. Div. 322, 140 N. Y. Supp. 357; *Moe v. McNally Co.* (1910), 133 App. Div. 480, 123 N. Y. Supp. 71; *Blake v. McClung* (1898), 172 U. S. 239, 257, 43 L. ed 432, 19 Supp. Ct. 165.

The title of receivers of a foreign corporation appointed in another state is subject to the right of the courts of this state to control the corporate assets in this state for the benefit of domestic creditors. *Courtright v. Vreeland* (1909), 64 Misc. 46, 117 N. Y. Supp. 952.

Rights of an assignee for the benefit of creditors under an assignment made pending a suit to sequester the property of a corporation determined in *Rump v. Van Rensselaer Realty Co.* (1910), 138 App. Div. 289, 122 N. Y. Supp. 912.

Actions by and against receivers.—Insolvent corporation not necessary party to action by its temporary receiver against another corporation to recover amount of fraudulent preference. *Nealls v. American Tube & Iron Co.* (1896), 150 N. Y. 42, 44 N. E. 944, affg. (1894), 76 Hun 220, 27 N. Y. Supp. 733. See, however, *Hubbell v. Merchants' Nat. Bank* (1886), 42 Hun 200. As to whether corporation necessary party defendant in action against its receiver *quere*. *Cobb v. Sweet* (1899), 46 App. Div. 375, 61 N. Y. Supp. 545. Corporation not indispensable party to summary proceedings brought by its temporary receiver. *Bien v. Bixby* (1896), 18 Misc. 415, 41 N. Y. Supp. 433. Stockholders of bank not proper parties in action by receiver against directors for misconduct. *Kimball v. Ives* (1883), 30 Hun 568.

Payments by receiver.—He may not pay debts of corporation where not authorized so to do in order appointing him. *Mercantile Trust Co. v. Kings Co. Ed. R. Co.* (1899), 40 App. Div. 141, 57 N. Y. Supp. 892.

Commissions of temporary receiver.—*Matter of Smith Co.* (1898), 31 App. Div. 39, 52 N. Y. Supp. 877; *Matter of Little* (1899), 47 App. Div. 22, 62 N. Y. Supp. 27, affd. (1901), 165 N. Y. 643, 59 N. E. 1125; *Atty.-Gen. v. North American L. Ins. Co.* (1882), 89 N. Y. 94, mod. (1882), 26 Hun 294. See also notes under § 239, post, as to powers of receivers.

§ 105. Additional powers and duties of temporary receiver.—A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities, of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed so to do by the court.

Source.—Code Civ. Pro. § 1789, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 41 and pt. of § 42; L. 1852, ch. 71, § 1. See note to last preceding section.

In General.—Temporary receiver proper party to action by creditor to enforce personal liability of directors. *Whitney v. Wilcox* (1901), 58 App. Div. 57, 68 N. Y. Supp. 667. Application of section considered. *Goodrich v. Sanderson* (1898), 35 App. Div. 546, 55 N. Y. Supp. 881; *Bien v. Bixby* (1896), 18 Misc. 415, 41 N. Y. Supp. 433; *Brown v. U. S. & B. M. SS. Co.* (1894), 8 Misc. 562, 28 N. Y. Supp. 642; *People v. St. Nicholas Bank* (1894), 76 Hun 522, 28 N. Y. Supp. 114.

Temporary receiver's powers.—Receiver may not surrender collaterals pledged as security for loan without order of court. *People v. St. Nicholas Bank* (1894), 76 Hun 522, 28 N. Y. Supp. 114.

Authority to act must be specifically given by court, and corporate fund not liable for debts accrued in absence of such authority. *Meyer v. Lexow* (1896), 1 App. Div. 116, 37 N. Y. Supp. 67. No authority to continue business, in absence of direction by court, and estate cannot be charged with liability incurred by

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him therein. *Appleton v. Welch* (1897), 20 Misc. 343, 45 N. Y. Supp. 751. Is vested with many of the important powers of a permanent receiver. *Nealla v. Am. Tube & Iron Co.* (1896), 150 N. Y. 42, 44 N. E. 944. He is vested with the title of the property for the purpose of his trust, and for the purpose of holding, protecting and reducing the property to possession he represents the corporation and its creditors as fully as a permanent receiver. *Matter of Smith Co.* (1898), 11 App. Div. 39, 52 N. Y. Supp. 877; *Stiefel v. N. Y. Novelty Co.* (1897), 14 App. Div. 371, 43 N. Y. Supp. 1012. See notes to preceding section and § 239, post.

§ 106. Permanent receiver.—A receiver appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver in article eleven of this chapter. (*Amended by L. 1909, ch. 240, § 33.*)

Source.—Code Civ. Pro. § 1788, in part. For remainder of section, see § 104, ante.

Consolidators' note.—This section was formerly a part of § 1788 of the Code of Civil Procedure. The original section provided that a permanent receiver should have all the powers, duties and liabilities of receivers appointed in proceedings for the voluntary dissolution of a corporation. The powers, duties and liabilities of such receivers have been consolidated in art. 11 of this chapter and the reference in this section has been changed accordingly.

References.—See notes to § 104, ante, and § 239, post.

§ 107. Additional duties and liabilities of permanent receiver.—A permanent receiver shall keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of such receiver, shall at all reasonable times be open for the inspection of all persons having an interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him, the supreme court, at either an appellate division or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per centum per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.

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Source.—R. S., pt. 3, ch. 8, tit. 4, § 42, as amended by L. 1858, ch. 348, § 1. This section (42) by the Code repealing act of 1880 is saved and made applicable to a receiver appointed as prescribed in § 1788 of the Code Civil Procedure.

Consolidators' note.—This section of the Revised Statutes was made applicable to proceedings for the voluntary dissolution of a corporation by L. 1880, ch. 245, § 1, p. 368, which preserved it from repeal and made it applicable in the following language: "Section 42 which is hereby made applicable to a permanent receiver appointed as prescribed in § 1788 of the Code of Civil Procedure." Section 42 of the Revised Statutes was amended by L. 1858, ch. 348, by adding to the original section certain provisions relating to receivers. These provisions have been preserved in the text. It becomes no longer necessary to retain the first sentence of this section as the powers, duties and liabilities of receivers have been made a separate article in this chapter and by an appropriate reference these provisions have been made applicable to this article.

§ 108. Application for appointment of receiver.—Applications made by the attorney-general for the appointment of a receiver of a corporation shall be made in the judicial district in which the action in which the appointment is sought is triable.

Source.—L. 1883, ch. 378, § 1, in part, as amended by L. 1896, ch. 282.

Consolidators' note.—A more general provision than the one found in the text has been inserted as § 314 in art. 12 relating to provisions applicable to two or more of the actions of proceedings incorporated in this chapter.

References.—Applications for appointment of receivers by persons other than attorney-general, § 183, post. County where action may be brought by attorney-general in behalf of the people, § 315, post.

Act of 1883 is constitutional.—*Matter of Stonebridge* (1891), 37 N. Y. St. Rep. 617, 13 N. Y. Supp. 770, *affd.* (1891), 128 N. Y. 618, 28 N. E. 253.

Application relates exclusively to receivers appointed in proceedings in insolvency. *Whitney v. N. Y. & Atlantic R. R. Co.* (1884), 32 Hun 164; *U. S. Trust Co. v. N. Y., W. S. & B. R. R. Co.* (1886), 101 N. Y. 478, 5 N. E. 316, *affg.* (1885), 35 Hun. 341.

Jurisdiction essential where appointment is denied. *Springs v. Bowery Nat. Bank* (1892), 63 Hun 505, 18 N. Y. Supp. 574.

Uncontroverted facts, peculiarly in knowledge of creditor, are to be taken as true, on application for appointment. *Holland Trust Co. v. Consol. Gas & Elec. Lt. Co.* (1895), 85 Hun 454, 32 N. Y. Supp. 830.

Strangers cannot participate in motion for appointment. *O'Mahoney v. Belmont* (1875), 62 N. Y. 133.

Expense of application a first charge. *Matter of New Paltz v. Wallkill R. R. Co.* (1899), 27 Misc. 451, 59 N. Y. Supp. 247, *affd.* (1899), 42 App. Div. 622, 59 N. Y. Supp. 1111.

§ 109. Officers and stockholders may be made parties in action brought by creditor.—Where the action is brought by a creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the persons, so made liable, may be made parties defendant, by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action.

Source.—Code Civ. Pro. § 1790, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 43.

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References.—Liability of stockholders generally for debts of corporation, Stock Corporation Law, §§ 56-59. Individual liability of stockholders of bank, Banking Law, § 120; of trust companies, Id. § 206. Enforcement of liabilities of stockholders of banking corporations by superintendent of banks, Id. § 80.

Application.—Section does not apply to action by attorney-general, and no order can be had compelling him to make stockholders parties defendant. *People v. Commercial Bank* (1902), 37 Misc. 16, 74 N. Y. Supp. 806, *affd.* (1902), 72 App. Div. 633, 76 N. Y. Supp. 1025. Application of section considered. *Matter of Sayre* (1902), 70 App. Div. 329, 75 N. Y. Supp. 386; *Hallett v. Met. Messenger Co.* (1902), 69 App. Div. 258, 74 N. Y. Supp. 639, *modg.* (1901), 35 Misc. 659, 72 N. Y. Supp. 370.

Stockholders as parties defendant where personally liable to creditors of corporation. *Matter of Murray Hill Bank* (1897), 153 N. Y. 199, 210, 47 N. E. 298; *Bagley & Sewall Co. v. Lenning* (1901), 61 App. Div. 26, 70 N. Y. Supp. 242; *Beals v. Buffalo Const. Co.* (1900), 49 App. Div. 589, 63 N. Y. Supp. 635; *Proctor v. Sidney Sash & Furniture Co.* (1896), 8 App. Div. 42, 40 N. Y. Supp. 454; *Cummings v. American Gear & Spring Co.* (1895), 87 Hun 598, 34 N. Y. Supp. 541. On their voluntary appearance. *People v. Hydrostatic Paper Co.* (1882), 88 N. Y. 623.

§ 110. Separate action may be brought against officers and stockholders.—Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant, as prescribed in the last section, the plaintiff in the action may maintain a separate action against them, to procure a judgment, declaring, apportioning and enforcing their liability.

Source.—Code Civ. Pro. § 1791, which was derived from R. S., pt. 3, ch. 3, tit. 4, §§ 44, 45.

Application of section considered. *Hallett v. Metropolitan Messenger Co.* (1902), 69 App. Div. 258, 74 N. Y. Supp. 639, *modg.* (1901), 35 Misc. 659, 72 N. Y. Supp. 370; *Bagley & Sewall Co. v. Lenning* (1901), 61 App. Div. 26, 70 N. Y. Supp. 242.

§ 111. Proceedings in such actions.—In an action brought as prescribed in either of the last two sections, the court must, when it is necessary, cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendant's liability must be apportioned accordingly; but, if it affirmatively appears, that the corporation is insolvent, and has no property to satisfy its creditors, the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.

Source.—Code Civ. Pro. § 1792, which was derived from R. S., pt. 3, ch. 3, tit. 4, §§ 46, 47.

Application of section considered. *Hallett v. Metropolitan Messenger Co.* (1902), 69 App. Div. 258, 74 N. Y. Supp. 639, *modg.* (1901), 35 Misc. 659, 72 N. Y. Supp. 370; *Beals v. Buffalo Const. Co.* (1900), 49 App. Div. 589, 63 N. Y. Supp. 635.

§ 112. Distribution of property of corporation by judgment in actions under this article.—A final judgment in an action, brought against a corporation, as prescribed in this article, either separately or in conjunction with its stockholders, directors, trustees, or other officers, must provide for a just and fair distribution of the property of the corporation,

and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation.

Source.—Code Civ. Pro. § 1793, which was derived from R. S., pt. 3, ch. 8, tit. 4, §§ 37, 48.

In general.—Jurisdiction in distribution of assets. *Webster v. Kings County Trust Co.* (1894), 80 Hun 420, 30 N. Y. Supp. 357, *affd.* (1895), 145 N. Y. 275, 39 N. E. 964. Where voluntary proceedings have priority. *Matter of Hoagland-Robinson Co.* (1899), 30 Misc. 28, 72 N. Y. Supp. 435. Application of section considered. *People v. American L. & T. Co.* (1896), 150 N. Y. 117, 44 N. E. 949; *Townsend v. Oneonta, C. & R. S. R. Co.* (1903), 88 App. Div. 208, 84 N. Y. Supp. 427; *Hirschfield v. Bopp* (1898), 29 App. Div. 180, 185, 50 N. Y. Supp. 676, *revd. on other grounds* (1898), 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; *Home Bank v. Brewster & Co.* (1897), 15 App. Div. 338, 44 N. Y. Supp. 54; *People v. Remington & Sons* (1889), 54 Hun 480, 8 N. Y. Supp. 31, *affd.* (1890), 121 N. Y. 676, 24 N. E. 1095; *Whitney v. N. Y. & Atl. R. Co.* (1884), 32 Hun 164.

"Fair and honest creditors."—This term includes all creditors, and not merely those whose diligence has given direction to the conduct of the proceedings. *People v. American Loan & Trust Co.* (1904), 177 N. Y. 231, 69 N. E. 429, *mod.* (1903), 87 App. Div. 139, 84 N. Y. Supp. 114. On reargument question fully discussed with same result, and costs given to those creditors who fought question through courts. Same case (1904), 177 N. Y. 467, 69 N. E. 1115.

Order of distribution.—Refers to provisions of Revised Statutes, R. S., pt. 3, ch. 8, tit. 4, §§ 66-89 (art. 11, *post*). *People v. Anglo American Sav. & L. Assn.* (1901), 60 App. Div. 389, 403, 69 N. Y. Supp. 1054. Creditor not entitled to preference over bondholders under mortgage existing when debt created. *Farmers' L. & T. Co. v. Bankers & Merchants' Tel. Co.* (1896), 148 N. Y. 315, 42 N. E. 707, 31 L. R. A. 403. Preference to employees: As to manager. *Matter of Am. Lace & Fancy Paper Works* (1898), 30 App. Div. 321, 51 N. Y. Supp. 818. As to contractor. *Charron v. Hale* (1898), 25 Misc. 34, 54 N. Y. Supp. 411. As to book-keeper. *People v. Beveridge Brewing Co.* (1895), 91 Hun 313, 36 N. Y. Supp. 525. As to salesmen. *Palmer v. Van Santvoord* (1897), 153 N. Y. 612, 47 N. E. 915, *affg.* (1897), 17 App. Div. 194, 45 N. Y. Supp. 354; *Matter of Luxton & Black Co.* (1898), 35 App. Div. 243, 54 N. Y. Supp. 778. *Matter of Fitzgerald* (1897), 21 Misc. 226, 45 N. Y. Supp. 630. Who are employees. *Matter of Stryker* (1899), 158 N. Y. 526, 53 N. E. 525. See on general subject of distribution. *People v. Granite State Provident Assn.* (1900), 161 N. Y. 492, 55 N. E. 1053; *Wise v. L. & C. Wise Co.* (1897), 153 N. Y. 507, 47 N. E. 788, *affg.* (1896), 12 App. Div. 319, 42 N. Y. Supp. 54; *People ex rel. v. Security L. Ins. Co.* (1877), 71 N. Y. 222; *Creteau v. Foote & Thorne Glass Co.* (1900), 54 App. Div. 168, 56 N. Y. Supp. 370.

Construction of word "must."—May be directory and not imperative. *Matter of Murray Hill Bank* (1897), 14 App. Div. 318, 328, 43 N. Y. Supp. 836, *affd.* (1897), 153 N. Y. 199, 47 N. E. 298.

Where creditor sues for himself alone court might still in final judgment provide for distribution to all creditors in position to avail themselves of liability sued on. *Cummings v. American Gear & Spring Co.* (1895), 87 Hun 598, 34 N. Y. Supp. 541.

Attorneys' claims.—*People v. Commercial Alliance Life Ins. Co.* (1896), 148 N. Y. 563, 42 N. E. 1044, *affg.* (1895), 91 Hun 389, 36 N. Y. Supp. 248; *Hallett v. Met. Messenger Co.* (1901), 35 Misc. 659, 72 N. Y. Supp. 370, *mod.* (1902), 69 App. Div. 258, 74 N. Y. Supp. 639.

Dividends in proceedings in other states should not be deducted from face of

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claim by receiver in this state before making his dividend. *People v. Universal L Ins. Co.* (1886), 42 Hun 616.

Trustees as purchasers.—They obtain good title where order appointing them allows them to purchase. *Webster v. Kings County Trust Co.* (1895), 145 N. Y. 275, 39 N. E. 964.

§ 113. **Recovery of stock subscriptions.**—Where the stockholders of the corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid, on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.

Source.—Code Civ. Pro. § 1794, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 49.

References.—Payment of stock subscriptions, Stock Corporation Law, § 53. Consideration for issue of stock, Stock Corporation Law, § 55. Liability for unpaid subscriptions, Stock Corporation Law, §§ 56–59. Payment of subscriptions to capital stock of business corporation, Business Corporation Law, § 5.

Parties.—Corporation, its receiver, and other stockholders not necessary parties in action by creditor against stockholder. *Thompson v. Nicolai* (1897), 21 Misc. 700, 49 N. Y. Supp. 422. Single judgment creditor may maintain such action. *Citizens' Bank of Buffalo v. Weinberg* (1899), 26 Misc. 518, 57 N. Y. Supp. 495.

Exhaustion of remedies.—Remedies against corporation must be exhausted before remedy against stockholder will be enforced. *Marshall v. Sherman* (1895), 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, revg. (1895), 84 Hun 186, 32 N. Y. Supp. 193. Issuing and return unsatisfied of execution against corporation is condition precedent to creditor's action against stockholder. *Bernard-White Coal Min. Co. v. Wadsworth* (1898), 27 App. Div. 550, 50 N. Y. Supp. 501; *Bernard-White Coal Min. Co. v. Ewart* (1895), 90 Hun 60, 35 N. Y. Supp. 573; *Hallett v. Met. Messenger Co.* (1901), 35 Misc. 659, 72 N. Y. Supp. 370, mod. (1902), 69 App. Div. 258, 74 N. Y. Supp. 639. Relief given where condition impossible to perform. *United States Glass Co. v. Vary* (1894), 79 Hun 103, 29 N. Y. Supp. 636, affd. (1897), 152 N. Y. 121, 46 N. E. 312.

Transferee of stock may be held liable upon an implied promise. *Signa Iron Co. v. Brown* (1902), 171 N. Y. 488, 64 N. E. 194.

Defenses.—Secret agreements made at time of subscription of stock as to repayment no defense to creditor's suit. *Beals v. Buffalo Const. Co.* (1900), 49 App. Div. 589, 63 N. Y. Supp. 635.

§ 114. **Liability of directors and stockholders.**—If it appears, that the property of the corporation, and the sums collected or * collectable from the stockholders, upon their stock subscriptions, are or will be insufficient to pay the debts of the corporation, the court must ascertain the several sums, for which the directors, trustees, or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.

Source.—Code Civ. Pro. § 1795, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 50.

* So in original.

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Application.—Section held to apply only to actions brought by creditors, not to actions by attorney-general. *People v. Commercial Bank* (1902), 37 Misc. 16, 74 N. Y. Supp. 806, *affd.* (1902), 72 App. Div. 633, 76 N. Y. Supp. 1025.

Costs and fees.—County treasurer's fees on moneys paid into court not taxable in plaintiff's bill of costs in action by creditor against stockholders. *Vedder v. Mudgett* (1882), 27 Hun 519, *affd.* (1883), 91 N. Y. 374.

§ 115. **Effect of this article.**—This article does not repeal or affect any special provision of law, prescribing that a particular kind of corporation shall cease to exist, or shall be dissolved, in a case or in a manner, not prescribed in this article; or any special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation.

Source.—Code Civ. Pro. § 1796; originally new in Code.

§ 116. **Entry of judgment and filing certified copies thereof.**—The final judgment in an action brought as prescribed in this article shall be entered in the office of the clerk of the county in which the principal business office, or the principal place of business of the corporation is located, and if it is adjudged that such corporation be dissolved, a certified copy of such judgment shall, if a banking corporation, be filed in the office of the superintendent of banks; if an insurance corporation, in the office of the superintendent of insurance; and if a business, transportation, railroad or membership corporation, in the office of the secretary of state. (*Added by L. 1916, ch. 163.*)

ARTICLE VII.

ACTION TO ANNUL A CORPORATION.

Section 130. Action by attorney-general to annul corporation when legislature directs.

131. Action by attorney-general to annul corporation by leave of court.

132. Notice of application for leave to commence action to annul corporation.

133. Jury trial.

134. Injunction and receiver in final judgment.

135. Temporary injunction.

136. Filing and publishing judgment.

§ 130. **Action by attorney-general to annul corporation when legislature directs.**—The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.

Source.—Code Civ. Pro. § 1797, which was derived from Code of Pro. § 429; R. S., pt. 3, ch. 9, tit. 2, § 13.

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Consolidators' note.—This article consists of ch. 15, tit. 2, art. 4, of the Code of Civil Procedure, which has been transferred to the General Corporation Law as art. 7, without change in substance.

References.—Action in nature of *quo warranto* to try right to exercise corporate franchises, Code Civ. Pro. §§ 1948–1956. Article does not apply to certain corporations. See § 300, post.

Application.—Action by attorney-general in nature of *quo warranto* to amend charter of corporation for long non-user, is within the spirit if not within the letter of this section. *People v. Broadway R. Co. of Brooklyn* (1890), 56 Hun 45, 9 N. Y. Supp. 6, revd. on other grounds (1891), 126 N. Y. 29, 26 N. E. 961. See *Rept. of Atty. Genl.* (1912) 576.

§ 131. Action by attorney-general to annul corporation by leave of court.

—Upon leave being granted, as prescribed in the next section, the attorney-general may bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacating the charter or annulling the existence of the corporation, upon the ground that it has, either

1. Offended against any provision of an act, by or under which it was created, altered or renewed, or an act amending the same, and applicable to the corporation; or,
2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,
3. Forfeited its privileges or franchises, by a failure to exercise its powers; or,
4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises; or,
5. Exercised a privilege or franchise, not conferred upon it by law.

Source.—Code Civ. Pro. § 1798, which was derived from Code of Pro. § 430, in part; R. S., pt. 3, ch. 8, tit. 4, § 39.

References.—Does not apply to certain corporations, § 300, post. Provisions regulating actions, §§ 300–316, post. A temporary receiver cannot be appointed but only a permanent receiver by final judgment, § 134, post.

In general.—Dissolution not permitted in action against trustees of building and loan association to adjudge void resolution distributing assets and for the appointment of a receiver. *People v. Lowe* (1888), 47 Hun 577, revd. on other grounds (1889), 117 N. Y. 175, 22 N. E. 1016. See generally *People v. B., H. T. & W. R. Co.* (1882), 27 Hun 528.

Application of section considered, see *People ex rel. Lehmaier v. Interurban Ry. Co.* (1904), 177 N. Y. 296, 69 N. E. 596, dismissing appeal from (1881), 85 App. Div. 407, 83 N. Y. Supp. 622; *People v. Am. L. & T. Co.* (1896), 150 N. Y. 117, 44 N. E. 949, dismissing appeal from (1896), 2 App. Div. 193, 37 N. Y. Supp. 780; *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, revg. (1890), 56 Hun 125, 8 N. Y. Supp. 918; *Thomas v. Musical Mut. Protective Union* (1890), 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175, revg. (1888), 49 Hun 171, 2 N. Y. Supp. 195. As to dissolution of bank for insolvency. *Hagmayer v. Alten* (1901), 36 Misc. 59, 72 N. Y. Supp. 623. As to failure to show true place of business. *People ex rel. Knickerbocker Press v. Barker* (1895), 87 Hun 341, 34 N. Y. Supp. 269, *affd.* (1895), 147 N. Y. 715, 42 N. E. 725.

The remedy offered for the restraint and punishment of corporations for illegal conduct in the exercise of privileges or franchises not conferred upon them by

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action by the attorney-general to suspend functions or annul
nas v. M. M. P. Union (1890), 121 N. Y. 45, 24 N. E. Rep. 24.
re is no conflict between this section and § 1785 (Gen. Corp.
Atlantic Ave. R. R. Co. (1890), 57 Hun 378, 10 N. Y. Supp.
N. Y. 513, 26 N. E. 622.

application under this section rests in the sound discretion
not given as a matter of right, but depends upon whether
fire the action to be brought. Matter of Attorney-General
401, 108 N. Y. Supp. 823.

Attorney-General on behalf of the people to declare the
railroad, or the portion thereof granted by the municipal
for abandonment and nonuser, even where the consent of
reviously obtained, is not authorized by this section. People
d Fulton Ferry R. R. Co. (1910), 140 App. Div. 611, 125 N. Y.
1), 201 N. Y. 594, 95 N. E. 1136.

It has been long held in this state that a cause of forfeiture
utage of or enforced against a corporation collaterally or in
n by a direct proceeding against the corporation for that
V. Y. Elevated R. R. Co. (1877), 70 N. Y. 327.

essary to forfeit charter.—A provision of a statute that a cor-
charter or forfeits "the rights acquired thereby unless certain
does not *ipso facto* dissolve the corporation or deprive it
ence, but simply exposes it to proceedings, on behalf of the
d enforce the forfeiture. Matter of Brooklyn Elevated R. R.
434, 26 N. E. 474, 451.

roviding that if a corporation does not perform certain acts
all be dissolved" failure of performance does not *ipso facto*
ion. Day v. Ogdensburg, etc., R. R. Co. (1887), 107 N. Y.

charter of a corporation that unless it commences business
e, "or this act and all rights and privileges granted hereby
id," does not *ipso facto* vacate the charter, but simply au-
-general to treat the charter as voidable. Matter of N. Y. &
Co. (1896), 148 N. Y. 540, 42 N. E. 1088, affg. (1895), 90 Hun
20.

glect of a railroad corporation to exercise all its franchises,
erminate its corporate existence, but to effect that result the
t not only elect to enforce the forfeitures, but also procure
to bring an action for that purpose under this section. People
R. R. Co. (1890), 128 N. Y. 240, 28 N. E. Rep. 635, affg. (1891),
7, Supp. 303. Such actions are not even then maintainable
interest is involved which requires the exercise of the
oration. Id.

entioned in subd. 3 refer to corporate franchises and not to
eople v. Bleecker St. & Fulton F. R. R. Co. (1910), 67 Misc.
1045, affd. (1910), 140 App. Div. 611, 125 N. Y. Supp. 1045,
Y. 594, 95 N. E. 1136.

relates merely to procedure, and does not determine existing
rocedure. People v. Atlantic Ave. R. Co. (1891), 125 N. Y.
5, (1890), 57 Hun 378, 10 N. Y. Supp. 907.

anufacturing corporation to file an annual report is a ground
suit of the attorney-general, independently of the liability of
v. Buffalo Stone & Cement Co. (1892), 131 N. Y. 140, 29 N.
9.

Where a corporation has never exercised its powers and franchises, but its sole business is to fix the market price at which a commodity shall be bought and sold, and its non-user was wilful and without justification, it is proper for the attorney-general to bring an action for its dissolution. *People v. Milk Exchange* (1892), 133 N. Y. 565, 30 N. E. 850.

A combination of milk dealers and creamery men to fix and control the prices they should pay for milk was held to be unlawful, and a judgment annulling the corporation in an action in the name of the people proper in *People v. Milk Exchange* (1895), 145 N. Y. 267, 39 N. E. 1062.

A membership corporation organized as a board of trade or exchange which conducts a collection agency for pecuniary gain comes within the scope of this section. *Rept. of Atty. Genl.* (1914) 349.

It seems that an action by the attorney-general to annul an added franchise to grant to a corporation is within the scope of the provisions of this section. *People v. Broadway R. R. Co., of Brooklyn* (1891), 126 N. Y. 29, 26 N. E. 961.

Doing of insurance business in violation of statute.—Where a business corporation agrees to care for plate glass for a fixed term for a certain consideration, and in the event that the glass is broken agrees to replace the same, and further agrees to keep the glass puttied in the frame, its corporate existence may be annulled in an action by the Attorney-General, pursuant to this section, upon the ground that said corporation is doing an insurance business contrary to the statute. *People v. Standard Plate Glass & Salvage Co.* (1916), 174 App. Div. 501, 156 N. Y. Supp. 1012.

Compliance after complaint justifies denial of petition for involuntary dissolution. *Rept. of Atty. Genl.* (1913), Vol. 2, p. 413.

Parties.—Action should be brought by attorney-general without relator, and action of relator on his own instigation does not bind attorney-general. *People v. Buffalo Stone & Cement Co.* (1892), 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240. Application as to attorney-general bringing action alone, considered. *People ex rel. Hearst v. Ramapo Water Co.* (1900), 51 App. Div. 145, 64 N. Y. Supp. 532. Attorney-general only proper party to bring action for annulment for violation of law concerning street car transfers. *People ex rel. Lehmaier v. Interurban Ry. Co.* (1904), 177 N. Y. 296, 69 N. E. 596, dismissing appeal from (1881), 85 App. Div. 407, 83 N. Y. Supp. 622; *McNulty v. Brooklyn Heights R. Co.* (1900), 31 Misc. 674, 66 N. Y. Supp. 57. Lessee of defendant's railroad entitled to be made party defendant. *People v. Albany & Vt. R. Co.* (1879), 77 N. Y. 232, *revg.* (1878), 15 Hun 126.

Attorney-general's duty.—He is vested with administrative duty of determining whether public interests demand commencement of action to annul a corporation. *Matter of Attorney-General* (1888), 50 Hun 511, 3 N. Y. Supp. 464.

Continuance of existence in absence of suit by attorney-general. *Matter of New York & Long Island Bridge Co.* (1896), 148 N. Y. 540, 42 N. E. 1088, *affg.* (1895), 90 Hun 312, 35 N. Y. Supp. 920; *Geneva Mineral Spring Co. v. Coursey* (1899), 45 App. Div. 268, 61 N. Y. Supp. 98.

What must be shown.—It must be shown that cause of forfeiture exists, that it involves public interests, and that court has authorized the action. *People v. The Ulster & Delaware R. Co.* (1891), 128 N. Y. 240, 28 N. E. 635, *affg.* (1890), 58 Hun 266, 12 N. Y. Supp. 303. Where consolidations have taken place affecting the welfare of the people attorney-general may sue for annulment. *People v. Milk Exchange* (1895), 145 N. Y. 267, 30 N. E. 1062, 27 L. R. A. 437; *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, *affg.* (1889), 54 Hun 354, 7 N. Y. Supp. 406. Where not shown that public injury imminent. *People v. Equitable Mut. Fire Ins. Co.* (1895), 12 Misc. 556, 33 N. Y. Supp. 708, *affd.* (1896), 1 App. Div. 84, 37 N. Y. Supp. 80. Attorney-general's

petition held too indefinite. *Matter of Attorney-general* (1894), 81 Hun 541, 30 N. Y. Supp. 1093.

To sustain an action by the people to dissolve a corporation for violation of law or abuse of its powers, two things must be shown; first, that the defendant corporation has exceeded its powers; and second, that such excesses or abuses threaten or harm the public welfare. *People v. North River Sugar Refining Co.* (1890), 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33.

The mere fact that a railroad corporation has failed to operate its road for five successive days, does not authorize the bringing of an action to forfeit its charter. *People v. Atlantic Ave. R. R. Co.* (1891), 125 N. Y. 513, 26 N. E. 622, 872.

Upon granting leave to the attorney-general to bring an action to vacate the charter of a corporation, the court has only to inquire whether the attorney-general alleges against the corporation a *prima facie* case. *Matter of Attorney-General* (1888), 50 Hun 511, 3 N. Y. Supp. 464.

An order permitting an action to be brought to annul the charter of a corporation should only be granted on application of the attorney-general stating that in his opinion the action can and should be maintained for the reasons given. *Matter of Attorney-General* (1894), 79 Hun 369, 29 N. Y. Supp. 449.

Authority will not be granted to the attorney-general as of course for leave to bring an action to vacate the charter of a corporation, and the facts on which he proposes to proceed, and not his conclusions therefrom, must be stated in his application. *Matter of Attorney-General* (1894), 81 Hun 541, 30 N. Y. Supp. 1093.

Petition for involuntary dissolution, or annulment of the charter, of a membership corporation denied upon the ground that the petitioner had failed to present to the Attorney-General any good reason to believe that an action can be maintained in behalf of the People of the State; an illegal act of an agent not authorized or adopted by some corporate act is no ground for annulment. *Rept. of Atty. Genl.* (1914) 238.

Forfeiture of franchise for non-user.—The extinction of a corporate franchise for non-user may only be determined in a litigation between the people of the state and the corporation, and where it has a special franchise to lay gas pipes in the streets of a village the municipality cannot maintain an action to forfeit or declare forfeited the general rights of the corporation to transact business. Forfeiture is a punishment for fault, not for misfortune, and where the only reason that said corporation has ceased to use the gas pipe is that it could not afford to supply the citizens of the village on account of competition, and therefore had temporarily suspended business, no ground of forfeiture is shown. *Village of Fredonia v. Fredonia Natural Gas Light Co.* (1914), 87 Misc. 592, 149 N. Y. Supp. 964, rev'd on other grounds 162 App. Div. 934.

The extent of the relief to which the people may be entitled on proof of the allegations of the complaint is not entirely clear. The only statutory provisions with respect to the judgment to be rendered in such an action appear to be those contained in section 342 of the General Business Law, which commands that a final judgment in favor of the plaintiff in such an action "must perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of." The appellate court should not on a motion to strike out allegations of a complaint attempt to decide in a case not entirely free from doubt, the relief to which the party whose pleading is attacked may become entitled on proof of the facts stated. That question should be left to the trial court. *People v. American Ice Co.* (1910), 135 App. Div. 180, 120 N. Y. Supp. 41.

Effect of pendency of proceeding for voluntary dissolution.—The pendency of a proceeding for the voluntary dissolution of a corporation will not constitute a bar to an action instituted by the attorney-general for the purpose of securing the dissolution of such corporation. *People v. Seneca Lake Grape and Wine Co.*

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(1889), 52 Hun 174, 5 N. Y. Supp. 136; *People v. Murray Hill Bank* (1896), 10 App. Div. 328, 41 N. Y. Supp. 804.

Effect of action on cause of action for tort.—An action brought by the people to effect the dissolution of a corporation does not of itself divest the title of the corporation to a cause of action for tort, but the corporation may sue upon the same at any time before the final judgment dissolving the corporation, and making the receiver permanent. The receiver may assign the same with the assets of the corporation so as to allow the purchaser to be substituted in the action. *Mutual Brewing Co. v. New York & College Point Ferry Co.* (1897), 16 App. Div. 149, 45 N. Y. Supp. 101.

Appeals from order granting leave.—An order granting leave under this section will not be reviewed upon appeal excepting in extreme case. *People v. Boston, H. T. & W. R. R. Co.* (1882), 27 Hun 528.

On an appeal from an order granting the attorney-general leave to bring suit to vacate the charter of a corporation, the supreme court will not determine the merits of the action. *Matter of the Attorney-General v. Ulster & Delaware R. R. Co.* (1888), 50 Hun 511, 3 N. Y. Supp. 464.

§ 132. Notice of application for leave to commence action to annul corporation.—Before granting leave, the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto.

Source.—Code Civ. Pro. § 1799, which was derived from Code of Proc. § 431; R. S., pt. 3, ch. 8, tit. 4, § 40.

In general.—Grounds for granting or denying leave considered in *Matter of Attorney-General* (1888), 50 Hun 511, 3 N. Y. Supp. 464. Application of section considered. *People v. Buffalo Stone & Cement Co.* (1864), 31 N. Y. 140; *People v. Broadway R. Co.* (1891), 126 N. Y. 29, 26 N. E. 961, revg. (1890), 56 Hun 45, 9 N. Y. Supp. 6.

Notice to corporation.—Failure to give notice no objection to proceedings where court directed no notice in its order. *People v. B., H. T. & W. R. Co.* (1882), 27 Hun 528.

§ 133. Jury trial.—An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section nine hundred and sixty-eight of the code of civil procedure and without procuring an order, as prescribed in section nine hundred and seventy of the code of civil procedure.

Source.—Code Civ. Pro. § 1800; new in Code.

References.—Section 968 refers to an action in which the complaint demands judgment for a sum of money, in which an issue of fact must be tried by jury, unless the jury trial is waived, and without the framing of issues as provided by § 970 of the Code.

Application of section considered, see *People v. Milk Exchange* (1894), 77 Hun 436, 29 N. Y. Supp. 259, affd. (1895), 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *People v. Equitable Mut. Fire Ins. Co.* (1895), 12 Misc. 556, 33 N. Y. Supp. 708, affd. (1896), 1 App. Div. 84, 37 N. Y. Supp. 80.

§ 134. Injunction and receiver in final judgment.—Where any of the matters, specified in section one hundred and thirty or section one hundred and thirty-one of this article, are established in an action, brought as

prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges, and franchises; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in article nine of this chapter.

Source.—Code Civ. Pro. § 1801, which was a substitute for Code of Proc. §§ 443 and 444. See also R. S., pt. 3, ch. 9, tit. 2, §§ 14, 49 and 51.

Consolidators' note.—This section which is in the language of § 1801 of the Code of Civil Procedure does not seem to confer upon the receiver appointed under the judgment in an action to annul a corporation the powers, duties and liabilities of receivers generally under the Revised Statutes and subsequent enactments as now found in art. 11 of this chapter. Section 134 simply states that the judgment must provide for the appointment of a receiver, etc., as where a corporation is dissolved upon its voluntary application. The intention probably was to preserve the practice of the earlier statutes. Revised Statutes, pt. 3, ch. 9, tit. 2, art. 1, § 27, provided that whenever a judgment should be rendered for the vacating and annulling any act of incorporation the court of chancery should have the same powers to appoint a receiver, etc., as were given in the proceedings for the voluntary dissolution of a corporation. This section was carried into the old Code of Procedure, § 444 of which provided that the court should have the same powers to appoint a receiver of the property of a corporation whose charter was annulled, and to take an account and to make distribution thereof among its creditors as were given in the proceedings for the voluntary dissolution of a corporation under the Revised Statutes. Whether or not these powers, duties and liabilities are conferred upon receivers in actions to annul a corporation the court in any event has the authority to confer them in a proper case.

References.—There seems to be no authority for the appointment of a temporary receiver under this article. Powers of receiver, §§ 230–278, post, but see note as to application under § 230.

Section cited.—*People v. American Ice Co.* (1910), 135 App. Div. 180, 120 N. Y. Supp. 41.

§ 135. **Temporary injunction.**—In an action, brought as prescribed in this article, an injunction order may be granted, at any stage of the action, restraining the corporation, and any or all of its directors, trustees and other officers, from exercising any of its corporate rights, privileges, or franchises; or from exercising certain of its corporate rights, privileges, or franchises, specified in the injunction order; or from exercising any franchise, liberty, or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section six hundred and three of the code of civil procedure, and all the provisions of title second of chapter seventh of the code of civil procedure applicable to an injunction specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.

Source.—Code Civ. Pro. § 1802, which was derived from R. S., pt. 3, ch. 8, tit. 4, §§ 31, 32.

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Consolidators' note.—The reference in this section to the "state paper" and the "newspaper printed at Albany, in which legal notices are required to be published," has been omitted for the reason that the state paper referred to has been abolished and there is no newspaper in Albany in which legal notices generally are required to be published. See Executive Law, § 83, which abolishes the "old" state paper.

§ 136. Filing and publishing judgment.—Where final judgment is rendered against a corporation, in an action, brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state; who must cause a notice of the substance and effect of the judgment, to be published, for four weeks, in a newspaper printed in the county, wherein the principal place of business of the corporation was located.

Source.—Code Civ. Pro. § 1803, which was derived from Code of Proc. § 445. But see R. S., pt. 3, ch. 9, tit. 2, §§ 24, 26.

Publication of notices of judgments.—To publish the substance and effect of judgements of dissolution is sufficient compliance with section 136 of the General Corporation Law requiring the publication of notices of judgments dissolving corporations in actions brought by the People of the State. Such publication is required to be made each day, except Sundays, for four weeks, and the fees therefor are governed by section 3317 of the Code of Civil Procedure, as amended by chapter 185, Laws of 1914. Rept. of Atty. Genl. (1914) 169.

ARTICLE VIII.

ACTION TO DISSOLVE MONEYED CORPORATION.

Section 150. Temporary injunction and receiver in action against moneyed corporation.

151. Order to show cause why injunction and receiver should not be permanent.
152. Inventory and appraisal by receiver.
153. Conversion of assets into cash by receiver.
154. Employment of counsel by receiver.
155. Notice to creditors by receiver.
156. Allowance, rejection and adjustment of claims by receiver.
157. Final settlement and distribution by receiver.
158. Notice of account and accounting by receiver.
159. Proceedings upon accounting.
160. Claims barred after distribution of assets by receiver.
161. Application of article.

§ 150. Temporary injunction and receiver in action against moneyed corporation.—Whenever the attorney-general shall commence an action against a moneyed corporation upon the information of either the superintendent of insurance, or the superintendent of banks, for the dissolution or sequestration of the property or annulment of the charter of a corporation formed under or subject to the banking or insurance law, and shall be satisfied that it is unsafe and inexpedient for such corporation to continue doing business, the supreme court may, on his application, in a

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case provided by law, appoint a receiver thereof, and may on such appointment grant an injunction restraining such corporation from carrying on its business until the further order of the court. The court may, in its discretion, dispense with notice of the application.

Sources.—L. 1902, ch. 60, § 1.

Consolidators' note.—This article embraces L. 1902, ch. 60, entitled "An act to simplify the procedure, facilitate the settlement and reduce the expense of receivers on dissolution of a moneyed corporation," and L. 1904, ch. 754, entitled "An act to simplify the settlement of accounts of receivers, on dissolution of a moneyed corporation." By its language, L. 1902, ch. 60, superseded and repealed all provisions inconsistent. Both acts have been inserted in this chapter as art. 8 in order to bring together in the chapter so far as possible all provisions relating to the dissolution of corporations which are now scattered in many independent acts and also to bring the acts mentioned in juxtaposition with other provisions applicable to the subject.

References.—Proceedings by superintendent of banks against insolvent banking corporations, Banking Law, §§ 56-59; report of superintendent to attorney-general of delinquencies of banking corporations and actions to dissolve, *Id.* § 59. Liquidation of delinquent insurance corporations, Insurance L. § 63; when insurance corporations deemed insolvent, *Id.* § 21.

Application of act of 1902.—While the provisions of this statute cannot affect the contract of employment of counsel made by the receiver before its passage, or payments made to counsel before its passage, it changes the old practice of partial settlements by a receiver, and the annual or semi-annual accounting under special term orders which prevailed under the Act of 1883, chapter 378, as amended by Laws of 1885, chapter 40. The statute produces a change of practice only, and interferes with no vested rights. It is controlling in accountings by receivers, although they were appointed prior to its passage. *People v. Manhattan Fire Insurance Co.* (1902), 77 App. Div. 517, 79 N. Y. Supp. 11.

Purpose.—This statute is to simplify the procedure, facilitate the settlement and reduce the expenses of receivers on dissolution of moneyed corporations. *Prince v. Schlesinger* (1906), 116 App. Div. 500, 505, 101 N. Y. Supp. 1031, *affd.* (1907), 190 N. Y. 546, 83 N. E. 1130.

Notice of motion, contemplated by this section, may be dispensed with in the discretion of the court, where the discretion is based on facts showing the necessity for instant action to prevent some impending wrong. *People v. Oriental Bank* (1908), 124 App. Div. 741, 109 N. Y. Supp. 509.

Appointment of receiver.—Facts must be shown by competent legal evidence and positive allegations in a verified complaint are not sufficient. Sufficiency of facts considered. *People v. Oriental Bank* (1908), 124 App. Div. 741, 109 N. Y. Supp. 509.

§ 151. Order to show cause why injunction and receiver should not be permanent.—The court, on granting an order without notice, either for the appointment of a receiver or for an injunction, or for both forms of relief, as herein provided, shall make an order that the corporation so proceeded against show cause at a term of the court to be held not more than thirty days thereafter, why such receiver and injunction should not be permanent. Such order shall be served not less than eight days before the date upon which the hearing thereon is to be had. Unless the court otherwise directs, the receiver appointed in the first instance shall be permanent receiver of such corporation, and the injunction shall be con-

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tinued during the pendency of the litigation. Such receiver shall, unless otherwise ordered by the court, continue to act as such up to and after final judgment, and until the affairs of the corporation shall be finally settled and its property distributed by him according to law. The bond to be given by the receiver on his appointment shall be fixed at such sum and so conditioned that it shall continue in force and effect until the final discharge of such receiver, including any liability which may be incurred by said receiver by virtue of his appointment as such in the final judgment, in case he shall be so named therein.

Source.—L. 1902, ch. 60, § 2.

A receiver of a moneyed corporation is presumed to have been appointed as a permanent receiver by reason of this act. In any event he will be treated as such where his answer alleges that he was a permanent receiver. *Prince v. Schlesinger* (1906), 116 App. Div. 500, 101 N. Y. Supp. 1031, *affd.* (1907), 190 N. Y. 546, 83 N. E. 1130.

§ 152. Inventory and appraisal by receiver.—It shall be the duty of the receiver to take an inventory and make an appraisal of the assets and property of the corporation. In case the corporation is subject to the banking law, two disinterested appraisers shall be appointed by the superintendent of banks to aid in this duty, and in case the corporation is subject to the insurance law, such appraisers shall be appointed by the superintendent of insurance. Ten days' notice of such inventory and appraisal shall be given to the corporation and such inventory and appraisal shall be completed and filed with the clerk of the supreme court in the county in which the trial is to be had, within ninety days after the appointment of such receiver, and a certified copy thereof in the office of the attorney-general, and in the office of the superintendent of banks, or in the office of the superintendent of insurance, as the case may be, unless for good cause shown the officer appointing such appraisers shall, in writing, extend the time for the completion thereof. Such appraisers shall receive as compensation a reasonable sum, not exceeding fifteen dollars per day and actual and necessary expenses, to be paid by the receiver upon the approval of the officer by whom they were named. The receiver shall be chargeable with the amount of such inventory and shall be relieved therefrom to the same extent and upon the same grounds as in the like case of an executor.

Source.—L. 1902, ch. 60, § 3, in part.

See Rept. of Atty. Genl. (1905) 434.

§ 153. Conversion of assets into cash by receiver.—The receiver shall proceed, immediately upon his appointment, to convert the assets of the corporation into cash.

Source.—L. 1902, ch. 60, § 3, in part.

Converting assets into cash.—The provisions of the above section that the receiver "shall proceed, immediately upon his appointment, to convert the assets into cash" do not mean that he shall sacrifice them, but that he must use reasonable diligence and proceed with such speed as will accord with the circumstances

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People v. New York Building, Loan & Banking Co. (1903), 41 Misc. 263, 84 N. Y. Supp. 844, *affd.* (1904), 96 App. Div. 625, 88 N. Y. Supp. 1112.

§ 154. **Employment of counsel by receiver.**—It shall not be lawful for any receiver to pay to any attorney or counsel any costs, fees or allowance until the amount thereof shall have been stated to the special term, as expenses incurred by such receiver and shall have been approved by that court by an order duly entered. Any such order shall be the subject of review by the appellate division and the court of appeals on appeal thereto taken by any party. The receiver may employ not to exceed one counsel unless the employment of additional counsel shall be authorized by the supreme court after notice to the attorney-general of an application therefor.

Source.—L. 1902, ch. 60, § 4, as amended by L. 1904, ch. 705.

Object of section.—Two things were sought by the above section:—(1) To limit the payments on account for legal services during the progress of the receivership to such as are approved in writing by the attorney-general; (2) to prohibit the allowance of compensation to an attorney, "unless an agreement for his compensation has been made in writing upon the approval of the attorney-general." The section cannot be construed as compelling the attorney-general to approve a contract for the employment of counsel in which the compensation is prescribed, without in any way fixing or limiting the amount thereof. *Matter of Candee v. Cunneen* (1904), 92 App. Div. 71, 86 N. Y. Supp. 723. Decision before amendment of 1904.

Effect of Act of 1902 as to contracts of employment of counsel made by receiver prior to its passage. *People v. Manhattan Fire Insurance Co.* (1902), 77 App. Div. 517, 79 N. Y. Supp. 11.

§ 155. **Notice to creditors by receiver.**—1. Within thirty days after a receiver qualifies he shall cause to be published once a week for twelve weeks in a newspaper published at the principal place of business of the corporation, a notice to all creditors of the corporation to present their claims to such receiver at his place of business within fifteen days after the last publication of such order. He shall also mail a copy of such notice to all the creditors of the corporation known to him or as shown on the books of the company, at their last known place of residence. 2. The receiver of any title guaranty company heretofore or hereafter appointed, which company is authorized by law to issue policies of insurance or agreements of indemnity or guaranty, and which corporation has issued and outstanding at the time of the appointment of the receiver, policies of insurance or agreements of indemnity or guaranty, exceeding two thousand in number, shall not be required to mail to the holders or owners of said policies of insurance or of said agreements, the notice required by law to be given to creditors of an insolvent moneyed corporation; but such receiver shall cause a notice to be published twice a week, for four successive weeks, in two newspapers published in the county where said corporation has its principal place of business; which said notice shall require all creditors and owners and holders of outstanding policies of insurance or agreements of indemnity or guaranty,

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to exhibit and prove their claim, within sixty days; and, in default of so doing, shall be precluded from all benefit of the judgment and from any and all distribution which may be made thereunder, except that the creditor or holder or owner of any policy or agreement of indemnity or guaranty, who shall exhibit or prove his claim, with an affidavit that he had no notice or knowledge thereof, in time to comply with the provisions hereof, at any time before an order is made directing a final settlement and distribution of assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may be applied, as if his claim had been exhibited and proved within the time limited by such notice. This subdivision shall apply to receivers of all moneyed corporations. (*Amended by L. 1909, ch. 240, § 34.*)

Source.—L. 1902, ch. 60, § 5, in part, and L. 1904, ch. 754, §§ 1, 4.

§ 156. Allowance, rejection and adjustment of claims by receiver.—

The receiver shall have the same power and authority with reference to the allowance or rejection of claims as is given to executors, and no reference shall be had to pass upon claims except such as may be disputed by such receiver. In case any claim shall be disputed, the receiver shall immediately upon the expiration of the time for the presentation of claims, upon notice to the parties whose claims have been rejected, apply to the court for the appointment of a referee to hear and determine as to the allowance thereof. Claims allowed by the receiver shall be subject to objection upon the final settlement and their validity may be determined as the validity of claims against estates are determined upon final settlement by a surrogate.

Source.—L. 1902, ch. 60, § 5, in part.

When fees may be paid before final accounting.—This act does not prevent the court from directing payment, except upon an accounting, of the receiver's fees, nor does the exercise of such power prior to an accounting constitute an abuse of discretion where it appears that the pendency of certain litigations alone prevents the receiver from rendering his final account. *People v. Anglo-American S. & L. Assn.* (1905), 107 App. Div. 270, 94 N. Y. Supp. 1113.

Action of referee reviewable.—Under chapter 60 of the Laws of 1902 the determination of a referee as to the validity of a claim is not final and the right to review same still exists. Practice on review discussed. *People v. N. Y. Federal Bank* (1907), 122 App. Div. 810, 107 N. Y. Supp. 811.

§ 157. Final settlement and distribution by receiver.—The receiver may apply for a final settlement of his accounts and an order for distribution at any time after the expiration of six months, and shall so apply within eighteen months after qualifying as such. The attorney-general or any creditor, or party interested, may apply for an order that the receiver show cause why an accounting and distribution should not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general, after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice

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to such receiver. In case of such application by a party other than the receiver, the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Source.—L. 1902, ch. 60, § 6.

§ 158. Notice of account and accounting by receiver.—1. The receiver shall file his account, together with a statement of the items and amounts claimed by his counsel, up to that date with the court and a duplicate thereof, together with the vouchers, with the attorney-general, at least thirty days before the time fixed for his final settlement and accounting, and the attorney-general shall serve upon the attorney for the receiver any objections he may have to the account, or to the statement as to the items and amounts claimed by counsel for compensation, appearing in such account on or before such hearing. The receiver shall also within ten days after the filing of the account, mail to each creditor of the corporation a notice of the time and place of the filing of his account, and a notice of the time and place of the presentation of the account to the court. Unless objection is made to the items of the account by a creditor or on behalf of the attorney-general, no referee shall be appointed to pass thereon, but the same shall be examined and settled by the court. In case objection is made a referee may be appointed to take the testimony and report the same to the court.

2. Prior to the final settlement of accounts of a receiver of any moneyed corporation, having in force, at the time of his appointment, outstanding policies of insurance or agreements of indemnity or guaranty, exceeding two thousand in number, said receiver shall give notice to all of the creditors and to the owners or holders of said policies of insurance or agreements of indemnity or guaranty, issued or entered into by such insolvent corporation, by publication of a notice published at least twice a week, for three successive weeks, immediately preceding the making of an application for a final settlement of his accounts and for an order for the distribution of the assets in his hands. Said notice shall state the fact that an application for a final settlement of his accounts and for an order for the distribution of the assets in hand will be made, and shall also state the time and place, when and where the application will be made. Upon the hearing of such application and motion, the court shall, unless objection is made to the items of the account by a creditor or by a holder or owner of a policy of insurance or agreement of indemnity or guaranty, or on behalf of the attorney-general, examine and settle the said accounts, and make an order for the settlement, adjustment and distribution of the assets in the hands of the receiver. Where objection is made to the items of account, the court may refer the same to a referee to examine and pass thereon. This subdivision shall apply to receivers of all moneyed corporations heretofore or hereafter appointed. (*Amended by L. 1909, ch. 240, § 35.*)

Source.—Subd. 1, L. 1902, ch. 60, § 8. Subd. 2, L. 1904, ch. 754, §§ 2, 4.

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§ 159. **Proceedings upon accounting.**—Upon any accounting by the receiver, after the expiration of the time for creditors to present claims, the court shall direct the receiver to immediately convert the entire assets of the corporation in his hands into cash, in case any of the assets have not been so converted, unless good and sufficient cause to the contrary shall appear to the satisfaction of the court, such as to authorize an order granting the receiver additional time for that purpose, and upon any such accounting the court shall direct the receiver to distribute the assets of the corporation in his hands to the persons entitled thereto, except so much thereof as may be necessary to be retained for the purpose of administering the trust and making payment upon contested claims, and upon such claims as may thereafter be presented and entitled to be paid. Whenever the attorney-general shall apply for an order to show cause why an accounting should not be had by a receiver by reason of his failure to so account within twelve months after his appointment, and shall deem it advisable to designate counsel to act on his behalf, the court may, upon the accounting, make a reasonable allowance by way of counsel fee to counsel so designated.

Source.—First sentence, L. 1902, ch. 60, § 7; second sentence, L. 1902, ch. 60, § 10.

§ 160. **Claims barred after distribution of assets by receiver.**—Upon the granting of the application and the making of the order of distribution, as provided in subdivision two of section one hundred and fifty-eight of this article, and the distribution of the assets in the hands of the receiver, in the manner directed by the order of the court, all claims of the creditors or of holders or owners of policies of insurance or agreements of indemnity or guaranty, against such receiver, shall be barred. This section shall apply to receivers of all moneyed corporations. (*Amended by L. 1909, ch. 240, § 36.*)

Source.—L. 1904, ch. 754, § 3.

§ 161. **Application of article.**—Except as provided in sections one hundred and fifty-five, one hundred and fifty-eight, subdivision two, and one hundred and sixty of this article, this article shall apply to all actions for the appointment of receivers of moneyed corporation brought by the attorney-general, and to all receivers of such corporations heretofore or hereafter appointed, and to the settlement and adjustment of their accounts and distribution of assets in their hands, and all proceedings with reference thereto hereafter to be taken, and shall supersede and repeal all provisions of law inconsistent herewith, so far as the same relate to actions for the sequestration, annulment or dissolution of moneyed corporations. As to all other corporations and as to matters not affected by this article, provisions of law heretofore existing shall remain in full force and effect.

Source.—L. 1902, ch. 60, § 9.

ARTICLE IX.

PROCEEDINGS FOR VOLUNTARY DISSOLUTION OF CORPORATION.

- Section 170. Petition for voluntary dissolution of corporation.
171. Directors or trustees may be required to petition.
172. Petition when directors or trustees do not agree.
173. Corporations excepted from two preceding sections.
174. Contents of petition.
175. Affidavit to be annexed to petition.
176. Presentation of petition.
177. Corporations without stockholders.
178. Action by court upon petition for dissolution.
179. Publication of order to show cause why corporation should not be dissolved.
180. Service of order to show cause.
181. Entering and filing order and papers.
182. Temporary receiver.
183. Application for appointment of receiver.
184. Injunction.
185. Referee.
186. Hearing.
187. Decision.
188. Use of original papers on hearing.
189. Amending papers.
190. Final order.
191. Permanent receiver.
192. Appointment of director, trustee or other officer or stockholder as receiver.
193. Certain sales, transfers and judgments void.
194. Omission, defect or default of receiver.
195. Exception of certain corporations.

§ 170. Petition for voluntary dissolution of corporation.—If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the state, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the supreme court praying for a final order dissolving the corporation, as prescribed in this article.

Source.—Code Civ. Pro. § 2419, as amended by L. 1895, ch. 946; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 58.

Consolidators' note.—This article consists of ch. 17, tit. 11 of the Code of Civil Procedure, entitled "Proceedings for the voluntary dissolution of a corporation." It has been inserted in this chapter as art. 9 without change but with the addition of one or two provisions not now found in the Code of Civil Procedure, but applicable to the subject.

References.—Article inapplicable to certain corporations, § 195. Voluntary dissolution before commencing business, § 220, post. Voluntary dissolution before expiration of time limit and without receiver, § 221, post. Action to procure

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dissolution, §§ 101 ff. Actions by the people to annul a corporation, §§ 130-136, ante. Dissolution of business corporation for non-payment of capital stock, Business Corporations Law, § 5. Dissolution of religious corporations, Religious Corporations Law, § 18. Dissolution of education corporations, Education Law, § 63. Dissolution of academies, Education Law, § 64. Voluntary dissolution of banking corporations, Banking Law, § 486.

In general.—A proceeding for the voluntary dissolution of a corporation rests upon the statute and not upon the general equity powers of the court. *Matter of Binghamton Gen. Elec. Co.* (1894), 143 N. Y. 261, 38 N. E. 297. The method of effecting corporate dissolution prescribed by statute is exclusive. *Matter of Importers & Grocers' Exch.* (1892), 132 N. Y. 212, 30 N. E. 401.

The court acquires jurisdiction of the property of the corporation upon presentation of a petition for voluntary dissolution as provided in this title. *Matter of Jensen Co.* (1891), 128 N. Y. 550, 28 N. E. 665. But it cannot take any other step except as authorized by the statute. *Matter of Simonds Mfg. Co.* (1899), 39 App. Div. 576, 57 N. Y. Supp. 776. The proceeding is purely statutory and the statute must be strictly pursued. *Matter of Malcolm Brew. Co.* (1903), 78 App. Div. 592, 79 N. Y. Supp. 1057; *In re Boynton, etc., Co.* (1884), 34 Hun 369; *Matter of Mart* (1889), 22 Abb. N. C. 227; add *Matter of Ehret* (1911), 70 Misc. 576.

Proceeding for voluntary dissolution is a special proceeding. *Matter of Hulbert Bros. Co.* (1899), 160 N. Y. 9, 54 N. E. 571, revg. (1899), 38 App. Div. 323, 57 N. Y. Supp. 38. As to the history of legislation in reference to the supervision and dissolution of corporations, see *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737.

Title applies only to corporations organized for the purposes of trade, business and profit, and not to those of a social character. *In re Sportsman's Assn.* (1888), 15 Civ. Pro. Rep. 215, 2 N. Y. Supp. 63. The life of a corporation continues until the final order is made dissolving it. *Drew v. Longwell* (1894), 81 Hun 144, 30 N. Y. Supp. 733.

Where, upon an application for voluntary dissolution, it appears that the corporation and its creditors have an apparent cause of action against officers and directors for maladministration of corporate affairs, the petition should be denied until such claims can be asserted in a representation action or otherwise, without prejudice to renew the application if, after a reasonable time, no such action is brought. *Matter of Great Northern Trading Co.* (1915), 168 App. Div. 536, 153 N. Y. Supp. 213.

Voluntary dissolution may be had where a large majority of both the trustees and stockholders wish to wind up the affairs of the corporation, and it appears that the interests of the stockholders are so discordant as to prevent efficient management. *Matter of Importers & Grocers' Exchange* (1892), 132 N. Y. 212, 30 N. E. 401.

Directors cannot effect a voluntary dissolution by selling and transferring all the corporate assets and distributing the proceeds among the stockholders. *Flaum v. Kaiser Bros. Co.* (1910), 66 Misc. 586, 589, N. Y. Supp. affd. (1911), 144 App. Div. 897, 129 N. Y. Supp. 1122.

Petition may be presented by proper officers who are not required to resign; the action is instituted by them in their individual capacity. *Zeltner v. Zeltner Brewing Co.* (1903), 174 N. Y. 247, 66 N. E. 810, affg. (1879), 79 App. Div. 136, 80 N. Y. Supp. 338. Petition must be verified by a majority of the directors in strict compliance with the statute. *Matter of Dolgeville Elec. Light & Power Co.* (1899), 160 N. Y. 500, 55 N. E. 287. Sufficiency of petition, see *Matter of Pyrolusite Manganese Co.* (1883), 29 Hun 429.

De facto directors may join in a petition for voluntary dissolution. *Matter of Manoca Temple Association* (1908), 128 App. Div. 796, 798, 113 N. Y. Supp. 172.

Insolvency is shown where it appears that notes of the corporation had gone to protest and that the company's assets were not sufficient to meet claims against it. *Matter of Lenox Corporation* (1901), 57 App. Div. 515, 68 N. Y. Supp. 103, *affd.* (1901), 167 N. Y. 623, 60 N. E. 1115.

The provisions of the banking law providing for the involuntary dissolution of banking corporations, so far as they are inconsistent with the provisions of this title, are paramount, and where proceedings are taken thereunder, they supersede a proceeding by the directors of the corporation for a voluntary dissolution under this title. *Matter of Murray Hill Bank* (1897), 153 N. Y. 199, 47 N. E. 298, see also *People v. Murray Hill Bank* (1896), 10 App. Div. 328, 41 N. Y. Supp. 804; *Matter of Murray Hill Bank* (1896), 9 App. Div. 546, 41 N. Y. Supp. 914.

Interests of the minority stockholders, as well as those of the majority, are entitled to be considered upon the question whether it is "beneficial to the interests of the stockholders that a corporation should be dissolved." *Matter of Rateau Sales Co.* (1911), 201 N. Y. 420, 94 N. E. 869, *revg.* (1910), 141 App. Div. 931, 126 N. Y. Supp. 1143.

Notice of application for voluntary dissolution must be given to the attorney-general, whether corporation is solvent or insolvent. *Matter of Broadway Ins. Co.* (1897), 23 App. Div. 282, 48 N. Y. Supp. 299.

The proceedings herein provided are purely statutory and a violation of the express requirements of the statute in connection with the institution and maintenance of a proceeding in the nature of an order to show cause why a dissolution should not be had are jurisdictional in character. And where no notice of the presentation of the petition and schedules, nor application of such order to show cause, nor any copy of the motion papers, nor such proposed order, are served upon the Attorney-General, the order to show cause is void and all proceedings under it are without jurisdiction and also void. *Knickerbocker Trust Co. v. Tarrytown, W. P. & M. R. Co.* (1909), 133 App. Div. 285, 117 N. Y. Supp. 871.

Notice to the Attorney-General is not required of an application for an order to show cause why a petition for the voluntary dissolution of a corporation should not be granted. *Matter of Geneva Basket Co.* (1911), 71 Misc. 156, 127 N. Y. Supp. 943.

See generally. *MacMahon v. Stepney Spare Wheel Agency* (1910), 140 App. Div. 554, 125 N. Y. Supp. 823.

Section cited.—*Strauss v. Casey Machine & Supply Co.* (1910), 68 Misc. 474, 476, 124 N. Y. Supp. 32; *Assets Realization Co. v. Howard* (1911), 70 Misc. 651, 673, 127 N. Y. Supp. 798, *affd.* (1912), 152 App. Div. 900, 136 N. Y. Supp. 1130.

§ 171. Directors or trustees may be required to petition.—It shall be the duty of a majority of the directors or trustees of every corporation created by or under the laws of this state to present a petition as prescribed in the last section whenever directed so to do by a majority in interest of its stockholders.

Source.—Code Civ. Pro. § 2420, in part, as amended by L. 1894, ch. 304, and L. 1896, ch. 569; originally derived from L. 1876, ch. 442, § 1. Remainder of section in §§ 172, 173.

In general.—Where a petitioner in a proceeding for a voluntary dissolution of a corporation having an even number of trustees equally divided respecting its management, neglect or refuse to proceed, the court, upon the application of any person interested, may direct the petitioner to move, so that the interests of all may be protected. *Matter of Peekamoose Fishing Club* (1897), 161 N. Y. 511, 45 N. E. 1037.

§ 172. Petition when directors or trustees do not agree.—If a corpora-

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tion, created under a general statute of the state for the formation of corporations or under any special act or charter has an even number of trustees or directors who are equally divided respecting the management of its affairs, or if the stock of such corporation is equally divided into not more than two independent ownerships or interests, or if the entire stock of the corporation is, at that time, owned by the trustees or directors who are even in number or equally divided representing the management of its affairs, or if the stock is so divided, that one-half thereof is owned or controlled by persons favoring the course of part of the trustees or directors and one-half thereof is owned by persons favoring the course of the other trustees or directors, the trustees or directors or the stockholders or one or more of them may present a petition as prescribed in section one hundred and seventy of this chapter.

Source.—Code Civ. Pro. § 2420, in part, as amended by L. 1894, ch. 304, and L. 1896, ch. 569; originally derived from L. 1876, ch. 442, § 1. For remainder of section, see §§ 171, 173.

Construction.—Under the proper construction of the statute the owners of fifty per cent of the stock have a right to present a petition to the court for a dissolution under section 172, without regard to any action of a majority of the directors under section 170, and similarly a majority of the directors may file a petition for dissolution irrespective of any of the provisions of section 172. *Matter of McLoughlin* (1917), 176 App. Div. 653, 163 N. Y. Supp. 547.

§ 173. Corporations excepted from two preceding sections.—Sections one hundred and seventy-one and one hundred and seventy-two of this chapter do not apply to savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

Source.—Code Civ. Pro. § 2420, in part, as amended by L. 1894, ch. 304, and L. 1896, ch. 569; originally derived from L. 1876, ch. 442, § 1. For remainder of section, see §§ 171, 172.

§ 174. Contents of petition.—The petition must show that the case is one of those specified in sections one hundred and seventy and one hundred and seventy-two of this chapter, and must state the reasons, which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against, the corporation.

2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just, and true inventory of all the property of the corporation, and of all the books, vouchers, and securities, relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating that fact; the number of shares belonging to him; the amount paid in upon his shares; and the amount still due thereupon. (*Amended by L. 1909, ch. 240, § 37.*)

Source.—Code Civ. Pro. § 2421, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 59.

Petition should contain a full and complete inventory of the property. *Matter of Dubois* (1857), 15 How Pr. 7. It is not sufficient to simply allege that the parties differ as to the management of the affairs of the corporation. *Matter of Pyrolusite Manganese Co.* (1883), 29 Hun 429. A technical or accidental omission in the inventory which does not show a lack of good faith may be obviated by evidence. *In re Santa Eulalia Mfg. Co.* (1889), 115 N. Y. 667, 21 N. E. 1119. A statement that the schedule contains the required matter so far as known and that there are "a number of other depositors whose names are unknown to petitioner" and gives the aggregate claims of all depositors, is sufficient. *Matter of Murray Hill Bank* (1896), 9 App. Div. 546, 41 N. Y. Supp. 914.

Where the petition sets forth that there is a deadlock between the stockholders the petitioner owning fifty per cent of the stock, and that a dissolution will be beneficial to the interests of the stockholders in that the other stockholder, together with a dummy stockholder under his control, who together owned the other fifty per cent of stock, removed the petitioner from office as treasurer, excluded him from the management of the business, refused to allow him to examine the corporation's books, and that they have appropriated the money of the corporation and wasted it in extravagant expenditures, etc., to the loss of the petitioner's investment, it sufficiently complies with the requirements of the statute as to warrant an order appointing a referee and requiring all interested parties to show cause before him why the corporation should not be dissolved. Such petition for a voluntary dissolution need not allege that a majority of the managing directors or trustees deem it beneficial to the interests of the stockholders that the corporation be dissolved. *Matter of McLoughlin* (1917), 176 App. Div. 653, 163 N. Y. Supp. 547.

This section should be construed to mean that the petition must show that the case is one of those specified in section 170 or 172 of this chapter; that is to say, it need not be shown that the case comes within section 170 and 172, for the word "and" as used in said clause should be construed to mean "or." *Matter of McLoughlin* (1917), 176 App. Div. 653, 163 N. Y. Supp. 547.

Where schedule shows a surplus instead of a deficiency of assets no case is made for the appointment of temporary receiver of the property of a corporation. *Matter of Hitchcock Mfg. Co.* (1896), 1 App. Div. 164, 37 N. Y. Supp. 834.

Other papers may be considered.—The complaint in an equity suit brought by stockholders to secure to the corporation benefits of a contract which the peti-

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tioners had assumed to allow to be forfeited, against its interests, is a material circumstance bearing upon the question whether a dissolution should be decreed. *Matter of Rateau Sales Co.* (1911), 201 N. Y. 420, 94 N. E. 869.

§ 175. **Affidavit to be annexed to petition.**—An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and the schedule, are just and true, so far as the affiant knows or has the means of knowing the same, must be annexed to the petition and schedule.

Source.—Code Civ. Pro. § 2422, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 60.

Petition by executors must be signed by each of them. *Matter of Ehret* (1911), 70 Misc. 576, 127 N. Y. Supp. 934.

§ 176. **Presentation of petition.**—The papers must be presented at a special term of the supreme court, held within the judicial district, embracing the county wherein the principal office of the corporation is located.

Source.—Code Civ. Pro. § 2423, in part, as amended by L. 1889, ch. 314; L. 1895, ch. 946, and L. 1906, ch. 293; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 61, as amended by L. 1876, ch. 442. For remainder of section, see §§ 178, 181, 182, 184.

§ 177. **Corporations without stockholders.**—In the case of corporations affected by the provisions of this article and not having stockholders, it shall be sufficient for the purposes of this article to notify, name and refer to the "members" of such corporations, instead of "stockholders," as herein provided.

Source.—Code Civ. Pro. § 2431, in part, as amended by L. 1884, ch. 406; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 91. For remainder of section, see § 195.

§ 178. **Action by court upon petition for dissolution.**—In a case specified in sections one hundred and seventy-one and one hundred and seventy-two of this chapter the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section one hundred and seventy of this chapter, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six weeks after the granting of the order, why the corporation should not be dissolved. (*Amended by L. 1909, ch. 240, § 38.*)

Source.—Code Civ. Pro. § 2423, in part, as amended by L. 1889, ch. 314; L. 1895, ch. 946, and L. 1906, ch. 293; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 61, as amended by L. 1876, ch. 442. For remainder of section, see §§ 176, 181, 182, 184.

Order to show cause must comply strictly with the statute. *People v. Seneca Lake, G. & W. Co.* (1889), 52 Hun 174, 5 N. Y. Supp. 136. An order requiring persons interested to show cause why the prayer of the petition should not be granted substantially complies with the section, and is sufficient, although served without a copy of the petition. *Matter of Jensen Co.* (1891), 128 N. Y. 550, 28 N. E. 665. But see *Matter of Pyrolusite Manganese Co.* (1883), 29 Hun 429.

Vacating petition for voluntary dissolution.—An application to vacate a petition and order to show cause why a corporation should not be permitted to dissolve

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will be denied where the applicant contends that the allegations of petitioner were false and does not sustain the burden of proving same. *Matter of Hassam Laying Co.* (1912), 152 App. Div. 610, 137 N. Y. Supp. 453.

Court has implied authority to do whatever is necessary to render effective the contemplated purpose of the proceedings, which the statute authorizes. *Matter of Seneca Oil Co.* (1912), 153 App. Div. 594, 138 N. Y. Supp. 73, *affd.* (1913), 98 N. Y. 545, 101 N. E. 1121.

§ 179. Publication of order to show cause why corporation should not be dissolved.—A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

Source.—Code Civ. Pro. § 2424, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 62.

The order to show cause is effective if it does not contain a direction in accordance with this section, requiring publication, and such defect does not render the appointment of a temporary receiver void and may be remedied by amendment. *Matter of Christian Jensen Co.* (1891), 128 N. Y. 550, 28 N. E. 665.

§ 180. Service of order to show cause.—A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, at least ten days before the time appointed or the hearing; or by depositing a copy of the order, at least twenty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

Source.—Code Civ. Pro. § 2425, as amended by L. 1906, ch. 293; new in Code.

References.—Services of papers on attorney-general, § 312, *post*.

Effect of service.—A service of the order to show cause on creditors does not require them to take notice of all further proceedings; notice of an accounting by the temporary receiver should be served on creditors. *Matter of Simonds Mfg. Co.* (1899), 29 App. Div. 576, 57 N. Y. Supp. 776.

§ 181. Entering and filing order and papers.—The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located.

Source.—Code Civ. Pro. § 2423, in part, as amended by L. 1889, ch. 314; L. 1895, ch. 946, and L. 1906, ch. 293; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 61, as amended by L. 1876, ch. 442. For remainder of section, see §§ 176, 178, 182, 184.

§ 182. Temporary receiver.—If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceedings before the final order, on motion of the petitioners or notice to the attorney-general, or on motion of the attorney-general or notice to the corporation, appoint a temporary receiver of the property of

the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one hundred and four of this chapter. The court may also, in its discretion, at any stage in the proceeding after the appointment of a temporary receiver, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court.

Source.—Code Civ. Pro. § 2423, in part, as amended by L. 1889, ch. 314; L. 1895, ch. 946, and L. 1906, ch. 293; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 61, as amended by L. 1876, ch. 442. For remainder of section, see §§ 176, 178, 181, 184.

Consolidators' note.—This section provides for the powers and duties of a temporary receiver and makes applicable to a temporary receiver appointed in proceedings for the voluntary dissolution of a corporation the powers and duties of a temporary receiver appointed in an action for sequestration and for the dissolution of a corporation. This was accomplished by the reference to § 1788 of the Code of Civil Procedure, which reference has been changed to § 105 of this chapter where § 1788 of the Code has been incorporated in this chapter. The powers and duties of a temporary receiver are not defined to any large extent by statute, but are mainly matters of judicial discretion. The powers, duties and liabilities of receivers consolidated in art. 11 of this chapter apply only to permanent receivers. For a note on the subject see 19 Abbott's New Cases, 359.

References.—Powers of temporary receivers, see §§ 104, 105, *ante*.

An order to show cause why the corporation should not be dissolved need not necessarily precede the granting of an order appointing a temporary receiver. It is the common practice to grant such an order at the same time that the order to show cause for dissolution is granted, or immediately thereafter and before the service thereof. The statute does not prescribe how soon after the filing of a petition this latter order must be granted. So that even though the order to show cause for dissolution was void for failure to comply with the requirements of section 170, *ante*, and no proceedings could be taken under it affecting such dissolution, the order appointing the temporary receiver is perfectly valid. The appointment of the temporary receiver being valid the court has jurisdiction to regulate and control his action, and may order him to issue and sell certain certificates which will be a valid lien on the property in his possession. *Knickerbocker Trust Co. v. Tarrytown, W. P. M. R. Co.* (1909), 133 App. Div. 285, 117 N. Y. Supp. 871.

Who is entitled to be heard.—Temporary receiver should not be appointed without a full hearing of persons representing the majority interests of stockholders and creditors. *Matter of Manoca Temple Assn.* (1908), 128 App. Div. 796, 113 N. Y. Supp. 172.

Temporary receiver.—As to powers of temporary receiver, see cases cited under § 104, *ante*. Where assets exceed liabilities, appointment of receiver is unauthorized. *Matter of Hitchcock Mfg. Co.* (1896), 1 App. Div. 164, 37 N. Y. Supp. 834. As to powers of temporary receiver of a banking corporation as against the superintendent of banking acting under the Banking Law, see *Matter of Murray Hill Bank* (1896), 9 App. Div. 546, 41 N. Y. Supp. 914. If the statutory authority is not strictly followed the order of appointment will be void. *Matter of Lenox Corporation* (1901), 57 App. Div. 515, 68 N. Y. Supp. 103, *affd.* (1901), 167 N. Y. 623, 60 N. E. 1115.

Temporary receiver should not be authorized to sell property, except for the most cogent reasons. *Matter of Malcolm Brewing Co.* (1903), 78 App. Div. 592, 79 N. Y. Supp. 1057. Temporary receiver may be authorized by the court to finish and complete the outstanding contracts of the corporation. *Nason Mfg. Co. v. Garden* (1900), 52 App. Div. 363, 65 N. Y. Supp. Div. 147. Occupation of premises by a temporary receiver creates no personal liability. *Metropolitan Life Ins. Co. v. Sanborn* (1901), 34 Misc. 531, 69 N. Y. Supp. 1009.

The amount of the commissions of a temporary receiver appointed under this section is governed by § 3320 of the Code. Such commissions are not to be computed simply upon the cash actually coming into his hands, but he may be entitled, in an extreme case, to two and a half per cent. of the value of the property, as compensation for receiving and protecting the same. *Matter of Smith Co.* (1898), 31 App. Div. 39, 52 N. Y. Supp. 877.

Where the temporary receiver is continued as permanent receiver, the creditors are entitled to require him to account for everything received by him in his capacity as temporary receiver. *Matter of Simonds Mfg. Co.* (1899), 39 App. Div. 576, 57 N. Y. Supp. 776.

§ 183. Application for appointment of receiver.—Every application made for the appointment of a receiver of a corporation other than applications made by the attorney-general on behalf of the people of the state, shall be made at a special term of the supreme court held in and for the judicial district in which the principal business office of the corporation is located.

Source.—L. 1883, ch. 378, § 1, in part, as amended by L. 1896, ch. 282.

Consolidators' note.—The statute of 1883, a portion of which is here consolidated, applies to proceedings for the voluntary dissolution of a corporation, *People v. Seneca Lake Grape & Wine Co.*, 52 Hun 174, 5 N. Y. Supp. 136 (1889). See also *U. S. Trust Co. v. N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 478; *MacNabb v. Porter & Lighter Co.* (1899), 44 App. Div. 102, 60 N. Y. Supp. 694; *Matter of Broadway Insurance Co.* (1897), 23 App. Div. 282, 48 N. Y. Supp. 299. A more general provision relating to applications for the appointment of receivers and otherwise will be found in § 314 under the head of provisions applicable to more than two of the actions or proceedings incorporated in this chapter.

Reference.—Application by attorney-general, § 108, ante.

§ 184. Injunction.—If a temporary receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation, from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

Source.—Code Civ. Pro. § 2423, in part, as amended by L. 1889, ch. 314; L. 1899, ch. 946, and L. 1906, ch. 293; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 6; as amended by L. 1876, ch. 442. For remainder of section, see §§ 176, 178, 181, 183.

In general.—Every lien upon the property of a corporation resting upon a valid agreement or process before the appointment of a receiver, the lienor being lawfully in possession, must be preserved with right of enforcement. *Matter of Birmingham General Elec. Co.* (1894), 143 N. Y. 261, 38 N. E. 297.

The injunctive power of the court before the final order is limited to restraining the prosecution of actions for a sum of money only, and the prosecution of

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foreclosure action cannot be restrained since the courts and legislatures cannot thus override the vested rights of creditors. *Matter of Tarrytown, etc., R. Co.* (1909), 133 App. Div. 297, 117 N. Y. Supp. 695.

§ 185. Referee.—If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable.

Source.—Code Civ. Pro. § 2426, in part; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 63. For remainder of section, see §§ 186, 187.

§ 186. Hearing.—At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts.

Source.—Code Civ. Pro. § 2426, in part; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 63. For remainder of section, see §§ 185, 187.

§ 187. Decision.—The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the corporation, and of all other matters, pertaining to its affairs.

Source.—Code Civ. Pro. § 2426, in part; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 63. For remainder of section, see §§ 185, 186.

The section must be complied with as to contents of referee's report, or the final order is void. *Matter of E. M. Boynton Saw & File Co.* (1885), 34 Hun 369.

§ 188. Use of original papers on hearing.—The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.

Source.—Code Civ. Pro. § 2427, in part, as amended by L. 1894, ch. 258; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 64. For remainder of section, see § 189.

§ 189. Amending papers.—The court may, at any stage of the proceedings before final order, on the application of the petitioners, or a majority of them, or on the application of the temporary receiver, grant an order amending the schedules annexed to the original petition, by the insertion of additional items, or by making the statements or inventory fuller and in greater detail than as originally filed, with the like effect as though said petition and schedules had been originally presented and filed as amended.

Source.—Code Civ. Pro. § 2427, in part, as amended by L. 1894, ch. 258; originally derived from R. S., pt. 3, ch. 8, tit. 4, § 64. For remainder of section, see § 188.

This contemplates an increase of the schedule or inventory, and not a decrease. Where the original schedules show solvency, they may not be subsequently amended to show insolvency in order to defeat an application to vacate the receivership. *Matter of Hitchcock Mfg. Co.* (1896), 1 App. Div. 164, 37 N. Y. Supp. 834.

§ 190. Final order.—Where the hearing is before a referee, a motion

for a final order must be made to the court, upon notice to each person who has made himself a party to the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a post-office within the state, where such a notice may be served. The notice may be served as prescribed in the code of civil procedure for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

Source.—Code Civ. Pro. § 2428; new in Code.

What constitutes a final order.—An order confirming a referee's report upon a receiver's accounts and the claims of creditors, adjudging who are creditors and directing the distribution among them of the balance in the hands of the receiver, after the payment of expenses, is a final order. *Matter of Hulbert Bros. & Co.* (1899), 160 N. Y. 9, 54 N. E. 571.

Power to vacate order.—The Supreme Court has inherent power to vacate an order for voluntary dissolution where substantial justice will be subserved; and the court is not precluded from so doing on the theory that by the entry of the order the corporation became forever legally dead. Where the order was improvidently granted it will be set aside even though the dissolution proceedings were not tainted with fraud or irregularity. *Matter of Automatic Chain Co.* (1909), 134 App. Div. 863, 119 N. Y. Supp. 379, *affd.* (1909), 198 N. Y. 618, 92 N. E. 1078.

See *Matter of Peekamoose Fishing Club* (1897), 151 N. Y. 511, 45 N. E. 1037.

§ 191. Permanent receiver.—Upon an application for a final order, if it appear to the court in a case specified in section one hundred and seventy of this chapter that the corporation is insolvent, or, in a case specified either in that section, or in sections one hundred and seventy-one and one hundred and seventy-two of this chapter, that for any reason a dissolution of the corporation will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation, and appointing one or more receivers of its property. But in the case of a solvent corporation, the court may, if there is no objection by creditors, dispense with a receiver and provide in the final order for the distribution of the assets. The order shall be entered in the office of the clerk of the county in which the principal business office, or the principal place of business of the corporation is located, and a certified copy thereof, if a banking corporation, shall be filed in the office of the superintendent of banks; if an insurance corporation, in the office of the superintendent of insurance; and if a business, transportation, railroad or membership corporation, in the office of the secretary of state. Upon the entry of the order and the filing of a certified copy thereof as herein provided, the corporation is dissolved. A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under article eleven of this chapter. (*Amended by L. 1909, ch. 240, and L. 1916, ch. 53.*)

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Source.—Code Civ. Pro. § 2429, in part, as amended by L. 1895, ch. 175, and L. 1899, ch. 599; originally derived from R. S., pt. 3, ch. 8, tit. 4, §§ 65, 66.

Consolidators' note.—In the title in the Code of Civil Procedure relating to proceedings for the voluntary dissolution of a corporation there will be found no statement of the powers, duties and liabilities of receivers who may be appointed in such proceedings. There is not even a reference in the proceedings conferring upon the receivers appointed in the proceedings the powers, duties and liabilities of receivers. The omission, however, is supplied by L. 1880, ch. 245, § 1, subd. 3, p. 369, which provides as follows: "§§ 66 to 89 (Revised Statutes, pt. 3, ch. 8, tit. 4, art. 3), both inclusive, which are hereby made applicable to a receiver appointed as prescribed in § 2429 of the Code of Civil Procedure." These sections of the Revised Statutes comprise in themselves or by reference the provisions in the Revised Statutes relating to the powers, duties and liabilities of receivers. The provisions of the Revised Statutes referred to have been consolidated in art. 11 of this chapter and have been incorporated in this article relating to proceedings for the voluntary dissolution of a corporation by a reference at the end of § 191 as follows: "A receiver appointed under this section shall have all the powers, duties and liabilities of receivers under art. 11 of this chapter."

References.—Powers, duties and liabilities of receivers, §§ 230–278, post. Bonds of receivers, §§ 225–227, post.

Application.—The provisions of this law in relation to receivers are intended to regulate the conduct of receiverships of domestic, not foreign, corporations. *Strauss v. Casey Machine & Supply Co.* (1910), 68 Misc. 474, 124 N. Y. Supp. 32.

The insolvency specified in this section is limited and defined by § 170. *Matter of Lenox Corporation* (1901), 57 App. Div. 515, 68 N. Y. Supp. 103, *affd.* (1901), 167 N. Y. 623, 60 N. E. 1115.

Injury to public interests.—Rights of a foreign creditor given by special statute will not be left unprotected in order to benefit resident stockholders. *Matter of People's Surety Co.* (1913), 82 Misc. 518, 144 N. Y. Supp. 131.

The order of dissolution is discretionary; it should be granted if the interests of the stockholders will be subserved thereby. In the exercise of its discretion the court should consider the interests of the minority as well as the majority. *Matter of Importers & Grocers' Exchange* (1892), 132 N. Y. 212, 30 N. E. 401. The order should not be granted for mere difference of opinion among the members of a corporation. *Fischer v. Raab* (1879), 57 How. Pr. 87.

Distribution of assets.—Where in a petition by all the directors of a solvent domestic corporation for a voluntary dissolution thereof, it is alleged that certain stockholders claim the right to a preference on the distribution of the assets, the referee appointed may hear and determine the controversy between the stockholders, and the court may provide by its final order for the distribution of the assets among those entitled thereto. *Matter of Seneca Oil Co.* (1912), 153 App. Div. 594, 138 N. Y. Supp. 78, *affd.* (1913), 208 N. Y. 545, 101 N. E. 1121.

Lease not terminated by dissolution. *People v. Nat. Trust Co.* (1880), 82 N. Y. 283.

Effect of appointment of receiver by final order is to supersede all other actions taken for the preservation of the property, including a temporary receiver. *Glines v. Binghamton Trust Co.* (1893), 68 Hun 511, 22 N. Y. Supp. 1023.

A permanent receiver becomes vested with the title of the assets of the corporation upon the granting of the order. *Dickey v. Bates* (1895), 13 Misc. 489, 35 N. Y. Supp. 525. As to powers and duties of receiver, see *Matter of Wendler Machine Co.* (1896), 2 App. Div. 16, 37 N. Y. Supp. 444. By the appointment of a receiver the property of the corporation comes into the possession of the court, and it has power to preserve and protect it. *Matter of Jensen Co.* (1891), 128 N. Y. 550, 28 N. E. 665.

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Notice to attorney-general necessary. *Matter of Broadway Ins. Co.* (1897), 23 App. Div. 282, 48 N. Y. Supp. 299.

The omission to serve upon the attorney-general the notice of the application of a permanent receiver for an order directing the sale of property is cured by a subsequent order of the court made upon due notice to the attorney-general confirming the sale. *Johnson v. Reyner* (1898), 25 App. Div. 598, 49 N. Y. Supp. 959. A copy of motion papers need not be served upon the attorney-general in a proceeding to determine the question as to the validity of claims against a corporation which has been dissolved, and whose assets are in the hands of a receiver. *People v. American Steam Boiler Ins. Co.* (1896), 3 App. Div. 504, 38 N. Y. Supp. 406.

Commissions of permanent receivers are regulated by § 76 of Revised Statutes, part 3, ch. 8. Chapter 378 of the Laws of 1883, regulating the compensation of receivers, does not apply to permanent receivers under this section. *Matter of Smith Co.* (1898), 31 App. Div. 39, 52 N. Y. Supp. 877. But see § 278, post. Section 76 referred to was repealed by L. 1906, ch. 349.

§ 192. Appointment of director, trustee or other officer or stockholder as receiver.—The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property.

Source.—Code Civ. Pro. § 2429, in part, as amended by L. 1895, ch. 175, and L. 1899, ch. 599; originally derived from R. S., pt. 3, ch. 8, tit. 4, §§ 65, 66. For remainder of section, see §§ 191, 194.

Consolidators' note.—This section is the same as the following provision in the Revised Statutes which latter provision therefore has been repealed.

"Any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 66.]

Propriety of appointing certain persons.—A creditor may be a proper person. *Chamberlain v. Greenleaf* (1878), 4 Abb. N. C. 92. Or a general agent of an insurance company. *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.* (1884), 33 Hun 539. But a person who stands in an improper relation to the cause should not be appointed. *Smith v. N. Y. Consol. Stage Co.* (1865), 28 How. Pr. 208. Nor a director who has participated in alleged mismanagement. *Keeler v. Brooklyn El. R. R. Co.* (1880), 9 Abb. N. C. 166. Nor an assignee of same estate. *Eichberg v. Wickham* (1892), 21 N. Y. Supp. 647. Nor a person who has signed a false statement as to the solvency of the corporation. *People v. Third Ave. Savings Bank* (1875), 50 How. 22.

A reference is proper to take and state the account of a receiver appointed pursuant to this section upon the voluntary dissolution of the corporation. *Matter of Home Book Co.* (1908), 60 Misc. 560, 112 N. Y. Supp. 1012.

§ 193. Certain sales, transfers and judgments void.—A sale, assignment, mortgage, conveyance, or other transfer, of any property of a corporation, made after the filing of a petition as prescribed in this article, in payment of, or as security for, an existing or prior debt, or for any other consideration, or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

Source.—Code Civ. Pro. § 2430, which was derived from R. S., pt. 3, ch. 8, tit. 4, § 71.

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Consolidators' note.—This section is the same as the following section of the Revised Statutes which latter section therefore has been repealed:

"All sales, assignments, transfers, mortgages and conveyances of any part of the estate real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as a security for, any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 71.]

A lien by judgment of attachment may be obtained by a creditor between the appointment of a receiver and the filing of his bond. *Chamberlain v. Rochester, etc., Paper Vessel Co.* (1876), 7 Hun 557.

Assignment for the benefit of creditors by corporation cannot be set aside in proceedings taken for a voluntary dissolution of the corporation, where the general assignee was not a party. *Matter of Muehlfeld* (1897), 16 App. Div. 401, 45 N. Y. Supp. 16.

A judgment by default on a just debt is not within the above section; it must appear that the judgment was suffered with intent to give a preference. *Matter of Muehlfeld and Haynes Piano Co.* (1896), 12 App. Div. 492, 42 N. Y. Supp. 302. See *Matter of Eagle Iron Works* (1840), 3 Edw. 385, revd. (1840), 8 Paige, 380, affd. (1840), 8 Paige 385; *Matter of Waterbury* (1840), 8 Paige 380; *Matter of Berry* (1857), 26 Barb. 55.

§ 194. **Omission, defect or default of receiver.**—In a proceeding for the voluntary dissolution of a corporation, the court may, in the furtherance of justice, upon notice to the attorney-general, and the attorney-general not objecting, and upon such further notice to creditors or others interested as the court shall direct, which notice may be made by mail upon all persons and corporations not residing or existing within the state, relieve a receiver from any omission, defect or default, in any proceeding or act required by law to be taken or done, or in the giving of any notice required by law to be given, and the court may upon like notice, confirm any act of a receiver, and any decision, report, order or judgment made in such proceeding.

Source.—Code Civ. Pro. § 2429, in part, as amended by L. 1895, ch. 175, and L. 1899, ch. 599; originally revised from R. S., pt. 3, ch. 8, tit. 4, §§ 65, 66. For remainder of section, see § 191, 192, ante.

§ 195. **Exception of certain corporations.**—This article does not apply to an incorporated library society, to a religious corporation, or to a select school or academy, incorporated by the regents of the university or by the legislature, or to a municipal or other political corporation.

Source.—Code Civ. Pro. § 2431, in part, as amended by L. 1884, ch. 406; originally revised from R. S., pt. 3, ch. 8, tit. 4, § 91. For remainder of section, see § 177, ante.

References.—As to dissolution proceedings by corporations mentioned in this section, see decisions cited under § 170, ante.

ARTICLE IX-A.

(Article added by L. 1917, ch. 292, in effect May 1, 1917.)

**FORFEITURE OF CHARTER OR REVOCATION OF CERTIFICATE OF AUTHORITY
FOR MAINTAINING A NUISANCE.**

Section 200. Forfeiture of charter or revocation of certificate of authority of corporations maintaining nuisances generated in another state.

201. Reinstatement.

202. Application of article.

§ 200. Forfeiture of charter or revocation of certificate of authority of corporations maintaining nuisances generated in another state.—Any corporation organized under the laws of this or any other state which shall so conduct its business, without the state, by the emission or discharge of dust, smoke, gas, steam or offensive, noisome or noxious odors or fumes, so as to unreasonably injure or endanger the health or safety in this state of any considerable number of the people of this state, shall be deemed guilty of a nuisance and the charter of such corporation, if incorporated by or under any law of this state shall be deemed forfeited in the manner prescribed in this section, or its certificate of authority to do business in this state, if incorporated or formed under the laws of any other state shall be deemed revoked and annulled in the manner prescribed in this section, and in either case shall not be revived, except as prescribed in the next section. Complaints may be made to the state commissioner of health by any person, association or corporation aggrieved, by petition or complaint in writing, setting forth any act or thing done or omitted to be done claimed to constitute a nuisance within the provisions of this section. Upon the presentation of such a complaint, the state commissioner of health shall cause a copy thereof to be served upon the corporation complained of, in the manner provided by law for the service of a summons accompanied by a notice, directed to such corporation, requiring that the matters complained of be abated, or that the charges be answered in writing within a time to be specified by such commissioner. If the charges contained in such complaint be not thus satisfied and it shall appear to such commissioner of health that there are reasonable grounds therefore he shall cause such charges to be investigated in such manner and by such means as he shall deem proper and fix a time for a hearing upon such complaint and cause notice thereof to be forwarded to the complainant and the corporation complained of. If the state commissioner of health, or his successor, after such notice to such corporation, and an opportunity for a hearing being given to it, shall find that such corporation is so conducting its business, without the state, as to unreasonably injure or endanger the health or safety in this state of any considerable number of people of this state, he shall file such findings in duplicate in the offices of the secretary of state and the attorney-general. A certificate of the secre-

tary of state giving notice of the filing of such findings shall be served upon the corporation, or upon the designated agent of a foreign corporation authorized to do business in this state, and thereupon the charter of such corporation if incorporated by or under any law of this state, or its certificate of authority to do business in this state, if incorporated or formed under the laws of any other state, shall be suspended for the period of thirty days. Any person who shall exercise or attempt to exercise any powers under the charter of any corporation or by virtue of a certificate of authority which has been so suspended, during the period of such suspension, shall be guilty of a misdemeanor. If at the expiration of such period the state commissioner of health upon further proof and opportunity to such offending corporation to be heard shall find and determine that such corporation continues to conduct its business so as to constitute such nuisance, he shall cause a notice of such determination to be served upon the corporation, or upon the designated agent of a foreign corporation authorized to do business in this state, and published once a week for two successive weeks in the official state paper. On the tenth day after such service and publication the charter of such corporation, if incorporated by or under any law of this state, shall be deemed forfeited or its certificate of authority to do business in this state, if incorporated or formed under the laws of any other state, shall be deemed to be revoked and canceled. Any person who shall exercise or attempt to exercise any powers under the charter of any corporation which has been so forfeited or by virtue of a certificate of authority which has been so revoked, shall be guilty of a misdemeanor. If, pursuant to this section, the charter of a domestic corporation be forfeited, the attorney-general shall forthwith apply to the supreme court for the appointment of a receiver of its property, who shall have all the powers and duties, so far as practicable, prescribed by articles ten-A and eleven of the general corporation law. (*Added by L. 1917, ch. 292, in effect May 1, 1917.*)

§ 201. **Reinstatement.**—When any corporation has ceased to perform the acts or maintain the nuisance by reason of which its charter has been forfeited or its certificate of authority revoked, and shall satisfactorily guarantee that it will not perform such acts or maintain such nuisance in the future, the charter or certificate of authority of such corporation may be revived in the manner prescribed in this section with the same force and effect as if such charter had not been forfeited or such certificate revoked. If such corporation shall file a petition in writing with the state commissioner of health setting forth that the nuisance in fact no longer exists and it shall appear that there are reasonable grounds therefor, such commissioner of health shall cause an investigation to be made in such manner and by such means as he shall deem proper, and if after such investigation, he shall find and certify that such corporation has ceased to conduct its business so as to constitute such nuisance, and shall file such

findings in duplicate in the offices of the secretary of state and attorney-general, the charter or certificate of authority of such corporation shall be deemed to be revived with full force and effect. A supplemental certificate of the secretary of state shall be served and published in like manner, and upon such service and publication, such revival shall become effective. Such revival shall not, however, prevent a subsequent forfeiture or revocation of the charter or certificate of the same corporation for the same or similar offense. This article shall not be deemed to apply to a corporation organized and existing under the laws of the state of New York and subject to the jurisdiction of the public service commission under the public service commissions law or principally engaged in furnishing power to such public service corporation. (*Added by L. 1917, ch. 292, in effect May 1, 1917.*)

§ 202. *Application of article.*—This article shall not apply to corporations operating railroad or steamboat lines. (*Added by L. 1917, ch. 292, in effect May 1, 1917.*)

ARTICLE X.

DISSOLUTION OF STOCK CORPORATION WITHOUT JUDICIAL PROCEEDINGS.

Section 220. Dissolution of stock corporation before beginning business.

221. Dissolution of stock corporation before expiration of time limit.

§ 220. *Dissolution of stock corporation before beginning business.*—The incorporators named in any certificate of incorporation filed for the purpose of creating a domestic stock corporation, other than a moneyed or transportation corporation, may, before the payment of any part of the capital, and before beginning business, surrender all corporate rights and franchises, by signing, verifying and filing in the office of the secretary of state and the clerk of the county where the certificate of incorporation is filed, a certificate setting forth the names of the incorporators, that no part of the capital has been paid, that there are no liabilities, that such business has not been begun, and surrendering all rights and franchises, and proof of the facts set forth in such certificate to the satisfaction of the secretary of state; and thereupon the said corporation shall be dissolved, and its corporate existence and power shall cease. In case any incorporator of such a corporation shall be deceased, then the aforesaid certificate may be made by the surviving incorporators providing two years shall have elapsed since the date of its incorporation, but in such case the certificate shall set forth the fact that one or more of said incorporators is deceased.

Source.—Former Stock Corp. L. (L. 1890, ch. 564) § 61, as added by L. 1904, ch. 296, and amended by L. 1908, ch. 457.

Consolidators' note.—These proceedings for the voluntary dissolution of stock corporations have been transferred to the General Corporation Law from the Stock

Corporation Law in order to bring together so far as possible all proceedings and actions relating to the winding up of a corporation.

§ 221. **Dissolution of stock corporation before expiration of time limit.**— Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows:

1. The board of directors of any such corporation may at a meeting called for that purpose, upon at least three days' notice to each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the stockholders for the purpose of voting upon a proposition that such corporation be forthwith dissolved. Such meeting of the stockholders shall be held not less than thirty nor more than sixty days after the adoption of such resolution, and the notice of the time and place of such meeting so called by the directors shall be published in one or more newspapers published and circulating in the county wherein such corporation has its principal office, at least once a week for three weeks successively next preceding the time appointed for holding such meeting, and on or before the day of the first publication of such notice, a copy thereof shall be served personally on each stockholder, or mailed to him at his last known post-office address. Such meeting shall be held in the city, town or village in which the last preceding annual meeting of the corporation was held, and said meeting may, on the day so appointed, by the consent of a majority in interest of the stockholders present, be adjourned from time to time, and notice of such adjournment shall be published in the newspapers in which the notice of the meeting is published. If at any such meeting the holders of two-thirds in amount of the stock of the corporation, then outstanding, shall, in person or by attorney, consent that such dissolution shall take place and signify such consent, in writing, then such corporation shall file such consent, attested by its secretary or treasurer, and its president or vice-president, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the then existing board of directors of said corporation, and the names and residences of its officers duly verified by the secretary or treasurer or president of said corporation, in the office of the secretary of state.

2. The secretary of state shall thereupon issue to such corporation, in duplicate, a certificate of the filing of such papers and that it appears therefrom that such corporation has complied with this section in order to be dissolved, and one of such duplicate certificates shall be filed by such corporation in the office of the clerk of the county in which such corporation has its principal office; and thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its business. The board of directors shall cause a copy of such certificate to be published at least once a week for two weeks in one

or more newspapers published and circulating in the county in which the principal office of such corporation is located, and at the expiration of such publication, the said corporation by its board of directors shall proceed to adjust and wind up its business and affairs with power to carry out its contracts and to sell its assets at public or private sale, and to apply the same in discharge of debts and obligations of such corporation, and, after paying and adequately providing for the payment of such debts and obligations, to distribute the balance of assets among the stockholders of said corporation, according to their respective rights and interests.

3. Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up.

4. After paying or adequately providing for the debts and obligations of the corporation the directors may, with the written consent of the holders of two-thirds in amount of the capital stock, sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state, and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in lieu of money, in proportion to their interest therein, but no such sale shall be valid as against any stockholder, who, within sixty days after the mailing of notice to him of such sale, shall apply to the supreme court in the manner provided by section seventeen of the stock corporation law, for an appraisal of the value of his interests in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale, or some of them, shall pay to such objecting stockholder or deposit for his account, in the manner directed by the court, the amount of such appraisal and upon such payment or deposit the interest of such objecting stockholder shall vest in the person or persons making such payment or deposit.

Source.—Former Stock Corp. L. (L. 1890, ch. 564) § 57, as added by L. 1896, ch. 922, and amended by L. 1900, ch. 760.

Notice of dissolution.—*Darcy v. Brooklyn & N. Y. Ferry Co.* (1908), 127 App. Div. 167, 170, 111 N. Y. Supp. 514, *affd.* (1909), 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. (N. S.) 267. See *Horner & Co. v. Lawrence* (1914), 86 Misc. 95, 149 N. Y. Supp. 82, *affd.* (1915), 166 App. Div. 920, 152 N. Y. Supp. 1140.

Place of meeting for the purpose of voting upon a proposition to dissolve a corporation under this section, must be in the city, town or village in which the last preceding annual meeting of the corporation was held within this State. Such annual meeting to have been legal, must necessarily have been within the boundaries of the State of New York. The meeting must be called originally for such place, and if called for an improper place cannot be legally adjourned. *Rept. of Atty. Genl.* (1912) 25.

The three days' notice to each director, provided by this section, may be dispensed with by written waiver duly executed before the meeting. *Atty. Genl. Opin.* (1915), 5 State Dep. Rep. 450.

L. 1909, ch. 28.

Dissolution without judicial proceeding.

§ 221.

Consent to dissolution.—A stock corporation can be dissolved without judicial proceedings only when the holder of two-thirds in amount of the entire outstanding stock of corporation consents thereto in writing. Rept. of Atty. Genl. (1912) 18.

Right of minority stockholder to prevent a sale of assets upon dissolution.—Where, pursuant to a plan proposed by the directors, the stockholders vote to dissolve a corporation, organize a new company in another state and sell the assets of the original corporation to the new company, exchanging share for share the stock in the new company, for that of the old one in order to avoid a heavy tax, a sale of the assets will not be enjoined at the instance of a minority stockholder who has accepted pecuniary benefits from the acts of which he complains and whose rights can be fully protected in other ways. The sale having been acquiesced in by a vast majority of the stockholders, it would be inequitable to annul the transaction and destroy a growing and profitable concern by ordering a resale of the property. *Treadwell v. United Verde Co.* (1909), 134 App. Div. 394, 119 N. Y. Supp. 112.

The corporation is continued by this section for the purpose of suing and being sued. And an action brought against a corporation after its dissolution should be brought against the corporation and not against the directors who have become trustees for the benefit of creditors. As to whether such directors may be joined with the corporation is a question that is still undetermined. *Cunningham v. Glauber* (1909), 133 App. Div. 10, 117 N. Y. Supp. 866.

Outstanding liabilities.—A corporation having outstanding potential liabilities cannot be said to be an "extinguished entity." *Metropolitan Tel. etc., Co. v. Metropolitan, etc., Co.* (1913), 156 App. Div. 577, 141 N. Y. Supp. 598.

Duties and liabilities of trustees on voluntary dissolutions.—Upon the dissolution of a corporation the directors become the trustees of the creditors of the corporation. As such it is their duty to settle its affairs, collect the assets, pay the debts, and divide among the persons entitled thereto the money and other property remaining. They have authority to sue for and recover the debts and property of the corporation as such trustees and they become jointly and severally, personally, liable to its creditors to the extent of the property which comes into their hands. However a receiver *pendente lite* will not be appointed after a distribution of the assets, even though such distribution was illegal; the defendant corporation itself has no property. *Tapley Co. v. Keller* (1909), 133 App. Div. 54, 117 N. Y. Supp. 817.

Assignment of claim for moneys due.—The officers of a corporation, being trustees of its assets after a voluntary dissolution, may execute a valid assignment of a claim for moneys due under a contract. *Asphalt P. & C. Co. v. City of New York* (1912), 149 App. Div. 622, 134 N. Y. Supp. 433, revg. (1910), 69 Misc. 588, 127 N. Y. Supp. 794.

Actions to set aside voluntary dissolution.—See, *Knickerbocker v. Groton Bridge, etc., Co.* (1906), 111 App. Div. 145, 97 N. Y. Supp. 595.

Rights of domestic creditors against dissolved foreign corporation doing business in this state will be protected, especially where the cause of action arose here and property applicable to the payment of their obligations is within the state. *Atlantic Dredging Co. v. Beard* (1911), 145 App. Div. 342, 130 N. Y. Supp. 4, affd. (1911), 203 N. Y. 584, 96 N. E. 415.

Sections 42 of the General Corporation Law does not apply to voluntary dissolution. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 513.

Section cited.—*Tanger v. Bankers' Land etc., Co.* (1913), 159 App. Div. 351, 144 N. Y. Supp. 613; *People ex rel. N. Y. Tel. Co. v. Pub. Service Com.* (1913), 157 App. Div. 156, 141 N. Y. Supp. 1018; *Logan v. New York Sugar Refining Co.* (1917), 176 App. Div. 660, 667, 163 N. Y. Supp. 214.

ARTICLE X-A.

(Inserted by L. 1909, ch. 240.)

PROVISIONS APPLICABLE TO TEMPORARY AND PERMANENT RECEIVERS OF CORPORATIONS.

Section 225. Security.

226. Removal or new bond.

227. Notice to sureties upon accounting.

§ 225. **Security.**—A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bonds by two sureties. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver or for increasing the same. (*Added by L. 1909, ch. 240, § 40.*)

Source.—Code Civ. Pro. § 715, in part, as amended by L. 1877, ch. 416, and L. 1896, ch. 94, new in Code. For remainder of section, see §§ 226, 227.

Liability of sureties.—Action will not lie until receiver's accounts have been passed upon after notice to sureties. *Stratton v. City Trust Co.* (1903), 86 App. Div. 551, 83 N. Y. Supp. 780. See same case (1902), 69 App. Div. 322, 74 N. Y. Supp. 670. Surety liable although receiver is removed prior to failure to pay over. *Thomson v. MacGregor* (1880), 81 N. Y. 592.

The liabilities of the sureties of a receiver differ from those of an administrator, being usually limited to an undertaking that he will faithfully discharge the duties of his trust, and a judgment against him in his official capacity is not conclusive upon his sureties unless there has been an accounting of the trust fund and the remedies against the receiver have been exhausted. *Coe v. Patterson* (1907), 122 App. Div. 76, 106 N. Y. Supp. 659.

Cost of bond not exceeding one per centum of amount annually may be charged as necessary expense on leave of court or judge. Code Civ. Pro. § 3320, as amended by L. 1909, ch. 65.

§ 226. **Removal or new bond.**—The court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office; may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition specified in the last section. But this section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (*Added by L. 1909, ch. 240, § 40.*)

Source.—Code Civ. Pro. § 715, in part, as amended by L. 1877, ch. 416, and L. 1896, ch. 94; new in Code. For remainder of section, see §§ 225, 227.

§ 227. **Notice to sureties upon accounting.**—A receiver who, having

executed and filed a bond as provided for in section two hundred and twenty-five or section two hundred and twenty-six of this chapter, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver. (*Added by L. 1909, ch. 240, § 40.*)

Source.—Code Civ. Pro. § 715, in part, as amended by L. 1877, ch. 416, and L. 1896, ch. 94; new in Code. For remainder of section, see §§ 225, 226.

ARTICLE XI.

POWERS, DUTIES AND LIABILITIES OF RECEIVERS OF CORPORATION.

- Section 230.** Application of this article.
- 231. Receiver trustee of property.
 - 232. Receiver's title to property.
 - 233. Transfer of assets of corporation to receiver.
 - 234. Security of receiver.
 - 235. Authority of single receiver.
 - 236. Authority where there is more than one receiver.
 - 237. Surviving receivers.
 - 238. Oath of receiver.
 - 239. General powers of receivers.
 - 240. Power of receiver to institute proceedings to recover assets.
 - 241. Power of receiver in the settlement of controversies.
 - 242. Power of receiver to employ counsel.
 - 243. Power of receiver to hold real property.
 - 244. Power of receiver to recover stock subscriptions.
 - 245. Duty of receiver to convert assets into money.
 - 246. Duty of receiver as to private sales.
 - 247. Duty of receiver to keep accounts.
 - 248. Duty of receiver to serve copy of report upon attorney-general and superintendent of banks.
 - 249. Duty of certain receivers to make reports.
 - 250. Duty of receivers to give notice to creditors.
 - 251. Delivery of property and payment of debts to receiver after notice.
 - 252. Penalty for concealing property from receiver.
 - 253. Duty of receiver to call creditors' meeting.
 - 254. Proceedings at creditors' meeting.
 - 255. Deduction of disbursements and commissions by receiver.
 - 256. Refunding consideration of subsisting contracts.
 - 257. Retention of funds for subsisting contracts and pending suits.
 - 258. Payment of debts not due.
 - 259. Allowance of set-offs.
 - 260. Penalties recovered by receiver.
 - 261. Order of payment by receiver.

§ 230.	Powers, duties and liabilities of receivers.	L. 1909, ch. 28.
262.	Failure to file claim before first dividend.	
263.	Second dividend by receiver.	
264.	Surplus to stockholders.	
265.	Disposition of moneys retained by receiver for suits.	
266.	Duty of receiver as to unclaimed dividend.	
267.	Effect of failure to file claim before second dividend.	
268.	Final accounting by receiver.	
269.	Notice of final accounting.	
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272.	Further accounting.	
273.	Removal of receiver.	
274.	Vacancy.	
275.	Renunciation by receiver.	
276.	Control of receiver by court.	
277.	Commissions and expenses of receiver in voluntary dissolution.	
278.	Commissions and expenses of receiver except in voluntary dissolution.	

§ 230. Application of this article.—Unless otherwise provided the provisions of this article shall apply only to permanent receivers appointed pursuant to section one hundred and six or section one hundred and ninety-one of this chapter.

Source.—New.

Consolidators' note.—This article relates to the powers, duties and liabilities of receivers of corporations and unless otherwise provided in specific sections it is made applicable to receivers appointed under art. 6 relating to actions for sequestration, actions for dissolution and actions to enforce the individual liability of officers and members of corporations and art. 9 relating to proceedings for the voluntary dissolution of a corporation. The article consists of the live matter in §§ 66–89 of the Revised Statutes (pt. 3, ch. 8, tit. 4, art. 3), the sections of the Revised Statutes relating to the powers, duties and obligations of trustees of insolvent debtors (pt. 2, ch. 5, tit. 1, art. 8) which were made applicable by reference in §§ 66 to 89 above referred to, provisions from the Code of Civil Procedure and finally provisions from independent statutes not found in the Revised Statutes or the Code of Civil Procedure relating to the subject of receivers. The provisions of the Revised Statutes were made applicable by L. 1880, ch. 245, § 1, subd. 3, p. 368. Section 42 of the Revised Statutes being made applicable to permanent receivers appointed in actions for sequestration, actions for dissolution, etc., under § 1788 of the Code of Civil Procedure and §§ 66 to 89, both inclusive, being made applicable to receivers appointed in proceedings for the voluntary dissolution of a corporation under § 2429 of the Code of Civil Procedure. The provisions of the Code of Civil Procedure relating to receivers and of independent statutes have been incorporated according to their context and judicial construction making them applicable. For convenience, the provisions relating to the powers, duties and liabilities of receivers of corporations have been placed in a separate article where by reference they have been made applicable to such actions and proceedings as they are now applicable to by law.

Section 230 is new. It makes the provisions of this article applicable to receivers appointed under § 106 or § 191 of this chapter. This merely carries out the present law. Section 107 of this chapter was formerly a part of § 1788 of the Code of Civil Procedure which provided that a permanent receiver should have all the powers, duties and liabilities imposed upon a receiver appointed in proceedings for the voluntary dissolution of a corporation.

Application of section.—The article by its terms does not apply to a receiver appointed pursuant to § 306, in action brought under § 90 against officers for misconduct; a receiver appointed under §§ 150, 151 to dissolve a moneyed corporation; a receiver appointed pursuant to § 306, in an action brought under § 131 to annul a corporation and vacate its charter; a receiver appointed pursuant to § 306, in an action to foreclose a corporate mortgage; a receiver appointed pursuant to § 306, in an action to preserve the assets; a receiver appointed pursuant to § 306, upon application of the regents, or a temporary receiver in any case. It applies to a permanent receiver in an action to sequester the property brought under § 100, in an action to dissolve a corporation brought by the attorney-general, a creditor or stockholder pursuant to §§ 101, 102, and in a proceeding for voluntary dissolution under § 170 ff. There seems to be some doubt as to whether the consolidators have not erred in failing to specifically apply the article to a receiver appointed pursuant to § 134 in an action by the people to vacate the charter or annul the existence of a corporation. That section provides that "the judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application."

A receiver not subject to this article is a common law receiver, and, except as subject to special statutes, has the powers and duties of receivers at common law, as declared by courts of equity.

Application.—The provisions of this article are intended to regulate the conduct of receiverships of our own corporations and not of the corporations of other states. *Strauss v. Casey Machine & Supply Co.* (1910), 68 Misc. 474, 124 N. Y. Supp. 32.

See *People v. German Bank* (1912), 136 N. Y. Supp. 311.

§ 231. Receiver trustee of property.—Permanent receivers shall be trustees of the property for the benefit of the creditors of the corporation and of its stockholders.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 67, in part.

Consolidators' note.—This section covers the same ground as the following provision in Revised Statutes which latter provision therefore has been omitted:

"All assignees and trustees, appointed under any authority, conferred by any of the provisions of the preceding articles of this title, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed, for the benefit of his creditors; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared, in respect to trustees."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 1.]

Receiver represents both creditors and stockholders.—*Attorney-General v. Guardian Mut. Life Ins. Co.* (1879), 77 N. Y. 272; *Talmage v. Pell* (1852), 7 N. Y. 328; *Van Cott v. Van Brunt* (1877), 2 Abb. N. C. 283, revd. on other grounds (1880), 82 N. Y. 535; *Attorney-General v. N. A. Life Ins. Co.* (1880), 82 N. Y. 172; *People ex rel. Attorney-General v. Security Life Ins. etc., Co.* (1879), 79 N. Y. 267; *McFarland v. Bain* (1881), 26 Hun 38.

The receiver of a voluntarily dissolved corporation is, by force of the statute, a trustee of the property of the corporation for the benefit of all its creditors; and the six years' statute of limitations does not run in his favor against claims not barred at the time of his appointment, so long as the trust is open and continuing, and has not been repudiated or denied. *Ludington v. Thompson* (1897), 153 N. Y. 499, 47 N. E. 903. See *Matter of Coleman* (1903), 174 N. Y. 373, 66 N. E. 983.

§ 232. **Receiver's title to property.**—Such receivers shall, from the time of their having filed the security required by law, be vested with all the property, real or personal vested or contingent, of the corporation. (*Amended by L. 1909, ch. 240, § 41, and L. 1913, ch. 766.*)

Source.—R. S., pt. 3, ch. 8, tit. 4, § 67, in part.

Consolidators' note.—This section relates to the same subject as the following provision of the Revised Statutes which is not applicable and therefore has been omitted:

"The trustees taking such oath, shall be deemed vested with all the estate, real and personal, of such debtor (except such as is exempted by the preceding articles), as follows:

1. In proceedings under the first article of this title, from the first publication of the notice to the non-resident, absconding or concealed debtor:
2. In proceedings under the second article, from the appointment of trustees:
3. In proceedings under the third, fifth, and sixth articles, from the execution of the assignment, in these articles directed:
4. In proceedings under the fourth article, when the assignment was voluntary, from the time of its execution; when executed by an officer as therein directed, from the time of the first publication of the notice in that article required to be given to creditors."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 6.]

Title of receiver.—See *Attorney-General v. Guardian Life Ins. Co.* (1879), 77 N. Y. 272; *Chapman v. Douglas* (1874), 5 Daly 244; *Stephens v. Meriden Britannia Co.* (1899), 160 N. Y. 178, 54 N. E. 781; *Reynolds v. Aetna Life Ins. Co.* (1899), 160 N. Y. 635, 55 N. E. 305; *Raymond v. Security Trust & Ins. Co.* (1904), 44 Misc. 31, 89 N. Y. Supp. 753, *affd.* (1905), 101 App. Div. 546, 91 N. Y. Supp. 1041.

When title vests.—Unless there are other liens, it probably relates back to the time of appointment, although some authorities seem to hold, generally, that title only vests as of the time of filing bond. *Matter of Lenox Corporation* (1901), 57 App. Div. 515, 68 N. Y. Supp. 103, *affd.* (1901), 167 N. Y. 623, 60 N. E. 1115; *Wells v. Higgins* (1892), 132 N. Y. 459, 30 N. E. 861; *Chamberlain v. Rochester S. P. V. Co.* (1876), 7 Hun 557; *Dickey v. Bates* (1895), 13 Misc. 489, 35 N. Y. Supp. 525; *Matter of Lewis & Fowler Mfg. Co.* (1896), 89 Hun 208, 34 N. Y. Supp. 983; *Matter of Muehlfeld v. Haynes Piano Co.* (1896), 12 App. Div. 492, 42 N. Y. Supp. 802.

Legal right of action against directors for negligence vests in a receiver upon his appointment. *Kelly v. Dolan* (1916), 233 Fed. 635, 638.

Title is subordinate to that of assignee previously appointed. *People v. U. S. Law Blank, etc., Co.* (1898), 24 Misc. 535, 53 N. Y. Supp. 852. And to holder of property previously disposed of by judicial decree. *Herring v. N. Y., L. E., etc., R. R. Co.* (1887), 105 N. Y. 340, 12 N. E. 763; *Dunlop v. Patterson Fire Ins. Co.* (1878), 12 Hun 627, *affd.* (1878), 74 N. Y. 145. And to the rights of domestic creditors who procure an attachment against a foreign corporation after the appointment of a receiver in the home jurisdiction but prior to the appointment of a receiver in this state. *National Park Bank v. Clark* (1904), 92 App. Div. 262, 87 N. Y. Supp. 185. See, *Courtright v. Vreeland* (1909), 64 Misc. 46 117 N. Y. Supp. 952.

Title is superior to judgment obtained subsequent to appointment. *Attorney-General v. Atlantic Mut. Life Ins. Co.* (1885), 100 N. Y. 279, 3 N. E. 193.

§ 233. **Transfer of assets of corporations to receiver.**—In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company on application by the attorney-general,

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all property, real and personal, and all securities of every kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

Source.—L. 1884, ch. 285, § 1.

Consolidators' note.—There is some difference between this section and the preceding section and it has therefore been preserved.

What are assets.—*Dean v. Biggs* (1881), 25 Hun 122, *affd.* (1883), 93 N. Y. 662; *Matter of Woven Tape Skirt Co.* (1877), 12 Hun 111; *Matter of Home Provident Safety Fund Assn.* (1891), 129 N. Y. 288, 29 N. E. 323; *Ashley v. Kinnan* (1888), 18 N. Y. St. Rep. 791, 2 N. Y. Supp. 574; *People v. Bank of Dansville* (1886), 39 Hun 187. Court may by order, protect assets. *Woerishoffer v. North River Construction Co.* (1885), 99 N. Y. 398, 2 N. E. 47. Discovery of assets, § 240, *post*.

§ 234. Security of receiver.—Before entering upon the duties of their appointment, such receivers shall give such security to the people of the state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 66, in part.

References.—See § 225, *ante*. Cost of bond, not exceeding one per centum upon amount may be included as necessary expense, upon allowance of court or judge. Code Civ. Pro. § 3320, as amended by L. 1909, ch. 65.

§ 235. Authority of single receiver.—When one receiver only, shall be appointed, all the provisions herein contained, in reference to several receivers shall apply to him.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 2.

§ 236. Authority where there is more than one receiver.—When there are more receivers than one appointed, the debts and property of the corporation may be collected and received by any one of them; and when there are more than two receivers appointed, every power and authority conferred on the receivers may be exercised by any two of them.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 3.

§ 237. Surviving receivers.—The survivor or survivors of any receivers shall have all the powers and rights given to receivers. All property in the hands of any receiver at the time of his death, removal or incapacity, shall be delivered to the remaining receiver or receivers, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 4.

§ 238. Oath of receiver.—Before proceeding to the discharge of any or their duties, all such receivers shall take and subscribe an oath, that they

will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer or court, that appointed them.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 5.

§ 239. General powers of receivers.—The said receivers shall have power:

1. To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due or to become due to such corporation, whether accruing or maturing before or after the dissolution thereof and whether vested or contingent at the time of such dissolution, in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such corporation before the appointment of the receiver of such corporation, or unless it shall have been duly contracted by such receiver subsequent to his appointment; notwithstanding the notice to creditors the receivers may sue for and recover any property or effects of the corporation and any debts due to it, at any time, before the day appointed for the delivery or payment thereof. (*Subd. 1, amended by L. 1913, ch. 766.*)

2. To take into their hands, all the property of such corporation, whether attached, or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same;

3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges, for attaching and keeping the same, to be allowed by the court having jurisdiction;

4. From time to time, to sell at public auction, all the property, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one;

5. To allow such credit on the sale of real property by them, as they shall deem reasonable, subject to the provisions of this article for not more than three-fourths of the purchase money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold;

6. On such sales, to execute the necessary conveyances and bills of sale;

7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments;

8. To settle all matters and accounts between such corporation and its

debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them;

9. Under the order of the court appointing them, to compound with any person indebted to such corporation and thereupon to discharge all demands against such person.

Source.—R. S., pt. 2, ch. 5, tit. 1, §§ 7, 10.

Consolidators' note.—This section comes from the chapter in the Revised Statutes relating to the powers, duties and liabilities of trustees of insolvent debtors (Revised Statutes, pt. 2, ch. 5, tit. 1, art. 8). It was made applicable to receivers appointed in proceedings for the voluntary dissolution of a corporation by the following provision in the Revised Statutes relating to the voluntary dissolution of a corporation.

"Such receivers shall have all the power and authority, conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made; pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 68.]

See *Matter of Coleman*, 174 N. Y. 383 (1903).

As to the application of R. S., pt. 2, ch. 5, see *Herring v. N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 382 (1887).

SUBD. 1. Some of the provisions relating to trustees of insolvent debtors, which were made applicable to receivers in proceedings for the voluntary dissolution of a corporation cannot be applied to such receivers. An illustration is found in the bracketed matter in this subdivision.

"The rights of the receiver become fixed at the time of his appointment; the rights of creditors of the bank represented by him then attach; and it would not be equitable to countenance any subsequent arrangement to give any one of them an undue preference over the others. Parties must stand or fall by the condition of things in existence at the time of the appointment of the receiver, unless special equities exist."

Matter of Van Allen (1861), 37 Barb. 225 [231].

The court of appeals citing above case says in a unanimous decision in *Van Dyck v. McQuade* (1881), 85 N. Y. 616 [617]:

"If, under the authority derived from the statute, the receiver in this case had the power to allow a set-off, that power did not extend to a case where no mutual debts subsisted at the date of the appointment of the receiver."

SUBD. 5. The words "not exceeding 18 months" have been bracketed out because a receiver is required to report within a year unless his time is extended. For the same reason the words "subject to the provisions of this article" have been inserted.

References.—Powers of temporary receivers. See §§ 104, 105, ante.

Management of property; powers and duties.—See *Clapp v. Clapp* (1888), 49 Hun 195, 1 N. Y. Supp. 919, *affd.* on rearg. (1889), 4 Silv. 379, 7 N. Y. Supp. 495, *affd.* (1890), 125 N. Y. 693, 26 N. E. 751; *Hackley v. Draper* (1875), 60 N. Y. 88; *People v. Security Life Ins. Co.* (1879), 79 N. Y. 267; *Syracuse Savings Bank v. S. C. & N. Y. R. R. Co.* (1882), 88 N. Y. 110; *Attorney-General v. N. A. Life Ins. Co.* (1882), 89 N. Y. 94; *People v. Com. Life Ins. Co.* (1896), 148 N. Y. 563, 42 N. E. 1044; *Gillig v. Treadwell* (1897), 151 N. Y. 552, 45 N. E. 1035.

Incurring debts.—For preservation. *Rogers v. Wendell* (1889), 54 Hun 540, 7 N. Y. Supp. 781, 8 N. Y. Supp. 515; *Raht v. Attrill* (1887), 106 N. Y. 423, 13 N. E. 282. In operating. *Vilas v. Page* (1887), 106 N. Y. 439, 13 N. E. 743; *Wesson v. Chapman* (1894), 77 Hun 144, 28 N. Y. Supp. 431; *Met. Trust Co. v. Tonawanda Valley, etc.*, R. R. Co. (1886), 103 N. Y. 245, 8 N. E. 488.

Receivers' certificates.—Courts of equity have power to authorize the issuance of receivers' certificates only for the expenses of preserving, maintaining and operating the railroad. *Knickerbocker Trust Co. v. Oneonta, etc., R. Co.* (1911), 201 N. Y. 379, 94 N. E. 871. Courts have power to authorize issuance of certificates of indebtedness by receiver of private corporation but not to make them prior liens. *Matter of Westchester County Brewery* (1911), 73 Misc. 352, 131 N. Y. Supp. 16.

Disaffirmance of fraudulent acts.—See *Personal Property Law*, § 19.

Payment of wages.—Preferred claims of employees. See *Labor Law*, § 9, and notes.

Deposits of money.—See § 313, post. Failure of bank. *Brett v. Brett* (1886), 4 N. Y. St. Rep. 704. Funds must be kept distinct. *Matter of Commonwealth Fire Ins. Co.* (1884), 32 Hun 78.

Must not purchase for self.—*Sheldon v. Saens* (1880), 59 How. Pr. 377.

Agreement of receiver may be adopted by court. *People v. National Mut. Ins. Co.* (1897), 19 App. Div. 247, 46 N. Y. Supp. 102.

Liability of receiver for payment of taxes.—Summary order for payment. *Central Trust Co. v. N. Y. City, etc., R. R. Co.* (1888), 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260; *Matter of Atlas Iron Construction Co.* (1897), 19 App. Div. 415, 46 N. Y. Supp. 467.

Personal liability to employees.—See *Ryan v. Rand* (1887), 20 Abb. N. C. 313; *Rogers v. Wendell* (1889), 54 Hun 540, 7 N. Y. Supp. 781, 8 N. Y. Supp. 515.

Liability for negligence is same as corporation's. *Graham v. Chapman* (1890), 33 N. Y. St. Rep. 349, 11 N. Y. Supp. 318; *Cardot v. Barney* (1875), 63 N. Y. 281.

Judgment against corporation.—Receiver is not liable, if obtained after its dissolution in a proceeding to which he was not a party. *People v. Knickerbocker Life Ins. Co.* (1887), 106 N. Y. 619, 13 N. E. 447.

Action against corporation during receivership, when maintainable. See *Pringle v. Woolworth* (1882), 90 N. Y. 502; *Decker v. Gardner* (1891), 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; *Farmers' Loan & Trust Co. v. Hoffman House* (1894), 7 Misc. 358, 27 N. Y. Supp. 634. Query? Do not above cases apply only to temporary receivers?

Actions by receivers do not abate. *Code Civ. Pro.* § 766. Preferred causes. *Id.* § 791, subd. 5. Actions are maintainable by receivers as follows: Against officers for misconduct in office, *Mason v. Henry* (1897), 152 N. Y. 529, 46 N. E. 837; to set aside collusive judgment, *Whittlesey v. Delaney* (1878), 73 N. Y. 571; to recover unpaid subscriptions, *Phoenix Warehousing Co. v. Badger* (1876), 67 N. Y. 294; to determine validity of corporate bonds, *Hubbell v. Syracuse Iron Works* (1886), 42 Hun 182; to compel restoration of funds of insurance corporation improperly paid under order of court, *Mills v. Ross* (1899), 39 App. Div. 563, 57 N. Y. Supp. 680, *affd.* (1901), 168 N. Y. 763, 61 N. E. 1131; to set aside illegal transfers, *Attorney-General v. Guardian Life Ins. Co.* (1879), 77 N. Y. 272; *Talmage v. Pell* (1852), 7 N. Y. 328; to recover unlawful dividends, *Osgood v. Laytin* (1867), 3 Keyes 521. Receiver may offset claims. *Holbrook v. Receivers of Am. Fire Ins. Co.* (1836), 6 Paige 220; *Osgood v. DeGroot* (1867), 36 N. Y. 348; *Matter of Van Allen* (1861), 37 Barb. 225. May be entitled to expenses although unsuccessful. *Matter of Merry* (1896), 11 App. Div. 597, 42 N. Y. Supp. 617. See also *Pittsburg Carbon Co. v. McMillan* (1890), 119 N. Y. 46, *affd.* (1901), 168 N. Y. 673; *Matter of Wendler Machine Co.* (896), 2 App. Div. 16, 37 N. Y. Supp. 444; *Moore v. Potter* (1895), 87 Hun 334, 34 N. Y. Supp. 212, *revd.* (1898), 155 N. Y. 481, 50 N. E. 271.

Receiver may sue directors for negligence. *Kelly v. Dolan* (1916), 233 Fed. 635, 638.

Actions to enforce liability of stockholders.—See *Farnsworth v. Wood* (1883), 91 N. Y. 306; *Billings v. Robinson* (1882), 28 Hun 122, *affd.* (1884), 94 N. Y. 415;

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Billings v. Trask (1883), 30 Hun 314. Receiver cannot question transfer made before his appointment. *Prentice v. Nichols* (1885), 100 N. Y. 227, 3 N. E. 81.

Actions against receivers.—Limitation of certain. See Code Civ. Pro. § 383. Preferred causes. *Id.* 791, subd. 5. Leave of court to sue receiver is essential. *James v. James Cement Co.* (1887), 8 N. Y. St. Rep. 490; *Foster v. Townshend* (1877), 68 N. Y. 203; *Merritt v. Lyon* (1836), 16 Wend. 405; *Smith v. Woodruff* (1858), 6 Abb. Pr. 65; *Taylor v. Baldwin* (1862), 14 Abb. Pr. 166; *De Groot v. Joy* (1859), 30 Barb. 483. Omission to obtain leave is not jurisdictional. *Hirshfeld v. Kallscher* (1894), 81 Hun 606, 30 N. Y. Supp. 1027; *James v. James Cement Co.*, *supra*; *Hackley v. Draper* (1874), 4 T. & C. 614, *affd.* (1875), 60 N. Y. 88. Where motion for leave should be made. *Matter of Commercial Bank* (1898), 35 App. Div. 224, 54 N. Y. Supp. 722. May be made at any stage of proceeding. *Hubbell v. Dana* (1853), 9 How. Pr. 424. Complaint in action against receiver not demurrable because failing to allege leave of court to bring same. *Di Chiara v. Sutherland* (1909), 62 Misc. 555, 115 N. Y. Supp. 622.

Foreign receivers.—Rights in this state. See *Howarth v. Angle* (1899), 39 App. Div. 151, 57 N. Y. Supp. 187, *affd.* (1900), 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; *Goodrich v. Sanderson* (1898), 35 App. Div. 546, 55 N. Y. Supp. 881; *Farmers' Loan & Trust Co. v. Aberle* (1897), 19 App. Div. 79, 46 N. Y. Supp. 10; *Dyer v. Powers* (1891), 39 N. Y. St. Rep. 136, 14 N. Y. Supp. 873; *Peters v. Foster* (1890), 56 Hun 607, 10 N. Y. Supp. 389; *Stone v. Penn Yan, etc., Railway* (1910), 197 N. Y. 279, 90 N. E. 843.

Separate receivers.—A receiver was appointed in corporate dissolution proceedings and another in foreclosure proceedings against the corporation. Held, in the absence of special equities, the claims of each receiver should be paid out of the property in his hands although the same person be receiver in both proceedings. *Knickerbocker Trust Co. v. Tarrytown, etc., R. Co.* (1909), 133 App. Div. 285, 117 N. Y. Supp. 871.

§ 240. Power of receiver to institute proceedings to recover assets.—Whenever any receiver of a domestic corporation, or of the property within this state of any foreign corporation, shall have been appointed and qualified, as provided in articles five, six, seven, nine, eleven or twelve of this chapter either before, upon, or after final judgment or order in the action or special proceeding in which such appointment was made, and shall, by his own verified petition, affidavit or other competent proof, show to the supreme court, at a special term thereof, held within the judicial district wherein such appointment was made, that he has good reason to believe that any officer, stockholder, agent or employee of such corporation, or any other person whomsoever, has embezzled or concealed, or withholds or has in his possession or under his control, or has wrongfully disposed of, any property of such corporation which of right ought to be surrendered to the receiver thereof; or that any person can testify concerning the embezzlement, concealment, withholding, possession, control or wrongful disposition of any such property, the court shall make an order, with or without notice, commanding such person or persons to appear at a time and place to be designated in the order, before the court or before a referee named by the court for that purpose, and to submit to an examination concerning such embezzlement, concealment, withholding, possession, control or wrongful disposition of such property; and at the time of making such order or at any

time thereafter, the court may, in its discretion, enjoin and restrain the person or persons so ordered to appear and be examined from in any manner disposing of any property of such corporation which may be in the possession or under the control of the person so ordered to be examined, until the further order of the court in relation thereto. No person so ordered to appear and be examined shall be excused from answering any question on the ground that his answer might tend to convict him of a criminal offense; but his testimony taken upon such examination shall not be used against him in any criminal action or proceeding.

Any person so ordered to appear and be examined shall be entitled to the same fees and mileage, to be paid at the time of serving the order, as are allowed by law to witnesses subpoenaed to attend and testify in an action in the supreme court, and shall be subject to the same penalties upon failure to appear and testify in obedience to such an order as are provided by law in the case of witnesses who fail to obey a subpoena to appear and testify in an action.

Any person appearing for examination in obedience to such order shall be sworn by the court or referee to tell the truth, and shall be entitled to be represented on such examination by counsel, and may be cross-examined, or may make any voluntary statement in his own behalf concerning the subject of his examination which may seem to him desirable or pertinent thereto.

The court before which such examination is taken, as well as the referee, if one be appointed for that purpose, shall have power to adjourn such examination from time to time, and may rule upon any question or objection arising in the course of such examination, to the same extent that might be done if the person so examined were testifying as a witness in the trial of an action.

When the examination of any person under such order shall be concluded, the testimony shall be signed and sworn to by the person so examined, and shall be filed in the office of the clerk of the county where the action is pending, or was tried, in which the receiver was appointed; and if from such testimony it shall appear to the satisfaction of the court that any person so examined is wrongfully concealing or withholding, or has in his possession or under his control, any property which of right belongs to such receiver, the court may make an order commanding the person so examined forthwith to deliver the same to such receiver, who shall hold the same subject to the further order of the court in relation thereto; and otherwise, the court may, at the conclusion of any such examination, make such final order in the premises as the interests of justice require.

Source.—L. 1898, ch. 534, §§ 1-5.

Consolidators' note.—The statute inserted here is entitled "An act to facilitate the collection and recovery of the assets of corporations for which receivers have been appointed." It applies to receivers appointed in proceedings for the voluntary dissolution of a corporation and to actions to dissolve corporations. Appropriate changes in references have been made to carry out the intent of the statute. The

statute is a complete scheme for the recovery of assets by receivers and supersedes the following provisions of the Revised Statutes which for that reason have been omitted:

"And all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 72.]

"Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the first section of the seventh article of this title, or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant commanding any sheriff or constable, to cause such debtor, his wife, or other person, to be brought before him at such time and place as he shall appoint, for the purpose of being examined.

"The officer issuing such warrant, shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the officer.

"If any person so brought before such officer, shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant, the particular default of the person committed shall be specified; and if it be, in not answering any question, such question shall also be specified therein.

"If any person so committed, shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall re-commit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him.

"Any sheriff or jailer wilfully suffering any person so committed or re-committed, pursuant to the foregoing sections, to escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict; shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.

"The person so examined, and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this article for concealing and not delivering any property, or paying any debt; but his answers, on such examination, may be given in evidence in the same manner, and with the like effect, as if they had been made in answer to a bill in equity filed by such trustees."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 12-17.]

Reference.—See also § 239, subd. 8.

Application.—The provisions of this section do not apply to a receiver appointed

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under the general equity power of the court in a stockholder's action against a foreign corporation and some of its officers to set aside fraudulent transfers and to prevent further transfers. Where the receiver was only appointed to prevent waste and not of the corporation itself. *Matter of Howell v. German Theatre* (1909), 64 Misc. 110, 117 N. Y. Supp. 1124.

§ 241. Power of receiver in the settlement of controversies.—If any controversy shall arise between the receivers and any other person, in the settlement of any demands against such corporation, or of debts due to such corporation the same may be referred to one or more indifferent persons, who may be agreed upon by the receivers and the party, with whom such controversy shall exist, by a writing to that effect, signed by them.

If such referee or referees be not selected by agreement, then the receivers or the other party to the controversy, provided no action at law is pending arising out of any such debts or demands, may serve a notice of their intention to apply to any judge of the supreme court at chambers, residing in the same district with said receivers, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified.

On the day so specified, upon due proof of the service of such notice, the judge before whom the application is made may, in his discretion, proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the supreme court.

When any witness to such controversy shall reside out of the county where the said receivers resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace.

The officer before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the receivers in the office of a clerk of the supreme court, and an order shall thereupon be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.

Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in personal actions pending therein.

The report of the referees shall be filed in the same office where the order for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

Source.—R. S., pt. 2, ch. 5, tit. 1, §§ 19-25. Sections 19, 22, as amended by L. 1862, ch. 373, §§ 1, 4. Sections 20, 21, as amended by L. 1907, ch. 476.

Consolidators' note.—This section was made applicable by the following provision of the Revised Statutes which latter provision therefore has been omitted.

"Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation (by a reference), as is given by law to trustees of insolvent debtors; and the same proceedings for that purpose shall be had, and with the like effect; and application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner, and the referees shall proceed in like manner, and file their report with the like effect in all respects."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 73.]

Authority of court to direct receiver to appear in pending litigation.—Upon the appointment of a permanent receiver in voluntary dissolution proceedings under the General Corporation Law, the court by virtue of sections 241 and 257 of said statute, made applicable by section 291 thereof, has implied power to authorize or direct its receiver to appear in litigation pending in this or another state against the corporation. *Matter of People's Surety Co.* (1913), 82 Misc. 518, 144 N. Y. Supp. 131.

See *People v. American Steam Boiler Ins. Co.* (1895), 14 Misc. 162, 35 N. Y. Supp. 355, *affd.* (1896), 3 App. Div. 604, 38 N. Y. Supp. 402.

§ 242. Power of receiver to employ counsel.—If the receiver of a corporation employs counsel he shall within three months after he has qualified as receiver enter into a written contract fixing the compensation of such counsel at not exceeding a certain amount or a certain percentage of the sums received and disbursed by him, which contract must be approved by the supreme court, on at least eight days' notice to the attorney-general. A payment by such receiver to his counsel on account of services shall only be made, pursuant to an order of the court, on notice to the attorney-general and subject to review on the final accounting. A contract with counsel shall not be made for a longer period than eighteen months, but may be renewed from time to time for periods of not more than one year, if approved by the supreme court on at least eight days' notice to the attorney-general. In case of the intervention of any policy-holder or depositor, by permission of the court, such policy-holder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policy-holder or depositor. It shall be unlawful for receivers of an insurance, banking or railroad corporation, or trust company to pay to any attorney or counsel any costs, fees or allowances until the amounts thereof shall have been stated to the special term as provided in section two hundred and forty-nine of this chapter, as expenses incurred, and shall have been approved by that court, by an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby.

Source.—L. 1883, ch. 378, § 2-a, as added by L. 1906, ch. 349; L. 1883, ch. 378, § 5 and § 4, in part, as amended by L. 1896, ch. 139.

Object of section.—Two things were sought by the above section:—(1) To limit the payments on account for legal services during the progress of the receivership to such as are approved in writing by the attorney-general; (2) to prohibit the allowance of compensation to an attorney, "unless an agreement for his com-

pensation has been made in writing upon the approval of the attorney-general." This section cannot be construed as compelling the attorney-general to approve a contract for the employment of counsel in which the compensation is prescribed, without in any way fixing or limiting the amount thereof. *Matter of Candee v. Cunneen* (1904), 92 App. Div. 71, 86 N. Y. Supp. 723. Decision before amendment of 1904.

Employment of attorney by receiver.—*Smith v. N. Y. Cent. Stage Co.* (1865), 28 How. Pr. 208; *Bennett v. Chapin* (1850), 3 Sandf. 673; *Ryckman v. Parkens* (1836), 5 Paige 543; *Warren v. Sprague* (1834), 4 Edw. 416, *affd.* (1844), 11 Paige 200; *Hynes v. McDermott* (1886), 14 Daly 104; *Clapp v. Clapp* (1888), 49 Hun 195, 1 N. Y. Supp. 919, *affd. on rearg.* (1889), 4 Silv. 379, 7 N. Y. Supp. 495, *affd.* (1890), 125 N. Y. 693, 26 N. E. 751; *First Nat. Bank v. Navarro* (1892), 43 N. Y. St. Rep. 813, 17 N. Y. Supp. 900.

Employment of a deputy attorney-general who resigned to accept retainer as attorney for receiver of a banking corporation not approved by court. *People v. Brooklyn Bank* (1908), 125 App. Div. 354, 109 N. Y. Supp. 534.

§ 243. Power of receiver to hold real property.—A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

Source.—Code Civ. Pro. § 716, in part, as amended by L. 1895, ch. 946. For remainder of section, see Code Civ. Pro. § 716, as amended by L. 1909, ch. 65.

Consolidators' note.—This section is general in its application and therefore has been inserted in this article. It will be preserved also in the Code of Civil Procedure as it applies to other subjects than corporations.

§ 244. Power of receiver to recover stock subscriptions.—If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed to recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may commence and prosecute any action or proceeding for the recovery of such sum, without the consent of any creditors of such corporation.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 69.

References.—See note to § 239.

§ 245. Duty of receiver to convert assets into money.—The receivers shall, as speedily as possible, convert the property, real and personal, of the corporation into money.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 26, in part.

§ 246. Duty of receiver as to private sales.—A receiver duly appointed in this state by and pursuant to a judgment in action, or by and pursuant to an order in a special proceeding, may, upon application to the court by which such judgment was rendered, or such order was made, and upon notice to such parties as may be entitled to notice of applications made in such action or special proceeding, be authorized by the said court to sell or convey the property, whether real or personal, of the corporation of

which he is the receiver, at private sale, upon such terms and conditions as the court may direct.

Source.—L. 1898, ch. 522, § 1.

Consolidators' note.—This section is general in its application and therefore has been inserted. It will also be taken care of in the Code of Civil Procedure as it relates to other subjects than corporations.

Editors' note.—The amendment to the Code of Civil Procedure, L. 1909, ch. 65, proposed by the consolidators, did not amend the Code on this subject.

§ 247. Duty of receiver to keep accounts.—They shall keep a regular account of all moneys received by them as receivers; to which, every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 26, in part.

§ 248. Duty of receiver to serve copy of report upon attorney-general and superintendent of banks.—All receivers of insolvent corporations who are required by law to make and file reports of their proceedings shall at the time of making and filing such reports, serve a copy thereof upon the attorney-general of this state, and receivers of such corporations as report to, and are under supervision of, the banking department shall on the first day of January and July of each year, during the continuance of their respective trusts, file with the superintendent of banks a report, verified by oath, in such form as the superintendent may prescribe, showing the condition of their respective trusts. In case any receiver of an insolvent corporation shall neglect to make and file a report of his proceedings for thirty days after the time he is required by law to make and file such report, or shall neglect for the same length of time to serve a copy thereof on the attorney-general, as required by this section, the attorney-general may make a motion in the supreme court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.

Source.—L. 1880, ch. 537, § 1, as amended by L. 1881, ch. 639. Last sentence L. 1880, ch. 537, § 2.

Consolidators' note.—Sections 3 and 4 of Laws 1880, ch. 537, have been repealed because covered by §§ 7 and 8 of L. 1883, ch. 378, which latter sections have been consolidated in the text as §§ 253 and 254. See *People v. Seneca Lake Grape and Wine Co.* (1889), 52 Hun 175, 5 N. Y. Supp. 136; *Whitney v. N. Y. & Atlantic R. R. Co.* (1884), 32 Hun 165, 66 How. Pr. 436; *Nealis v. American Tube & Iron Co.* (1894), 76 Hun 220, 27 N. Y. Supp. 733; *Matter of Stonebridge* (1890), 57 Hun 441, 10 N. Y. Supp. 727; *People v. American Steam Boiler Ins. Co.* (1896), 3 App. Div. 504, 38 N. Y. Supp. 406.

§ 249. Duty to certain receivers to make reports.—It shall be the duty of every receiver of an insurance, banking or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action, or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months,

and to file a copy of the same, if a receiver of a bank or trust company, with the superintendent of banks; if a receiver of an insurance company, with the superintendent of insurance; and in each case with the attorney-general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months. Of the intention to present such account, as aforesaid, the attorney-general, and also the surety or sureties on the official bond of such receiver, shall be given eight days' notice in writing; and the attorney-general shall examine the books and accounts of such receiver at least once every twelve months.

Source.—L. 1883, ch. 378, § 4, in part, as amended by L. 1885, ch. 40, and L. 1896, ch. 139.

Application of section.—Section does not require court to pass on correctness of accounts. This must be determined under former practice. *People v. Knickerbocker Life Ins. Co.* (1884), 18 Wk. Dig. 492.

§ 250. Duty of receivers to give notice to creditors.—The receivers immediately upon their appointment, shall give notice thereof which shall be published for three weeks in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated; and therein shall require,

1. All persons indebted to such corporation, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such receivers and to pay the same.

2. All persons having in their possession any property or effects of such corporation to deliver the same to the said receivers by the day so appointed.

3. All the creditors of such corporation to deliver their respective accounts and demands to the receivers or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

4. All persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers, at the time and place in such notice specified.

Source.—Paragraphs 1-3, R. S., pt. 2, ch. 5, tit. 1, § 8. Par. 4, R. S., pt. 3, ch. 3, tit. 4, § 70.

Consolidators' note.—The following provision of the Revised Statutes relating to powers, duties and liabilities of trustees of insolvent debtors are inapplicable and therefore have been omitted:

"In the case of an insolvent or imprisoned debtor, such notice shall be published for at least three weeks in a newspaper printed in the county where application was made; and in the case of non-resident, absconding or concealed debtors, it shall be published, for the same time, in the newspapers in which the notice of an attachment having issued is directed to be printed."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 9.]

Held, that the provisions of 2 Revised Statutes, 469, §§ 70 and 72, to the effect that receivers immediately after their appointment shall give a certain notice, do not apply to a temporary receiver. *Nealis v. American Tube & Iron Co.* (1894), 76 Hun 220, 27 N. Y. Supp. 732.

§ 251. **Delivery of property and payment of debts to receiver after notice.**—After the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 72, in part.

§ 252. **Penalty for concealing property from receiver.**—Every person indebted to such corporation, or having the possession or custody of any property or thing in action, belonging to it, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the receivers, or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt or double the value of such property so concealed; which penalties may be recovered by the receivers.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 11.

Consolidators' note.—This provision was contained in ch. 5 of the Revised Statutes (pt. 2, tit. 1, art. 8) and is made applicable by § 72 of ch. 8 of the Revised Statutes (pt. 3, tit. 4, art. 3).

§ 253. **Duty of receiver to call creditors' meeting.**—They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 74, in part; R. S., pt. 2, ch. 5, tit. 1, § 27.

Consolidators' note.—The provisions made applicable by the following section of the Revised Statutes have been incorporated in this article, and the following provision therefore has been repealed: "The receiver shall be subject to all the duties and obligations by law imposed on trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall be herein made."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 74.]

§ 254. **Proceedings at creditors' meeting.**—At such meeting, or other adjourned meeting thereafter, all accounts and demands for and against such corporation, and all its open and subsisting contracts, shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 28, in part; R. S., pt. 3, ch. 8, tit. 4, § 74, in part.

§ 255. **Deduction of disbursements and commissions by receiver.** Out of the moneys in their hands the receivers may first deduct all the necessary

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disbursements made by them in the discharge of their duty and such commissions as may be allowed by law.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 29.

Consolidators' note.—The commissions of receivers of corporations are no longer regulated by this section of the Revised Statutes, but by §§ 280 and 281 of this chapter. Hence the omission of the bracketed matter in § 255 and the insertion of the words, "and such commissions as may be allowed by law." Section 3320 of the Code of Civil Procedure has not been inserted in this article for the reason that it provides for the expenses and commissions of receivers not otherwise provided for.

§ 256. Refunding consideration of subsisting contracts.—If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurance or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 75.

See generally, *Martyne v. American Union Fire Ins. Co.* (1915), 168 App. Div. 380, 153 N. Y. Supp. 433, *affd.* (1916), 216 N. Y. 183, 110 N. E. 502.

§ 257. Retention of funds for subsisting contracts and pending suits.—The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of canceling and discharging any open or subsisting engagements. If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.

Source.—R. S., pt. 3, ch. 8, tit. 4, §§ 77, 78.

Consolidators' note.—The following provision of the Revised Statutes is covered by this section and the former therefore has been repealed: "If, at the time any dividend is made, any prosecution be pending against the trustees, in which a demand against such debtor may be established, the trustees may retain in their hands, the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding, to be applied according to the event of such proceeding or suit, or to be distributed in a second or other dividend."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 33.]

The following section of the Revised Statutes on this subject is inapplicable and is therefore omitted:

"Whenever any bond shall have been executed by an attaching creditor for the purpose in the last section specified, the trustees shall retain a sufficient sum from

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the monies in their hands to indemnify such creditor, until a final determination he had, respecting his liability."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 31.]

§ 258. **Payment of debts not due.**—Every person to whom a corporation shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed for the time unexpired of such credit.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 35.

§ 259. **Allowance of set-offs.**—Where mutual credit has been given by any corporation, and any other person, or mutual debts have subsisted between such corporation and any other person, the receivers may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be allowed of any claim or debt, which would not have been entitled to a dividend, as hereinbefore directed.

No set-off shall be allowed by such receivers, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, in a suit brought by such receivers.

Source.—R. S., pt. 2, ch. 5, tit. 1, §§ 36, 37.

§ 260. **Penalties recovered by receiver.**—All penalties which shall be recovered by any receivers, pursuant to the provisions of this article, shall be deemed a part of the property of the corporation, and shall be distributed as such among its creditors.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 39.

§ 261. **Order of payment by receiver.**—The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows:

1. All debts due by such corporation of the United States, and all debts entitled to a preference under the laws of the United States.
2. All debts that may be owing by the corporation as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.
3. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.
4. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.

Source.—First clause to colon (:), R. S., pt. 3, ch. 8, tit. 4, § 79, pt.; subd. 1, "all debts due by such corporation to the United States and," R. S., pt. 2, ch. 5, tit. 1, § 32; subd. 1, "all debts entitled to a preference under the laws of the

United States," R. S., pt. 3, ch. 8, tit. 4, § 79, pt.; subd. 2, R. S., pt. 2, ch. 5, tit. 1, § 34; subds. 3 and 4, R. S., pt. 3, ch. 8 tit. 4, § 79 pt.]

Consolidators' note.—The following provisions of the Revised Statutes relating to the duties of trustees of insolvent debtors have been omitted as inapplicable:

"They shall distribute the residue of the monies in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows:

"1. In the case of proceedings under the first article of the title, among those who were creditors at the time of issuing the first warrant of attachment:

"2. In proceedings under the third and fifth articles of this title, among those who were creditors at the time of the execution of the assignment by the insolvent:

"3. In proceedings under the fourth article, when an assignment was executed by any officer as therein directed among those who were creditors at the time of the first publication of notice to creditors to appear and determine whether they will unite in a petition; and when the assignment was voluntary among those who were creditors at the time of the execution thereof:

"4. In proceedings under the sixth article, among those creditors, at whose suit the debtor was imprisoned on execution at the time of his discharge."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 33.]

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel for the benefit of all the creditors, and his costs for defending any such suit."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 30.]

Claims.—Statutory method of ascertaining, not exclusive. *Ludington v. Thompson* (1897), 153 N. Y. 499, 47 N. E. 903. Receiver may compromise without order of court; the order is simply a protection. *Higgins v. Herrmann* (1897), 23 App. Div. 420, 48 N. Y. Supp. 244. And where paid pursuant to order, receiver is protected, although court determines subsequently that parties were not entitled to payment. *Willis v. Sharp* (1891), 124 N. Y. 406, 26 N. E. 974; *People v. E. Remington & Sons* (1891), 60 Hun 42, 14 N. Y. Supp. 441. Expense of application of creditor to compel payment is a first charge. *Matter of New Paltz & Wallkill R. R. Co.* (1899), 27 Misc. 451, 59 N. Y. Supp. 247, *affd.* (1899), 42 App. Div. 622, 59 N. Y. Supp. 1111. Receiver is not authorized to admit invalid claim as against other creditors. *Ins. Co. of Penn. v. Telfair* (1899), 45 App. Div. 564, 61 N. Y. Supp. 322. Remedy of creditor where receiver has been discharged. *N. Y. & West. Union Tel. Co. v. Jewett* (1889), 115 N. Y. 116, 21 N. E. 1036. Interest allowable on dividend unsuccessfully contested by receiver. *People v. E. Remington & Sons* (1891), 59 Hun 307, 12 N. Y. Supp. 824, *affd.* (1891), 126 N. Y. 679, 28 N. E. 249. Failure to present claim in time does not bar creditor of his pro rata share of undistributed assets. *Same v. Same* (1891), 59 Hun 282, 14 N. Y. Supp. 947, *affd.* (1891), 126 N. Y. 654, 27 N. E. 853. But otherwise, if assets have been distributed. *Sullivan v. Miller* (1887), 106 N. Y. 635, 13 N. E. 772. Court may order distribution at any time. *Woodruff v. Erie Ry. Co.* (1883), 93 N. Y. 609, *revg.* (1881), 25 Hun 246. Receiver cannot deduct personal debt. *McGarry v. Smith* (1879), 2 Law Bull 7.

Contingent claims cannot share in the distribution. Claims must be valued and determined and their status fixed as of the date of the commencement of the action for corporate dissolution. *People v. Metropolitan Surety Co.* (1912), 205 N. Y. 135, 98 N. E. 412; *People v. Metropolitan Surety Co.* (1913), 158 App. Div. 65, 144 N. Y. Supp. 235.

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Classification of claims.—See *Attorney-General v. Guardian, etc., Ins. Co.* (1889), 5 N. Y. Supp. 84.

Interest on claims.—See *People v. Merchants' Trust Co.* (1907), 187 N. Y. 293, 79 N. E. 1004.

§ 262. **Failure to file claim before first dividend.**—Every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before the second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 81, part.

Consolidators' note.—The following provision of the Revised Statutes has been omitted as superseded by this section:

"Any creditor who shall have neglected to deliver to the trustees an account of his demand, before the first, second, third, or other dividend, and who shall deliver his account to them before the second, or other subsequent dividend, shall receive the sum he would have been entitled to, on any former dividend, before any distribution be made to other creditors."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 41.]

§ 263. **Second dividend by receiver.**—If the whole of the property of such corporation be not distributed on the first dividend, the receivers shall, within one year thereafter, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week in a newspaper printed in the county where the principal place of business of such corporation was situated.

Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the money which may be retained to pay such creditors as herein provided.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 80 and 81, in part.

Consolidators' note.—The following provision of the Revised Statutes has been omitted as superseded by this section.

"If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall, within one year thereafter, make a second dividend of all the monies belonging to the estate of the debtor, then in their hands, among the creditors entitled thereto, as herein before specified; and in the same manner from year to year, so long as any monies belonging to the estate of such debtor shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 40.]

See *People v. German Bank* (1912), 186 N. Y. Supp. 311.

§ 264. **Surplus to stockholders.**—If after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock.

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Source.—R. S., pt. 3, ch. 8, tit. 4, § 83.

Consolidators' note.—The following provision of the Revised Statutes has been omitted as superseded by this section:

"If after settling the estate of any debtor, and after discharging his debts, entitled to a dividend, any surplus shall remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 43.]

The following provision has been omitted as inapplicable:

"Every debtor who shall be discharged under the third, fourth or fifth articles of this title, shall be allowed the sum of five per cent. on the net produce of all his estate, that shall be received by the assignee, to be paid by him to them, in case such net produce, after such allowance made, shall be sufficient to pay the creditors of such debtor, entitled to a dividend, the sum of seventy cents on the dollar, on the amount of their debts respectively, as the same shall have been ascertained; but the said allowance shall not exceed in the whole, the sum of five hundred dollars."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 44.]

Surplus assets.—Stockholders have quasi lien upon their distributive share of assets and are entitled to have a sale of assets for cash or its equivalent, and they cannot be compelled to exchange such lien for a lien upon other securities. *People v. Anglo-American, etc., Assn.* (1901), 60 App. Div. 389, 69 N. Y. Supp. 1054; *Smith v. Westchester, etc., Co.* (1912), 78 Misc. 75, 137 N. Y. Supp. 690, *affd.* (1898), 156 App. Div. 920, 141 N. Y. Supp. 1147.

§ 265. Disposition of moneys retained by receiver for suits.—When any suit pending at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 84.

§ 266. Duty of receiver as to unclaimed dividend.—If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the same was declared, the receivers shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors.

Source.—R. S., pt. 2, ch. 5, tit. 1, § 42.

See *People v. German Bank* (1912), 136 N. Y. Supp. 311.

§ 267. Effect of failure to file claim before second dividend.—After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 82.

§ 268. Final accounting by receiver.—A receiver shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Source.—Code Civ. Pro. § 2431-b, as added by L. 1906, ch. 293.

Consolidators' note.—This section supersedes the provisions of the Revised Statutes given below since it provides that the "receiver is not required or authorized to file any account except as herein provided except by special order of the court."

"Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the court of chancery, on oath, which shall be referred to a master to examine and report thereon."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 86.]

"Within ten days after any dividend made by any trustees, they shall render on oath, and file with the clerk of the court of common pleas of the county in which they reside, or with the clerk of the supreme court, an account in writing of all their proceedings in the premises stating:

1. Their disbursements, commissions and the dividends made by them;
2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them;
3. The property, monies and effects of the debtor remaining in their hands, and the value and situation of such property:

And such trustees may at any time be compelled by a rule of the supreme court, or of the court of common pleas of the county in which they reside, to render such account on oath, on the application of the debtor, or of any creditor."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 45.]

Accounting.—Temporary receiver need not account to himself as permanent receiver of same property. *Matter of Simonds Mfg. Co.* (1899), 39 App. Div. 576, 57 N. Y. Supp. 776. Creditors may appear on accounting. *Greason v. Goodwillie-Wyman Co.* (1885), 38 Hun 138. Where no property is received by receiver, he cannot be compelled to account. *Lyons v. Atlantic Hills Gold Mining, etc., Co.* (1891), 38 N. Y. St. Rep. 892, 14 N. Y. Supp. 533. And he is entitled to his discharge. *People v. Bushwick Chemical Co.* (1892), 45 N. Y. St. Rep. 329, 18 N. Y. Supp. 542, *affd.* (1892), 133 N. Y. 694, 31 N. E. 647. A *de facto* receiver cannot escape an accounting. *O'Mahoney v. Belmont* (1875), 62 N. Y. 133. The validity of appointment is not before the court. *Hardt v. Levy* (1897), 20 App. Div. 400,

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46 N. Y. Supp. 815, affd. (1898), 155 N. Y. 660, 49 N. E. 1097. See *Matter of Little* (1900), 47 App. Div. 22, 62 N. Y. Supp. 27.

§ 269. **Notice of final accounting.**—Previous to rendering such account the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in a newspaper, of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such account will be rendered. Said receivers shall also give notice to the sureties on their official bonds, as provided in section two hundred and twenty-seven of this chapter. (*Amended by L. 1909, ch. 240, § 42*).

Source.—R. S., pt. 3, ch. 8, tit. 4, § 87.

§ 270. **Hearing on final accounting.**—Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 89, in part.

§ 271. **Reference of final account.**—The referee to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 88.

§ 272. **Further accounting.**—Such receivers shall also account from time to time in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 89, in part.

See *People v. German Bank* (1912), 136 N. Y. Supp. 311.

§ 273. **Removal of receiver.**—Such receivers may be removed by the court.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 85, in part.

Consolidators' note.—The following provision of the Revised Statutes has been omitted as superseded by this section:

"And they may be removed by the supreme court, for cause shown."

[R. S., pt. 2, ch. 5, tit. 1, art. 3, § 46.]

Reference.—Motion by attorney-general for removal, see § 311, post.

Removal.—Court may remove on its own motion. *Hoyt v. Continental Ins. Co.* (1885), 21 Wk. Dig. 145. See *Bruns v. Stewart Mfg. Co.* (1883), 31 Hun 195.

Summary removal.—See *Horton v. McNally Co.* (1913), 155 App. Div. 322, 140 N. Y. Supp. 357.

§ 274. **Vacancy.**—Any vacancy created by removal, death or otherwise, may be supplied by the court.

Source.—R. S., pt. 2, ch. 8, tit. 4, § 85, in part.

Consolidators' note.—The following provision of the Revised Statutes has been omitted having been incorporated in this article:

"Whenever any trustee shall be removed, or shall die, or become incapacitated to perform his duties, the officer who originally appointed such trustee, or in case of his absence, death, or removal, any other officer residing in the county where such trustee was resident, who by law would have been empowered to make such appointment, after giving notice, and an opportunity to the creditors to propose proper persons, may appoint another in the place of such trustee, who shall, in all respects, have the like powers and authority, and be subject to the same control, obligations and responsibilities; and the said appointment shall be certified and recorded, as the original appointment was required to be recorded."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 48.]

Power given to court is not made obligatory. *Horton v. McNally* (1913), 155 App. Div. 322, 334, 140 N. Y. Supp. 357.

§ 275. **Renunciation by receiver.**—Any receiver who shall be desirous of renouncing the trust vested in him, may apply to the court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.

Such application shall be accompanied by a full, true and just account of all the transactions of such receiver, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and property of the corporation, in respect to which he was appointed receiver, within his knowledge, and the situation of the same.

To such account shall be annexed the affidavit of the receiver, that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the court, to whom the application is made, and shall be certified by the clerk of the court.

Such court, shall thereupon grant an order, directing notice to be given to all persons interested in the property of the corporation, in respect to which such receiver was appointed, to show cause on a day or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

Such notice shall be published, once in each week, for six weeks successively in such newspapers, as such court shall direct.

On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that notice was duly published, the court shall proceed to hear the proofs and allegations of the parties.

If it shall appear that the proceedings of such receiver, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court be satisfied that for any reason it is inexpedient for such receiver to continue in the execu-

tion of the duties of his appointment, and that such duties can be executed by another receiver, without injury to the property of the corporation, or to the creditors; and if no good cause to the contrary appear, such court shall grant an order, allowing such receiver to renounce his appointment.

Upon such order being granted, such receiver shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

The expense of all proceedings in effecting such renunciation shall be paid by the receiver making the application.

Source.—R. S., pt. 2, ch. 5, tit. 1, §§ 49, 51–56, 60, 62.

Consolidators' note.—The following provisions of the Revised Statutes have been omitted as inapplicable:

"If the officer who made such appointment shall not then be in office, such application may be made to a circuit judge, supreme court commissioner, or the first judge of the county, residing in the same county where the appointment of such assignee was made."

"Such assignment shall be executed by such trustee, to such person, or persons, as the court or officer shall appoint for that purpose; and in the appointment, such persons as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court or officer."

"Such assignment shall transfer to the persons to whom it shall be made, all the remaining estate and effects, vested in the trustee so renouncing; and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation, as the original trustee; and shall continue any suit that may have been commenced by such original trustee, in his name, or in that of such new assignee."

"Upon producing to the officer or court allowing such assignment, the certificate of the assignee, duly proved by the oath of a subscribing witness, that such assignment has been duly made, and the property capable of delivery, belonging to such debtor, together with all the books, vouchers, and documents, relating to the estate of such debtor, has been duly delivered; and also a certificate of the county clerk, that such assignment has been recorded; such court or officer shall grant to the trustee so applying, an order that he be discharged from his trust."

"Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where such order was granted; and the petition of the trustee, the affidavit and proceedings thereon, with the certificate of the new assignee, shall be filed in the same office where the original papers and proceedings, in respect to such debtor, were filed."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, §§ 50, 57, 58, 59, 61.]

§ 276. Control of receiver by court.—The receivers shall be subject to the control of the court and may be compelled to account at any time.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 85, in part.

Consolidators' note.—The following provisions of the Revised Statutes have been omitted as superseded by this section.

"Such trustees shall be subject to the order of the supreme court, and of the court of common pleas of the county in which they were appointed, upon the

application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 46, pt.]

"Whenever any authority shall be exercised by a court of common pleas, or any officer, pursuant to any provisions of this title, the proceedings may be removed into the supreme court by certiorari, and there examined and corrected. But no such certiorari shall issue, unless allowed by a justice of the supreme court, or a circuit judge; nor shall it operate as a stay of proceedings, unless it shall be so directed in the order of allowance."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 47.]

The following provisions of the Revised Statutes have been omitted because inapplicable:

"Any person who shall discover to the trustees any secreted effects, property, or things in action, belonging to such debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate on the value of the effects so discovered, to be paid by the trustees, out of the estate of such debtor; but this section shall not extend to persons who have such property, effects or things, in their own possession."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 18.]

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel, for the benefit of all the creditors, and his costs for defending any such suit."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 30.]

Reference.—See note under § 238.

The court, having jurisdiction *in personam* over the receiver, may restrain him from further prosecuting an action, especially when he was appointed in an action to dissolve a domestic corporation. *Guaranty Trust Co. v. Edison United Phonograph Co.* (1908), 128 App. Div. 591, 112 N. Y. Supp. 929.

§ 277. Commissions and expenses of receiver in voluntary dissolution.—

A receiver appointed pursuant to article nine is entitled, in addition to his necessary expenses, to commissions upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder, not exceeding one per centum; but in case the commissions of a receiver so computed shall not amount to one hundred dollars, said court or judge may in his or its discretion allow said receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by said receiver.

Source.—Code Civ. Pro. § 2431-a, as added by L. 1906, ch. 293.

Consolidators' note.—Section 3320 of the Code of Civil Procedure has not been consolidated in this chapter for the reason that it provides for the expenses and commissions of receivers except as otherwise specially prescribed by statute.

The following provision of the Revised Statutes was expressly repealed by ch. 49 of L. 1906:

"Such receivers shall, in addition to their actual disbursements, be entitled to

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such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators."

[R. S., pt. 3, ch. 8, tit. 4, art. 3, § 76.]

The following provision of the Revised Statutes is omitted as embraced within the language of § 76 of the Revised Statutes.

"And a commission at the rate of 5 per cent. on the whole sum which shall have come into their hands."

[R. S., pt. 2, ch. 5, tit. 1, art. 8, § 29.]

§ 278. **Commissions and expenses of receiver except in voluntary dissolution.**—A receiver of a corporation, except a receiver appointed in proceedings for its voluntary dissolution, is entitled, in addition to his necessary expenses, to such commissions, not exceeding two and one-half per centum upon the sums received and disbursed by him, as the court by which or the judge by whom he is appointed allows, but except upon a final accounting such a receiver shall not receive on account of his services for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate. Upon final accounting, the court may make an additional allowance to such receiver, not exceeding two and one-half per centum upon the sums received and disbursed by him, if the court is satisfied that he has performed services that fairly entitled him to such additional allowance. Where more than one receiver shall be appointed, the compensation herein provided shall be divided between said receivers.

Source.—L. 1883, ch. 378, § 2, as amended by L. 1886, ch. 275; L. 1901, ch. 506, and L. 1906, ch. 349.

Code provision.—A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his lawful expenses, to such commission, not exceeding five per centum, upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed, allows. * * * [§ 3320, in part].

Application of above section.—Applies only to receivers of insolvent corporations. So held in *U. S. Trust Co. v. N. Y. W. S., R. R. Co.* (1886), 101 N. Y. 5, N. E. 316, in which it was held that the fees of a receiver in a foreclosure proceeding were regulated by above section of the Code. Followed in *Matter of Smith Co.* (1898), 31 App. Div. 39, 52 N. Y. Supp. 877, in reference to fees of temporary receiver in proceeding for voluntary dissolution.

Rate and computations of commissions.—This section permits two different percentages which may be allowed a receiver. In the first place such receiver is entitled to a commission not exceeding two and one-half per centum upon the sum received and distributed by him as allowed by the court, but he shall not receive for any one year a greater amount than twelve thousand dollars, nor for any period less than a year more than at that rate; and it provides in the second place that where more than one receiver shall be appointed, the compensation provided shall be divided between such receivers. Upon final accounting the court may make an additional allowance not exceeding two and one-half per centum if the court is satisfied that the receiver has performed services fairly entitling him to such additional allowance; and where more than one receiver has been appointed the compensation shall be divided between them. Such commissions are to be computed upon the value of the entire property that comes into the receivers' hands and is distributed by him by order of the court, whether to the creditors of the insolvent estate or to the beneficiaries under a will or trust instrument or by

a settlement or compromise between parties. *People v. Brooklyn Bank* (1909), 64 Misc. 538, 118 N. Y. Supp. 722.

Extra compensation under guise of commissions not allowable. *Matter of Orient Mut. Ins. Co.* (1892), 50 N. Y. St. Rep. 460, 21 N. Y. Supp. 237.

When fees may be paid before final accounting.—This section does not prevent the court from directing payment, except upon an accounting, of the receiver's fees, nor does the exercise of such power prior to an accounting constitute an abuse of discretion where it appears that the pendency of certain litigations alone prevents the receiver from rendering his final account. *People v. Anglo-American S. & L. Assn.* (1906), 107 App. Div. 270, 94 N. Y. Supp. 1113.

Decisions generally.—An order cannot be made directing a receiver to pay over the entire fund in his hands without authorizing him to deduct his commissions and expenses, or in any way providing for their payment. *Galster v. Syracuse Savings Bk.* (1883), 29 Hun 594.

A receiver is entitled to have his commission calculated and allowed upon the final settlement and disposition of his accounts. *Matter of Security Life Ins. Co.* (1883), 31 Hun 36.

Under L. 1883, ch. 378, the court ought to scrutinize closely and critically, receivers' charges. *Rogers v. Adriatic Ins. Co.*, N. Y. Daily Register, September 19, 1884.

The same principle should be applied by a receiver as to assignees and trustees; that negligence, inattention and misconduct resulting in probable losses are a ground for refusing to award him commissions. *Clapp v. Clapp* (1888), 49 Hun 495, 1 N. Y. Supp. 919, *affd.* on rearg. (1889), 4 Silv. 379, 7 N. Y. Supp. 495, *affd.* (1890), 125 N. Y. 693, 26 N. E. 751.

A receiver cannot be allowed upon his accounting both commissions and a sum for his services. *Hynes v. McDermott* (1886), 14 Daly 104, 3 N. Y. St. Rep. 582.

Prior to the passage of L. 1883, ch. 378, the commissions of a receiver of an insolvent life insurance company were properly fixed by the court which appointed him within the limit of 5 per cent. on receipts and disbursements. *Attorney-General v. Guardian Life Ins. Co.* (1883), 93 N. Y. 631.

Proceeds of securities in hands of superintendent of insurance are assets on which the receiver is entitled to commissions. *Attorney-General v. North Am. Life Ins. Co.* (1882), 89 N. Y. 94.

Premium notes and loans made on policies are not assets on which the receiver is entitled to commissions. *Id.*

In computing the commissions of a receiver of a corporation upon his resignation, only the amount of money which has actually come into his hands should be considered. *People v. Mutual Benefit Association* (1886), 39 Hun 49.

Commissions will not be allowed a receiver upon money merely turned over to him by his predecessor in office. *Attorney-General v. Continental Life Ins. Co.* (1884), 32 Hun 223.

Where a receiver was never entitled to receive a certain sum of money and the order directing payment to him was erroneous, and was reversed by the court on appeal, he should not retain commissions and counsel fees before making restitution thereof. *Pittsfield Nat. Bk. v. Bayne* (1893), 140 N. Y. 321, 35 N. E. 630.

The commissions of a temporary receiver appointed under § 2423 of the Code of Civil Procedure (voluntary dissolution) are not to be computed simply upon the cash which actually comes into his hands, but he may be entitled, in an extreme case, to 2½ per cent. of the value of the property coming into his hands for receiving and protecting the same, such amount to be determined and allowed by the court. *Matter of Smith Co.* (1898), 31 App. Div. 39, 52 N. Y. Supp. 877. *But see* section as amended.

If receiver allows the business to proceed the same as before his appointment,

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he is only entitled to commissions on the proceeds which come into his hands. *Matter of Woven Tape Skirt Co.* (1881), 85 N. Y. 506.

The court in the case *Matter of Smith Co.* (1898), 31 App. Div. 39, 52 N. Y. Supp. 877, discusses the question of the amount of commissions to which a receiver is entitled for merely receiving and protecting the property. "It has long been settled that executors and administrators are entitled to one-half commissions for receiving and one-half commissions for paying out the monies of the estate, and there is no reason why the exercise of judicial discretion conferred by § 3320 should by a different construction be limited to cash received."

A receiver, whose allowance has been reduced and who is directed to return the excess will be allowed a credit to the extent of moneys advanced by him in good faith to protect the corporate property. *People v. Brooklyn Bank* (1913), 157 App. Div. 171, 142 N. Y. Supp. 75.

ARTICLE XII.

PROVISIONS APPLICABLE TO TWO OR MORE OF THE FOREGOING PROCEEDINGS OR ACTIONS.

Section 300. Application of preceding articles to certain corporations.

- 301. Officers and agents may be compelled to testify in certain actions.
- 302. Injunction staying actions by creditors in certain actions.
- 303. Creditors of corporation may be brought in to prove their claims in certain actions.
- 304. When attorney-general must bring certain actions.
- 305. Requisites of injunction against corporations in certain cases.
- 306. Appointment of receivers of property of corporations.
- 307. Judicial suspension or removal of officer of corporation.
- 308. Application of the last three sections.
- 309. Misnomer not available in action against stockholder.
- 310. Appraisal of property of insolvent corporation.
- 311. Application by attorney-general for removal of receiver and to facilitate closing affairs of receivership.
- 312. Service of papers upon attorney-general.
- 313. Designation of depositories of funds in order appointing receiver.
- 314. Application to the court in certain actions and proceedings.
- 315. County wherein action may be brought by attorney-general on behalf of the people.
- 316. Preferences in actions * of proceedings by or against receivers.

§ 300. Application of preceding articles to certain corporations.—

Articles fifth, sixth or seventh of this chapter do not apply to a religious corporation; or to a municipal or other political corporation, created by the constitution, or by or under the laws of this state; or to any corporation which the regents of the university have power to dissolve, except upon the application of the regents, or of the trustees of such a corporation; and in aid of its liquidation under such dissolution.

Source.—Code Civ. Pro. § 1804, as amended by L. 1903, ch. 290, and L. 1904, ch. 501; originally derived from R. S., pt. 2, ch. 8, tit. 4, § 57. The amendment of 1903 exempted corporations which the regents have power to dissolve. The amendment of 1904 inserted the word "political."

* So in original.

L. 1909, ch. 28. Provisions applicable to two or more proceedings. §§ 301-303.

Consolidators' note.—This article contains without change the provisions in ch. 15, tit. 2, art. 5, of the Code of Civil Procedure entitled "Provisions applicable to two or more of the actions specified in this title," and in addition to the provisions of the Code of Civil Procedure certain other statutory provisions of too general a nature to be inserted under any of the preceding articles.

§ 301. Officers and agents may be compelled to testify in certain actions.

—In an action, brought as prescribed in article fifth, sixth or seventh, a stockholder, officer, alienee, or agent of a corporation, is not excused from answering a question, relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture. But his testimony shall not be used, as evidence against him, in a criminal action or special proceeding.

Source.—Code Civ. Pro. § 1805, which was derived from R. S., pt. 2, ch. 8, tit. 4, §§ 51-55.

§ 302. Injunction staying actions by creditors in certain actions.—In

such an action, the court may, in its discretion, on the application of either party, at any stage of the action, before or after final judgment, and with or without security, grant an injunction order, restraining the creditors of the corporation from bringing actions against the defendants, or any of them, for the recovery of a sum of money, or from taking any further proceedings in such actions, theretofore commenced. Such an injunction has the same effect, and, except as otherwise expressly prescribed in this section, is subject to the same provisions of law, as if each creditor, upon whom it is served, was named therein, and was a party to the action in which it is granted.

Source.—Code Civ. Pro. § 1806, which was derived from R. S., pt. 2, ch. 8, tit. 4, § 56.

Application.—Inapplicable to voluntary dissolutions. *Kingsley v. First Nat. Bank of Bath* (1887), 31 Hun 329, 338. Inapplicable to restrain mortgage foreclosure pending appeal to court of appeals concerning validity of another mortgage on company's property. *Davidson v. The John Good Cordage Co.* (1901), 63 App. Div. 366, 71 N. Y. Supp. 565. See, generally, *Attorney-General v. Guardian Mut. Life Ins. Co.* (1879), 77 N. Y. 272; *Marshall v. Wendell* (1899), 45 App. Div. 120, 61 N. Y. Supp. 13; *People v. Commercial Alliance Life Ins. Co.* (1896), 5 App. Div. 213, 39 N. Y. Supp. 117; *Hirschfeld v. Kuraheedt* (1894), 81 Hun 555, 30 N. Y. Supp. 1023, *affd.* (1895), 145 N. Y. 84, 39 N. E. 817; *People v. Remington* (1887), 45 Hun 347.

Rules concerning injunctions inapplicable to certain features of injunction provided for in this section. *Phoenix Foundry v. North River Const. Co.* (1884), 33 Hun 156.

§ 303. Creditors of corporation may be brought in to prove their claims

in certain actions.—In such an action, the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such a manner, and in such a

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reasonable time, not less than six months from the first publication of notice of the order as the court directs; and that the creditors, who make default in so doing, shall be precluded from all benefit of the judgment, and from any distribution which may be made thereunder, except as hereinafter provided. Notice of the order must be given by publication, in such newspapers, and for such a length of time, as the court directs. Notwithstanding such order any such creditor who shall exhibit and prove his claim in the manner directed thereby, with proof, by affidavit or otherwise, that he has had no notice or knowledge thereof in time to comply therewith, any time before an order is made directing a final distribution of the assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.

Source.—Code Civ. Pro. § 1807, as amended by L. 1886, ch. 372; originally derived from R. S., pt. 2, ch. 8, tit. 4, § 56. Last sentence added by amendment of 1886.

Not a special proceeding.—Proof of claim here authorized is not a special proceeding, but an incidental step in the action. *People v. American Loan & Trust Co.* (1896), 150 N. Y. 117, 44 N. E. 949, dismissing appeal from (1896), 2 App. Div. 193, 37 N. Y. Supp. 780, and holding order for payment of creditor's claim not appealable to court of appeals.

Extension of time will be granted and new order made and published where creditors have been misled by receiver's statements. *People v. Security Life Ins. & Ann. Co.* (1879), 79 N. Y. 267.

Order directing revaluation of policies in life insurance company, already allowed on proof of claim, is proper when parties had died after expiration of time given in notice. *Matter of Attorney-General v. Continental Life Ins. Co.* (1882) 88 N. Y. 77.

No appeal unless exceptions taken to decisions of special term concerning claim against insolvent corporation. *Matter of Buffalo Ice Co.* (1899), 37 App. Div. 144 55 N. Y. Supp. 783.

§ 304. **When attorney-general must bring certain actions.**—Where the attorney-general has good reason to believe, that an action can be maintained in behalf of the people of the state, as prescribed in articles fifth, sixth or seventh of the chapter, except section one hundred and thirty of this chapter, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director, or trustee, of the corporation, applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action or apply for leave to bring it, if he has good reason to believe, that it can be maintained. Where such an application is made section nineteen hun-

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dred and eighty-six of the code of civil procedure applies thereto, and to the action brought in pursuance thereof.

Source.—Code Civ. Pro. § 1808, which was derived from Code of Proc. § 430, last sentence.

Application.—Attorney-General has absolute discretion as to whether an action is required by public interests. *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, revg. (1890), 56 Hun 125, 8 N. Y. Supp. 918. But see *People v. Lowe* (1889), 117 N. Y. 175, 194, 22 N. E. 1016, revg. (1888), 47 Hun 577. See, in general, *People v. Murray Hill Bank* (1896), 10 App. Div. 323, 41 N. Y. Supp. 804.

Parties.—No relator required where attorney-general brings action believing public interests require it. *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, revg. (1890), 56 Hun 125, 8 N. Y. Supp. 918; *People v. Manhattan Real Estate Co.* (1902), 79 App. Div. 535, 77 N. Y. Supp. 837, revd. on other grounds (1903), 175 N. Y. 133, 67 N. E. 219. Person instigating such action has no such relation as that anything done by him will affect people's rights in action. *People v. Buffalo Stone & Cement Co.* (1892), 131 N. Y. 142, 29 N. E. 947, 15 L. R. A. 240. See *People ex rel. Hearst v. Ramapo Water Co.* (1900), 51 App. Div. 145, 64 N. Y. Supp. 532.

§ 305. Requisites of injunction against corporations in certain cases.—

An injunction order, suspending the general or ordinary business of a corporation, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the corporation, or to the trustee, director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

Source.—Code Civ. Pro. § 1809, in part, so far as section relates to corporations; originally derived from L. 1870, ch. 151, § 1. For remainder of section, see Code Civ. Pro. § 1809, as amended by L. 1909, ch. 65.

Application.—Section applies to business done, whether charter permits it or not. *Mayor, etc., v. Starin* (1888), 56 N. Y. Super. Ct. 153, 2 N. Y. Supp. 346. Injunction not granted to restrain investment of surplus funds. *Bach v. Pacific M. S. Co.* (1872), 12 Abb. N. S. 373. Not granted to restrain from constructing railroad where corporate franchises have not been adjudged forfeited. *Moran v. Lydecker* (1882), 27 Hun 532.

Notice of application.—An order to show cause why an injunction should not be granted is a sufficient notice of the application for such injunction. *Goss v. Warp Twisting Machine Co.* (1909), 133 App. Div. 122, 117 N. Y. Supp. 228.

Bankruptcy proceedings.—An injunction order restraining the officers and directors of a corporation from acting as such is not a violation of the Federal statutes as preventing the institution of bankruptcy proceedings, since the order merely restrains them pending further order of the court, and can be modified upon a proper application. *Id.*

Ex parte injunction void.—*Ciancinimo v. Man* (1892), 1 Misc. 121, 20 N. Y. Supp. 762; *Wilkie v. Rochester & State Line R. Co.* (1877), 12 Hun 242; add *Town of Fort Edward v. Hudson Valley R. Co.* (1908), 127 App. Div. 438, 111 N. Y. Supp. 753.

Incidental stay.—A clause contained in an order to show cause why a director should not be permitted to examine the corporate books, staying defendants from

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removing said director pending the proceeding, is not an injunction within the meaning of this section. *People ex rel. Stauffer v. Bonwit Bros.* (1910), 69 Misc. 70, 125 N. Y. Supp. 958.

§ 306. Appointment of receivers of property of corporations.—A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in articles fifth, sixth or seventh of this chapter.

2. An action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation.

5. Upon the application of the regents of the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or upon the application of the trustees of such a corporation, with notice to the regents.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

Source.—Code Civ. Pro. § 1810, as amended by L. 1903, ch. 290; originally derived from L. 1870, ch. 151, § 3. The amendment of 1903 added last subd.

References.—Powers of receivers generally, see note to § 239. Powers of certain permanent receivers, see §§ 230-278. Powers of temporary receivers, §§ 104, 105, ante. See § 192 as to who is eligible for appointment as receiver in proceedings for voluntary dissolution.

Judiciary Law, § 251, provides that no person holding the office of clerk, deputy clerk, special deputy clerk, or assistant in the clerk's office of a court of record within the county of New York shall be appointed a receiver, except by the written consent of all the parties to the action, or special proceeding other than the parties in default for failure to appear or plead. Code Civ. Pro. § 827, authorizes the court to appoint a referee to inquire into the propriety of appointing a certain person as receiver.

Application.—Inapplicable to foreign corporation not doing business in this state. *Logan v. McCall Publishing Co.* (1893), 140 N. Y. 447, 35 N. E. 655. However, the court may appoint receiver of property in this state, notwithstanding there is receiver in the foreign state, and § 306 does not interfere therewith. *Popper v. Supreme Council* (1901), 61 App. Div. 405, 70 N. Y. Supp. 637. Non-resident stockholder of foreign corporation with extensive property in this state may maintain action under this section, and fact that he is also director is immaterial. *McNabb v. Porter Air-Lighter Co.* (1899), 44 App. Div. 102, 60 N. Y. Supp. 694. See also *Walter v. McAllister Co.* (1897), 21 Misc. 747, 48 N. Y. Supp. 26; *Hall v. Holland House Co.* (1895), 12 Misc. 55, 33 N. Y. Supp. 50.

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Application of section considered generally, see *Jacobus v. Diamond Soda Water Co.* (1904), 94 App. Div. 366, 88 N. Y. Supp. 302, *Halpin v. Mutual Brewing Co.* (1895), 91 Hun 220, 36 N. Y. Supp. 151; *People v. Equitable Mut. Fire Ins. Corp.* (1896), 1 App. Div. 84, 37 N. Y. Supp. 80; *Porter v. Industrial Information Co.* (1893), 5 Misc. 262, 25 N. Y. Supp. 328; *Gildersleeve v. Lester* (1893), 68 Hun 532, 22 N. Y. Supp. 1026; *People v. Ballard* (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, revg. (1890), 56 Hun 125, 8 N. Y. Supp. 918. Where trustee ineligible for office, by act of incorporation, no action by Attorney-General necessary. *Matter of Northern Dispensary* (1899), 26 Misc. 147, 56 N. Y. Supp. 784.

Case must be brought within the statutory provisions for the appointment of receiver, and general equity powers of the court will not be exercised where no waste or mismanagement are shown. *Brewster v. Brewster Co.* (1911), 145 App. Div. 812, 130 N. Y. Supp. 654.

Good faith.—Where the complaint contains averments tending to cast doubt upon the good faith of plaintiff, receivership will be denied. *Sedgwick v. Seward Development Co.* (1911), 144 App. Div. 455, 129 N. Y. Supp. 209.

Where no officer to hold assets.—All officers and directors of corporation not permitted to resign in order to have receiver appointed and shift burdens on court, as this section does not warrant such action. *Zeltner v. Zeltner Brewing Co.* (1903), 174 N. Y. 247, 66 N. E. 810, affg. (1903), 79 App. Div. 136, 80 N. Y. Supp. 338. See also *Same v. Same* (1903), 85 App. Div. 387, 83 N. Y. Supp. 366; *Yorkville Bank v. Zeltner Brewing Co.* (1903), 80 App. Div. 578, 80 N. Y. Supp. 839.

A receiver of a corporation should not be appointed under this section on the ground that there are no officers of the corporation entitled to hold its assets merely because three of five directors have been ousted by order of the court, if the two remaining are *prima facie* qualified to act in that they are apparently duly elected and one of them, the vice-president, is given by the by-laws all the powers of the president who was ousted. *Ehret v. Ringler Co.* (1911), 144 App. Div. 480, 129 N. Y. Supp. 551, revg. (1910), 70 Misc. 627, 129 N. Y. Supp. 546, appeal dismissed (1912), 204 N. Y. 638, 98 N. E. 1102.

A receiver of the property appointed by a court in the exercise of its equitable jurisdiction as a so-called common-law receiver *pendente lite* of the property of a foreign corporation to prevent the unlawful disposition and waste of its property, is not a receiver appointed under the provisions of subdivision 3 of this section where the action in which the receiver is appointed is not brought to preserve the assets of the corporation having no officers empowered to hold its property and where it is shown that an injunction and an accounting are sought against them. This subdivision does not interfere with the inherent power of the Supreme Court to appoint a receiver of the property of corporation as distinguished from a receiver of the corporation itself. *Matter of Howell v. German Theatre* (1909), 64 Misc. 110, 117 N. Y. Supp. 1124.

To "hold" the assets as used in subd. 3 of this section means to preserve the assets. *Ehret v. Ringler & Co.* (1910), 70 Misc. 627, 632, 129 N. Y. Supp. 546, revd. on other grounds (1911), 144 App. Div. 480, 129 N. Y. Supp. 551, appeal dismissed (1912), 204 N. Y. 638, 98 N. E. 1102.

Receiver on foreclosure should be appointed notwithstanding receiver of property was previously appointed in action for foreclosure of junior mortgage. *Holland Trust Co. v. Consolidated Gas, etc., Co.* (1895), 85 Hun 454, 32 N. Y. Supp.

A receiver in supplementary proceedings may not be appointed where the judgment debtor is a domestic corporation. *Banker Contracting Co. v. Callahan Contracting Co.* (1915), 92 Misc. 241, 245, 155 N. Y. Supp. 543.

Who should be appointed receiver.—A person will not be appointed who stands in any improper relation to the cause. *Smith v. N. Y. Consol. Stage Co.* (1865),

§§ 307, 308. Provisions applicable to two or more proceedings. L. 1909, ch. 28.

28 How. Pr. 208; but there is no rule of law which prevents the appointment of a creditor, *Chamberlain v. Greenleaf* (1878), 4 Abb. N. C. 92; or a general agent of an insurance company, *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.* (1884), 23 Hun 539; a director who has participated in the alleged mismanagement should not be appointed, *Keeler v. Brooklyn El. R. R. Co.* (1880), 9 Abb. N. C. 166, nor an assignee of the same estate, especially where a contest is likely to result, *Eichberg v. Wickham* (1892), 21 N. Y. Supp. 647; *People's Bank of East Orange v. Fancher* (1892), 21 N. Y. Supp. 525; nor a person who has signed or verified a false statement as to the solvency of the corporation. *People v. Third Ave. Savings Bank* (1875), 50 How. Pr. 22.

The propriety of appointing the same person as a receiver in an action to foreclose a mortgage against a corporation, and also in an action by the attorney-general for its dissolution is exclusively a question for the court. *Herring v. N. Y. Lake Erie, etc., R. R. Co.* (1882), 63 How. Pr. 497.

Right to enjoin officers and directors.—This section relates to all actions provided for by section 90, *ante*, and the right of the court to appoint a receiver in this section carries with it, by necessary implication, the right to enjoin the officers and directors from interfering with the property, or doing any acts which shall in any manner interfere with the receiver. *Goss v. Warp Twisting Machine Co.* (1909), 133 App. Div. 122, 117 N. Y. Supp. 228.

Supplementary proceedings.—Although since the amendment of § 2463 of the Code of Civil Procedure by L. 1908, ch. 278 supplementary proceedings may be maintained against domestic corporations by judgment creditors, such right does not authorize the appointment of a receiver. *Boucker Contracting Co. v. Callahan Contracting Co.* (1916), 218 N. Y. 321, 113 N. E. 257, *affg.* (1916), 172 App. Div. 609, 156 N. Y. Supp. 1116.

§ 307. **Judicial suspension or removal of officer of corporation.**—A trustee, director, or other officer of a corporation shall not be suspended or removed from office, by a court or judge, otherwise than by the final judgment of a competent court, in an action brought by the attorney-general, as prescribed in section ninety of this chapter.

Source.—Code Civ. Pro. § 1811, which was derived from L. 1870, ch. 151, § 2.

Suspension or removal of the directors of a corporation can only be had in an action brought by the Attorney-General pursuant to sections 90, 91 and 307 of the General Corporation Law. *Welcke v. Trageser*, No. 1 (1909), 131 App. Div. 731, 116 N. Y. Supp. 166.

Without some statute or provision of the charter authorizing his removal or suspension, a director cannot be removed or suspended from office until the end of his term, at least without cause. *People ex rel. Manice v. Powell* (1911), 201 N. Y. 194, 202, 94 N. E. 634, *affg.* (1910), 140 App. Div. 912, 126 N. Y. Supp. 1139.

§ 308. **Application of the last three sections.**—The last three sections apply to an action or special proceeding, against a corporation created by or under the laws of the state, or a trustee, director, or other officer thereof; or against a corporation created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the corporation does business within the state, or has, within the state, a business agency or a fiscal agency, or an agency for the transfer of its stock.

Source.—Code Civ. Pro. § 1812, in part, so far as relates to corporations;

L. 1909, ch. 28. Provisions applicable to two or more proceedings. §§ 309, 310.

originally derived from L. 1870, ch. 151, § 5. For remainder of section, see Code Civ. Pro. § 1812, as amended by L. 1909, ch. 65.

As to foreign corporations.—Inapplicable to foreign corporation not doing business or having agency in this state. *Logan v. McCall Publishing Co.* (1893), 140 N. Y. 447, 35 N. E. 655. See *Miller v. Barlow* (1903), 88 App. Div. 532, 85 N. Y. Supp. 310, revd. in (1904), 179 N. Y. 294, 72 N. E. 116. Receivers of property may be appointed in this state notwithstanding appointment of receiver in another state. *Popper v. Supreme Council* (1901), 61 App. Div. 405, 70 N. Y. Supp. 637. Where constitutionality as to this point questioned, non-resident stockholders may sue for appointment of receiver, etc., under authority of this section. *Walter v. McAlister Co.* (1899), 21 Misc. 747, 48 N. Y. Supp. 26. Where receiver has office in New York city and does business there, this fact is sufficient to exempt the corporation and its officers from examination in supplementary proceeding, according to § 2463 of the Code. *Matter of Victor* (1897), 20 Misc. 289, 45 N. Y. Supp. 800, revg. (1897), 20 Misc. 13, 44 N. Y. Supp. 603. Where receiver of foreign corporation will be appointed in this state. *Dreyfuss v. Seale* (1896), 18 Misc. 55, 41 N. Y. Supp. 875, revd. (1899), 37 App. Div. 351, 55 N. Y. Supp. 1111. *Hall v. Holland House* (1895), 12 Misc. 55, 33 N. Y. Supp. 50.

§ 309. **Misnomer not available in action against stockholder.**—Where an action, authorized by a law of the state, is brought against one or more persons, as stockholders of a corporation, an objection to any of the proceedings can not be taken, by a person properly made a defendant in the action on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the corporation, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

Source.—Code Civ. Pro. § 1813, in part, so far as same relates to corporations; originally derived from L. 1869, ch. 157, § 2. For remainder of section, see Code Civ. Pro. § 1813, as amended by L. 1909, ch. 65.

§ 310. **Appraisal of property of insolvent corporation.**—Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the property of any corporation in the hands of a receiver or otherwise, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

§§ 311, 312. Provisions applicable to two or more proceedings. L. 1909, ch. 28.

Source.—L. 1891, ch. 34, § 1.

Consolidators' note.—This section of L. 1891, ch. 34, embraces the subject of appraisals of property generally. Only such portion of the section as applies to corporations has been inserted in this article. Other parts of the section have been taken care of in other consolidated laws.

§ 311. Application by attorney-general for removal of receiver and to facilitate closing affairs of receivership.—The attorney-general may, at any time he deems that the interests of the stockholders, creditors, policyholders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district:

1. For an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or,
2. To compel him to account, or,
3. For such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and

Any appeal from any order made upon any motion under this section shall be to the appellate division of the department in which such motion is made.

Source.—L. 1883, ch. 378, § 7.

§ 312. Service of papers upon attorney-general.—A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding for the dissolution of a corporation or a distribution of its assets, shall, in all cases, be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this section would be ex parte or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and shall have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

Source.—L. 1883, ch. 378, § 8.

Consolidators' note.—The provisions of this section apply not only to actions brought by the attorney-general but to proceedings for the voluntary dissolution of a corporation. Hence its insertion in this general article.

"That § 8 of ch. 378 of the Laws of 1883, entitled 'An act in relation to receivers of corporations,' requiring that a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of

§ 1909, ch. 28. Provisions applicable to two or more proceedings. § 312.

the order or judgment to be proposed thereon, in every action for the dissolution of a corporation, shall, in all cases, be served on the attorney-general, applies to proceedings for the voluntary dissolution of corporations, and the court has no jurisdiction to entertain such proceedings unless a service of such notice is made or waived." *People v. Seneca Lake Grape and Wine Co.* (1889), 52 Hun 175, 5 N. Y. Supp. 136.

"Held, that the action brought to sequester the property of the company, in which Henry was appointed receiver, was an action for 'a distribution of its assets,' within the meaning of § 8 of ch. 378 of 1883, requiring copies of all notices and all motion papers in every such action to be served upon the attorney-general." *Whitney v. N. Y. & Atlantic R. R. Co.* (1884), 32 Hun 165.

Other citations under this section are *Dohn v. Buffalo Amusement Co.* (1901), 66 App. Div. 446, 73 N. Y. Supp. 95; *Nealis v. American Tube and Iron Co.*, 76 Hun 220; *Matter of Stonebridge* (1890), 57 Hun 441, 10 N. Y. Supp. 727; *People v. American Steam Boiler Ins. Co.* (1896), 3 App. Div. 504, 38 N. Y. Supp. 406.

Application.—Applies to proceedings for voluntary dissolution. *People v. Seneca Lake Grape & Wine Co.* (1889), 52 Hun 174, 5 N. Y. Supp. 136; *Matter of Broadway Ins. Co.* (1897), 23 App. Div. 283, 48 N. Y. Supp. 299. Applies only to domestic corporations. *MacNabb v. Porter Air-Lighter Co.* (1899), 44 App. Div. 102, 60 N. Y. Supp. 694.

The attorney-general is entitled to notice of a motion for the appointment of a referee to hear and determine a disputed claim filed with the permanent receiver of a corporation, appointed in an action for the dissolution of such corporation. *Matter of Eustace v. New York Building-Loan Co.* (1904), 98 App. Div. 97, 90 N. Y. Supp. 784.

The provisions of this section requiring the service upon the Attorney-General in every action or proceeding for the dissolution of a corporation or the distribution of its assets, of a copy of all motion papers, etc., do not apply to a motion made pursuant to the provisions of section 19 of the Banking Law for the sale of real property of a bank in the possession of the Superintendent of Banks. *Rept. of Atty. Genl.* (1913), Vol. 2, p. 601. Nor to supplementary proceedings. *Rept. of Atty. Genl.* (1913) 107.

Where plaintiff seeks a chancery or, as it is sometimes called, a common-law receiver, not a statutory one, for the purpose only of maintaining the *status quo* and preventing a practical dissolution, no notice of the application need be given to the attorney general. *Russell v. Washington Life Ins. Co.* (1909), 62 Misc. 403, 115 N. Y. Supp. 950, *revd.* (1909), 132 App. Div. 217, 116 N. Y. Supp. 841.

Service of papers jurisdictional.—Above cases, and *Whitney v. N. Y. & Atlantic R. R. Co.* (1884), 32 Hun 164. But omission may be cured by subsequent proceedings. *Johnson v. Rayner* (1898), 25 App. Div. 598, 49 N. Y. Supp. 959; *Matter of Stonebridge* (1891), 37 N. Y. St. Rep. 617, 13 N. Y. Supp. 770, *affd.* (1891), 128 N. Y. 618, 28 N. E. 253. See also § 194, *ante*, as to relief by court of omissions of notice in proceedings for voluntary dissolution.

Where the attorney-general has not been served with papers in a proceeding for the voluntary dissolution of a corporation, as required by this section, he cannot after a motion made, validate the proceeding by admitting service or by signing waivers, but it seems that he can confer jurisdiction by waiving service before the motion is brought to a hearing. *Matter of Strong Co.* (1908), 128 App. Div. 208, 112 N. Y. Supp. 557.

An order modifying the restraining clause of an order enjoining persons from bringing an action against a corporation pending proceedings for its dissolution, by permitting the moving parties to prosecute to judgment a pending action against the corporation is void when it appears that no notice of such order was

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served upon the attorney-general as required under this section. *Dohn v. Buffalo Amusement Co.* (1901), 66 App. Div. 446, 73 N. Y. Supp. 95.

Short notice may be accepted by attorney-general. *Matter of Peekamoose Fishing Club* (1897), 151 N. Y. 511, 45 N. E. 1037.

When notice not necessary.—Application for order to show cause why books should not be produced on accounting. *Greason v. Goodewille-Wyman Co.* (1895), 38 Hun 138. Stipulation for reference of claim. *People v. Am. Steam Boiler Ins. Co.* (1895), 14 Misc. 162, 35 N. Y. Supp. 355, *affd.* (1896), 3 App. Div. 504, 38 N. Y. Supp. 406. Motion in special proceeding to determine validity of claim. *People v. Am. Steam Boiler Ins. Co.* (1896), 3 App. Div. 504, 38 N. Y. Supp. 906. Application for the appointment of an ancillary receiver of foreign corporation. *Woerishoffer v. North River Construction Co.* (1884), 6 Civ. Pro. Rep. 113, *affd.* (1885), 34 Hun 634, *affd.* (1885), 99 N. Y. 398, 2 N. E. 47. Commencement of suit, which receiver is authorized to commence. *Nealis v. Am. Tube & Iron Co.* (1894), 76 Hun 220, 27 N. Y. Supp. 733, *affd.* (1896), 150 N. Y. 42, 44 N. E. Application for order to show cause why petition for voluntary dissolution should not be granted. *Matter of Geneva Basket Co.* (1911), 71 Misc. 156, 127 N. Y. Supp. 943. *It seems*, that it is proper to give the Attorney-General notice of an application to vacate an order for the voluntary dissolution of a corporation. *Matter of McLoughlin* (1917), 176 App. Div. 653, 163 N. Y. Supp. 547.

See *Abrams v. Manhattan Consumers Brewing Co.* (1910), 68 Misc. 168, 123 N. Y. Supp. 663, *revd.* (1894), 142 App. Div. 392, 126 N. Y. Supp. 844. *Knickerbocker Trust Co. v. Tarrytown, etc., R. Co.* (1909), 133 App. Div. 285, 117 N. Y. Supp. 871.

§ 313. Designation of depositories of funds in order appointing receiver.—All orders appointing receivers of corporations shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursement shall be deposited and no deposits or investments of such trust funds shall be made elsewhere, except upon the order of the court upon due notice given to the attorney-general.

Source.—L. 1883, ch. 378, § 3.

§ 314. Application to the court in certain actions and proceedings.—All applications to the court shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable.

Source.—L. 1883, ch. 378, § 9, as amended by L. 1896, ch. 282.

References.—See § 108, *ante*, partly to same effect.

Decisions.—On application for the appointment of a receiver facts peculiarly in the knowledge of the creditor, although alleged on information and belief, are to be taken as true, if not denied. *Holland Trust Co. v. Consolidated Gas & Electric Light Co.* (1895), 85 Hun 454, 32 N. Y. Supp. 830.

It is contrary to the orderly and regular proceedings in a court of justice to allow a stranger to participate in a motion for the appointment of a receiver. *O'Mahoney v. Belmont* (1875), 62 N. Y. 133.

§ 315. County wherein action may be brought by attorney-general on behalf of the people.—An action or proceeding brought by the attorney-general on behalf of the people of the state against any corporation for

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the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general.

Source.—L. 1883, ch. 378, § 1, in part, as amended by L. 1896, ch. 282. For remainder of section, see §§ 108, 183, ante.

Consolidators' note.—This provision of the statute of 1883 has been incorporated in this article because it relates to actions or proceedings brought by the attorney-general "against any corporation for the purpose of procuring its dissolution, the appointment of a receiver or the sequestration of its property."

§ 316. Preferences in actions or proceedings by or against receivers.—

All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this chapter, shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the state of New York.

Source.—L. 1883, ch. 378, § 10.

Reference.—See note under § 239, ante, as to actions by and against receivers.

ARTICLE XIII.

ALTERATION AND REPEAL OF CHARTER OF CORPORATION.

Section 320. Alteration and repeal of charter.

321. Conflicting corporate laws.

§ 320. Alteration and repeal of charter.—The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 40, as added by L. 1895, ch. 672.

Note.—This provision was in the Revised Statutes of 1828 but was not included in the Constitution (art. 8, § 1) until 1846. It was repealed in 1890, but it was thought that the legislature might thereby relinquish its rights as to corporations organized subsequent to the Revised Statutes and prior to 1846. It was, therefore, re-enacted in 1895.

Rights of legislature to amend.—See, generally, *Lord v. Equitable Life Assur. Soc.* (1909), 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420; *Pratt Institute v. City of New York* (1905), 183 N. Y. 151, 72 N. E. 1119; *People ex rel. D. & H. Co. v. Pub. Service Com.* (1910), 140 App. Div. 839; *Bush v. New York Life Ins. Co.* (1909), 135 App. Div. 447, 119 N. Y. Supp. 796; *Colby v. Equitable Trust Co.* (1908), 124 App. Div. 262, 108 N. Y. Supp. 978, *affd.* (1908), 192 N. Y. 535, 84 N. E. 1111.

Special charter may be amended by general act which does not refer specifically to such charter. *N. Y. C. etc., R. Co. v. Williams* (1910), 199 N. Y. 108, 119, 92 N. E. 404, 35 L. R. A. (N. S.) 549.

Exemption from taxation.—Legislative power to amend a corporate charter, where it exists at all—whether by virtue of a State Constitution or general law, includes right to repeal a provision exempting corporate property from taxation. *People ex rel. Cooper Union v. Gass* (1907), 190 N. Y. 323, 328, 83 N. E. 64.

§ 321. Conflicting corporate laws.—If in any corporate law there is or

§§ 330, 331.

Laws repealed.

L. 1909, ch. 28.

shall be any provision in conflict with any provisions of this chapter or of the stock corporation law, the provisions so conflicting shall prevail and the provision of this chapter or of the stock corporation law with which it conflicts shall not apply in such a case. If in any such law there is or shall be a provision relating to a matter embraced in this chapter or in the stock corporation law, but not in conflict with it, such provision in such other law shall be deemed to be in addition to the provision in this chapter or in the stock corporation law relating to the same subject-matter, and both provisions shall, in such case, be applicable.

Source.—Former Gen. Corp. L. (L. 1890, ch. 563) § 33, as added by L. 1892, ch. 687.

References.—Corporate law defined, § 3, subd. 11, ante. See note to § 1, ante.

Corporation legislation.—The enactment of the General Corporation Law, the Stock Corporation Law and the Banking Law at the same time shows an intention to provide one consistent scheme of legislation, relating to corporations. *Gause v. Boldt* (1906), 49 Misc. 340, 99 N. Y. Supp. 442, *affd.* (1906), 115 App. Div. 897, 100 N. Y. Supp. 1118, *affd.* (1907), 188 N. Y. 546, 80 N. E. 568.

Where there is a conflict between the provisions of the Banking Law and the Stock Corporation Law, the provisions of the former will prevail; but in the absence of such conflict the provisions of the latter are applicable. *Stramann v. Yorkville Bank* (1911), 148 App. Div. 8, 132 N. Y. Supp. 130, *affd.* (1913), 210 N. Y. 536, 103 N. E. 1133.

Under this section, sections 16 and 17 of the Stock Corporation Law being in conflict with section 104 of the Transportation Corporation Law, the latter must prevail. *Matter of Bronson* (1917), 177 App. Div. 374, 164 N. Y. Supp. 179.

ARTICLE XIV.

LAWS REPEALED; CONSTRUCTION; WHEN TO TAKE EFFECT.

Section 330. Laws repealed.

331. Construction.

332. When to take effect.

§ 330. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Portions excepted from repeal are not engrafted upon the law to which the repealing schedule is attached. *Matter of Sampson* (1897), 22 Misc. 198, 49 N. Y. Supp. 576, *affd.* (1898), 33 App. Div. 49, 53 N. Y. Supp. 531, *affd.* (1900), 161 N. Y. 511, 56 N. E. 9.

§ 331. **Construction.**—Nothing in this chapter shall be construed to impair any right or liability which any existing corporation, its officers, directors, stockholders or creditors may have or be subject to or which any such corporation, other than a railroad corporation, had or was subject to on the date when this chapter takes effect, by virtue of any special act of the legislature creating such corporation or creating or defining any such right or liability, unless such special act is repealed by this chapter or the other general laws hereinbefore mentioned.

Consolidators' note.—This section was originally taken from L. 1890, ch. 563, §

L. 1903, ch. 28.

Laws repealed.

§ 332.

25, and made § 36 by L. 1892, ch. 637. The wording of the section has been changed, but only so as to conform the language to its re-enactment. The date "April 30, 1891," which was the date fixed for the taking effect of the old law, has been omitted, and in its place have been substituted the words "the date when this chapter takes effect," as the exact date is now uncertain and there is no real necessity for fixing a date definitely. The time of the taking effect of the act will be certain enough and serve all useful purposes. This change brings the provisions of the act down to date without change of substance. Bracketed matter is omitted because covered by General Construction Law, §§ 80, 95, 101.

§ 332. When to take effect.—This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part 1, chapter 18,	All
Revised Statutes.....	Part 3, chapter 8, title 4, sections	2, 43
Revised Statutes.....	Part 3, chapter 8, title 4, article 3, §§.....	66-91

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1811	67	All	1851	98	All
1811	235	All	1851	107	All
1813	78	All	1851	487	All
1815	47	All	1851	497	All
1815	202	All	1852	228	All
1816	58	All	1852	372	All
1817	223	All	1853	53	All
1818	67	All	1853	117	All
1819	102	All	1853	124	All
1821	14	All	1853	135	All
1822	213	All	1853	245	All
1825	325	4-11,	1853	333	All
13, 14, 17, 18	21	1,	1853	471	1, 2, 4
1828	76, 77, 457 (2d Meet.)	All	1853	481	All
1836	284	All	1853	502	All
1836	316	All	1853	626	All
1838	160	All	1854	3	All
1838	161	All	1854	87	All
1838	262	All	1854	140	All
1839	218	All	1854	201	All
1842	166	All	1854	232	All
1846	155	All	1854	269	All
1846	215	17, 18	1854	282	All
1847	100	3, 4	1854	312	All
1847	210	All	1855	301	All
1847	222	All	1855	302	All
1847	270	All	1855	390	All
1847	272	All	1855	478	All
1847	287	All	1855	485	All
1847	398	All	1855	496	All
1847	404	All	1855	546	All
1847	405	All	1855	559	All
1848	37	All	1856	65	All
1848	40	All	1857	29	All
1848	45	All	1857	83	All
1848	140	All	1857	185	All
1848	269	All	1857	202	All
1848	265	All	1857	262	All
1848	360	All	1857	444	All
1849	250	All	1857	546	All
1849	362	All	1857	558	All
1850	71	All	1857	643	All
1850	140	All	1857	776	All
1851	14	All	1858	10	All
1851	19	All	1858	125	All
			1858	348	All

Laws repealed.

L. 1909, ch. 28.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1859	209	All	1871	481	All
1859	311	All	1871	536	All
1859	455	All	1871	560	All
1860	116	All	1871	652	All
1860	269	All	1871	657	All
1860	523	All	1871	669	All
1861	149	All	1871	697	All
1861	170	All	1871	883	All
1861	215	All	1872	81	All
1861	238	All	1872	128	All
1862	205	All	1872	146	All
1862	248	All	1872	248	All
1862	425	All	1872	283	All
1862	438	All	1872	350	All
1862	449	All	1872	374	All
1862	472	All	1872	426	All
1863	63	All	1872	609	All
1863	134	All	1872	611	All
1863	346	All	1872	779	All
1864	85	All	1872	780	All
1864	337	All	1872	820	All
1864	517	All	except 20		
1864	582	All	1872	829	All
1865	234	All	1872	843	All
1865	246	All	1873	151	All
1865	307	All	1873	352	All
1865	691	All	1873	432	All
1865	780	All	1873	440	All
1866	73	All	1873	469	All
1866	259	All	1873	616	All
1866	322	All	1873	634	All
1866	371	All	1873	710	All
1866	697	All	1873	737	All
1866	780	All	1873	814	All
1866	799	All	1874	76	All
1866	838	All	1874	143	All
1867	12	All	1874	149	All
1867	49	All	1874	240	All
1867	248	All	1874	288	All
1867	254	All	1874	430	All
1867	419	All	1875	4	All
1867	480	All	1875	58	All
1867	509	All	1875	88	All
1867	775	All	1875	108	All
1867	906	All	1875	113	All
1867	937	All	1875	119	All
1867	960	All	1875	120	All
1867	971	All	1875	159	All
1867	974	All	1875	193	All
1868	253	All	1875	256	All
1868	290	All	1875	319	All
1868	573	All	1875	343	2, 4, 8
1868	781	All	1875	365	All
1869	234	All	1875	445	All
1869	237	All	1875	510	All
1869	605	All	1875	586	All
1869	706	All	1875	598	All
1869	844	All	1875	606	All
1869	917	All	1875	611	All
1870	124	All	1876	77	All
1870	135	All	1876	135	All
1870	322	All	1876	190	All
1870	443	All	1876	198	All
1870	568	All	1876	280	All
1870	773	All	1876	353	All
1871	95	All	1876	373	All

L. 1909, ch. 28.

Laws repealed.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1876	415	All	1880	583	All
1876	435	All	1880	585	All
1876	446	All	1881	22	All
1877	103	All	1881	58	All
1877	158	All	1881	77	All
1877	164	All	1881	116	All
1877	171	All	1881	117	All
1877	224	All	1881	148	All
1877	266	All	1881	213	All
1877	311	All	1881	232	All
1877	374	All	1881	295	All
1878	35	All	1881	296	All
1878	61	All	1881	311	All
1878	85	All	1881	313	All
1878	121	All	1881	321	All
1878	163	All	1881	337	All
1878	203	All	1881	338	All
1878	210	All	1881	351	All
1878	261	All	1881	399	All
1878	264	All	1881	422	All
1878	316	All	1881	464	All
1878	334	All	1881	468	All
1878	394	All	1881	470	All
1879	214	All	1881	472	All
1879	253	All	1881	485	All
1879	290	All	1881	551	All
1879	293	All	1881	589	All
1879	350	All	1881	639	All
1879	377	All	1881	649	All
1879	393	All	1881	650	All
1879	395	All	1881	674	All
1879	413	All	1881	685	All
1879	415	All	1882	73	All
1879	441	All	1882	82	All
1879	503	All	1882	140	All
1879	505	All	1882	273	All
1879	512	All	1882	289	All
1879	541	All	1882	290	All
1880	5	All	1882	306	All
1880	85	All	1882	309	All
1880	90	All	1882	331	All
1880	94	All	1882	349	All
1880	113	All	1882	353	All
1880	133	All	1882	393	All
1880	155	All	1882	405	All
1880	182	All	1883	46	All
1880	187	All	1883	71	All
1880	223	All	1883	102	All
1880	225	All	1883	216	All
1880	241	All	1883	232	All
1880	245	1,	1883	237	All
§ 3, subd. 5, part relating to receivers appointed as prescribed in Code Civil Procedure, § 2429			1883	238	All
1880	254	All	1883	240	All
1880	263	All	1883	287	All
1880	267	All	1883	323	All
1880	349	All	1883	361	All
1880	415	All	1883	378	All
1880	417	All	1883	381	All
1880	474	All	1883	382	All
1880	484	All	1883	384	All
1880	510	All	1883	386	All
1880	537	All	1883	387	All
1880	575	All	1883	388	All
1880	582	All	1883	409	All
			1883	482	All
			1883	483	All

Laws repealed.

L. 1909, ch. 23.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1883	497	All	1888	549	All
1884	140	All	1888	560	All
1884	193	All	1889	57	All
1884	208	All	1889	76	All
1884	223	All	1889	78	All
1884	252	All	1889	236	All
1884	267	All	1889	242	All
1884	285	1	1889	281	All
1884	367	All	1889	332	All
1884	386	All	1889	369	All
1884	397	All	1889	426	All
1884	421	All	1889	519	All
1884	422	All	1889	524	All
1884	439	All	1889	531	All
1884	441	All	1889	532	All
1884	444	All	1889	564	All
1885	40	All	1890	23	All
1885	84	All	1890	98	All
1885	127	All	1890	119	All
1885	141	All	1890	193	All
1885	153	All	1890	292	All
1885	171	All	1890	416	All
1885	305	All	1890	421	All
1885	369	All	1890	483	All
1885	422	All	1890	497	All
1885	423	All	1890	506	All
1885	489	All	1890	508	All
1885	498	All	1890	543	All
1885	535	All	1890	563	All
1885	540	All	1891	34	Part
1885	549	All	relating to appraisal of property of insolvent corporations		
1886	65	All	1891	38	All
1886	182	All	1891	57	All
1886	271	All	1891	297	All
1886	275	All	1892	2	All
1886	310	All	1892	19	All
1886	321	All	1892	687	All except 37
1886	322	All	1894	136	All
1886	403	All	1894	400	All
1886	415	All	1895	872	All
1886	509	All	1896	139	All
1886	551	All	1896	282	All
1886	579	All	1896	922	1
1886	586	All	part adding § 57 to L. 1892, ch. 688		
1886	592	All	1898	522	Part
1886	601	All	relating to receivers of corporations		
1886	605	All	1898	534	All
1886	634	All	1899	201	All
1886	642	All	1900	177	All
1887	450	All	1900	704	All
1887	486	All	1900	723	All
1887	536	All	1900	760	All
1887	570	All	1901	96	All
1887	601	All	1901	214	All
1887	616	All	1901	355	All
1887	622	All	1901	506	All
1887	724	All	1901	538	All
1888	189	All	1902	9	All
1888	306	All	1902	60	All
1888	313	All	1902	285	All
1888	359	All	1903	178	All
1888	394	All	1904	236	All
1888	447	All	1904	296	All
1888	482	All	1904	490	All
1888	513	All	1904	705	All
1888	514	All			

L. 1909, ch. 28.

Consolidators' notes.

LAWS OF	CHAPTER	SECTION	Code Civil Procedure	432,
1904	737	All	subd. 2, from words "by a writing"	
1904	754	All	to "an authentication"; 716, pt. re-	
1905	256	All	lating to corporations; 1781-1808;	
1906	228	All	1809, pt. relating to corporations;	
1906	239	All	1810, 1811; 1812, 1813, pt. relating to	
1906	349	All	corporations; 2411; 2412-2414, pt. re-	
1906	531	All	lating to corporations; 2415, 2416,	
1907	115	All	2419-2431-b; 3390-3396, pt. relating to	
1908	457	All	corporations	

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

R. S., pt. 3, ch. 8, tit. 4, art. 3, §§ 66-91.—Sections 66-91 contained the provisions relating to the powers and duties of receivers in proceedings for the voluntary dissolution of a corporation which are made applicable to actions for the dissolution of a corporation and the sequestration of its property. Sections 90-91 were repealed by L. 1880, ch. 245, § 1, ¶ 3. Sections 66-89 were continued by chapter 45 of the Laws of 1880 (§ 1, ¶ 3, subd. 5) in the following language: "Sections 66-89 both inclusive which are hereby made applicable to a receiver appointed as prescribed in § 2429 of the Code of Civil Procedure." The sections of the Revised Statutes referred to, except §§ 68, 71, 73, 76 and 86, are consolidated in General Corporation Law, §§ 231, 232, 234, 244, 250, 251, 253, 254, 256, 257, 261-265, 267, 269-274, 276. For disposition of § 68, see note to § 239; for § 71, see note to § 93; for § 73, see note to § 241; for § 86, see note to § 268. Section 76 was repealed by L. 1906, ch. 349, § 3.

As the statutes covered by express repealing acts have been repealed by the consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1858, ch. 348.—Consolidated in General Corporation Law, § 107.

L. 1871, ch. 652.—Section 1 of this act permits the filing in the office of the secretary of state of certified copies of certificates of incorporation, the originals of which had been destroyed by fire in 1871, after having been filed. Section 2 authorizes certified copies of such refiled certificates to be used in evidence with the same effect as if they were copies of originals.

The purpose of this act was to make good the loss of certificates destroyed by fire. Section 1 is no longer necessary, as § 8 of the Consolidated General Corporation Law permits the filing of certified copies of lost or destroyed certificates, and 2 is also unnecessary and obsolete as § 933 of the Code of Civil Procedure permits certified copies of papers filed in pursuance of law to be used in evidence. The whole act is, therefore, obsolete.

L. 1877, ch. 311.—Relates to admission in evidence of certified or exemplified copies of certificates of incorporation or other papers of foreign corporations. Consolidated in General Corporation Law, § 9.

L. 1880, ch. 245, § 1, ¶ 3, subd. 5, pt.—This is a statute which continued the provisions relating to the powers and duties of receivers contained in the Revised Statutes and made them applicable to receivers appointed as provided in § 2429 of the Code of Civil Procedure relating to the voluntary dissolution of a corporation. The provisions of the Revised Statutes having been consolidated in this chapter this portion of the laws of 1880 is no longer necessary and may be repealed.

L. 1880, ch. 474.—Empowers any corporation created by act of congress for holding an international exhibition in this state to enter upon and condemn land necessary for holding an international exhibition. It was enacted for this special purpose, and as there is no longer any international exhibition, such as is contemplated by the act, now in prospect, the act is inoperative and obsolete.

L. 1880, ch. 537.—Section 1 was amended "to read as follows" by L. 1881, ch. 39, § 1. Section 2 is consolidated in General Corporation Law, § 248. Sections 3, 4 and 5 were amended "to read as follows" by L. 1881, ch. 331, §§ 1, 2.

L. 1881, ch. 639.—Consolidated in General Corporation Law, § 248.

L. 1882, ch. 331.—Relates to receivers of insolvent corporations. Covered by L. 1883, ch. 378, §§ 7 and 8, which have been consolidated in General Corporation Law, §§ 311 and 312.

L. 1883, ch. 378.—Sections 1 and 9 were amended "to read as follows" by L. 1896, ch. 282, §§ 1, 2. Section 2 was amended "to read as follows" by L. 1886, ch. 275, § 1. Section 2a was added by L. 1906, ch. 349, § 2, and has been consolidated in § 242. Section 4 was amended "to read as follows" by L. 1885, ch. 40, § 1. Section 3 is consolidated in General Corporation Law, § 313. Section 5 is consoli-

dated in § 242. Section 6 is repealed as temporary. Sections 7 and 8 are consolidated in §§ 311, 312. Section 10 is consolidated in § 316.

L. 1884, ch. 235, § 1.—Consolidated in General Corporation Law, § 233.

L. 1886, ch. 310.—This statute is entitled "An act to provide for the winding up of corporations which have been annulled and dissolved by legislative enactment." It has not been consolidated because it has been declared unconstitutional in *People v. O'Brien*, 111 N. Y. 1. In that case, Ruger, Ch. J., after speaking of L. 1886, ch. 271, declaring it unconstitutional and void, says: "These remarks apply with equal force to chapter 310." * * * "These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Company, as the provision for bringing an action by the attorney-general to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme, that it cannot be supposed it would have been enacted except in connection with the other provisions of the act. We, therefore, think this law is obnoxious to the objection, that it assumes to take property without due process of law, and impairs the obligation of contracts." * * * Andrews and Earl, J. J., concur in the result upon these grounds: "(1) The annulling act is constitutional and valid, and its effect was only to take the life of the corporation. (2) All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts, with other railway companies survived. (3) The act, chapter 271, is unconstitutional. (4) That act and the act, chapter 310, are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation. (5) As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance; and, therefore, the judgment should be reversed and complaint dismissed."

L. 1886, ch. 403.—The "old" General Corporation Law purported to repeal L. 1887, ch. 403, but L. 1886, ch. 403 was intended. This act has been previously repealed by L. 1890, ch. 565, § 180.

L. 1887, ch. 601.—Amends L. 1886, ch. 310, § 10. L. 1886, ch. 310, is recommended for repeal because unconstitutional. This statute should therefore be repealed. See note 73.

L. 1891, ch. 34, pt. relating to appraisal of property of insolvent corporations.—Consolidated in General Corporation Law, § 310.

L. 1892, ch. 19, § 4.—Consolidated in General Corporation Law, § 6.

L. 1892, ch. 687.—All except § 37. This act amends the "old" General Corporation Law (L. 1890, ch. 563) generally. All except § 37 is recommended for repeal because its live provisions have been incorporated in the General Corporation Law. Section 37 is classified as special.

L. 1894, ch. 186.—Consolidated in General Corporation Law, § 21.

L. 1894, ch. 400.—Consolidated in General Corporation Law, § 12.

L. 1895, ch. 672.—This act amended several sections of L. 1892, ch. 687, and also added three new sections (38, 39, and 40).

The amendments to §§ 3, 4, 9, 10, 11, and 16, and the added §§ 38, 40 are consolidated in General Corporation Law without change of numbering, except that the numbering of the added sections mentioned is changed to 42 and 220, respectively. Sections 5, 6, 22 and 39 have been amended "to read as follows."

L. 1896, ch. 159.—Consolidated in General Corporation Law, §§ 242, 249.

L. 1896, ch. 222.—Consolidated in General Corporation Law, §§ 108, 183, 314, 315.

L. 1896, ch. 522, as to receivers of corporations. Consolidated in General Corporation Law, § 246.

L. 1896, ch. 534.—Consolidated in General Corporation Law, § 240.

L. 1899, ch. 201.—Consolidated in General Corporation Law, § 9.

L. 1900, ch. 733.—Consolidated in General Corporation Law, §§ 17-19.

L. 1900, ch. 760.—This statute amends L. 1896, ch. 222, § 1, which added § 5 to the Stock Corporation Law. Relates to dissolution of stock corporations. Consolidated in General Corporation Law, § 221.

L. 1901, ch. 355.—Section 1 of this act amends several sections of the General Corporation Law. The amendment to § 20 is consolidated in General Corporation Law, but is split up into three sections and appears in law as §§ 23, 24 and 25.

The amendments to §§ 22 and 39 are consolidated in General Corporation Law as §§ 27 and 43, respectively.

The amendment to § 32 is superseded by L. 1905, ch. 356, which amends to read as follows.

L. 1909, ch. 28.

Consolidators' notes.

Section 2 is a saving clause of rights accrued prior to amendments last noted. This saving clause is no longer necessary, as it is covered by the General Construction Law.

L. 1902, ch. 60.—Consolidated in General Corporation Law, §§ 150-160. Section 4 was amended "to read as follows" by L. 1904, ch. 705.

L. 1902, ch. 255.—Consolidated in General Corporation Law, § 5.

L. 1903, ch. 178.—Consolidated in General Corporation Law, § 14.

L. 1904, ch. 236.—Consolidated in General Corporation Law, § 22.

L. 1904, ch. 296.—This statute added § 61 to the Stock Corporation Law. Relates to dissolution of stock corporations by incorporators. Consolidated in General Corporation Law, § 220.

L. 1904, ch. 490.—Consolidated in General Corporation Law, § 15.

L. 1904, ch. 737.—Consolidated in General Corporation Law, § 34.

L. 1904, ch. 754.—Section 1 consolidated in General Corporation Law, § 155. Section 2 consolidated in § 158. Section 3 consolidated in § 160; and section 4 consolidated in § 155.

L. 1905, ch. 256.—Split up into five sections and consolidated in General Corporation Law, §§ 37-41, without change of substance and new headings added.

L. 1906, ch. 228.—Consolidated in General Corporation Law, § 13.

L. 1906, ch. 239.—Consolidated in General Corporation Law, § 44.

L. 1906, ch. 349.—Section 1 consolidated in General Corporation Law, § 278. Section 2 consolidated in § 242. Section 3 is a repealing section, and the repeal has been noted in the schedule.

L. 1906, ch. 531.—Consolidated in General Corporation Law, § 5.

L. 1907, ch. 115.—Consolidated in General Corporation Law, § 6.

L. 1862, ch. 472.—L. 1892, ch. 687, § 34, purported to repeal L. 1823, ch. 472. There were but 269 chapters enacted in 1823 and they were numbered consecutively from 1 to 269. Inasmuch as the repeal of L. 1823, ch. 472, was placed between the repeal of L. 1862, ch. 449, and L. 1863, ch. 63, the probable intent was to repeal L. 1862, ch. 472, an act amending the act authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes.

L. 1863, ch. 134.—L. 1892, ch. 687, § 34, purporting to repeal L. 1866, ch. 134, an act to repeal an act authorizing the common council of Buffalo to procure certain printing and advertising to be done for said city. The repeal is between that of L. 1863, ch. 63, and L. 1863, ch. 346. The probable intent was to repeal L. 1863, ch. 134, an act amending an act for the incorporation of companies to navigate the lakes and rivers.

Code Civil Procedure.—The following sections of the Code of Civil Procedure are consolidated in General Corporation Law as follows:

Code Sec.	Sec.	Code Sec.	Sec.
432, subd. 2, pt.	in 16	1804	in 300
715	in 225, 226, 227	1805	in 301
716 pt.	in 243	1806	in 302
1781	in 90	1807	in 303
1782	in 91	1808	in 304
1783	in 92	1809 pt.	in 305
1784	in 100	1810	in 306
1785	in 101	1811	in 307
1786	in 102	1812 pt.	in 308
1787	in 103	1813 pt.	in 309
1788	in 104, 106	2411	in 60
1789	in 105	2412 pt.	in 61
1790	in 109	2413 pt.	in 62
1791	in 110	2414 pt.	in 63
1792	in 111	2415	in 64
1793	in 112	2416	in 65
1794	in 113	2419	in 170
1795	in 114	2420	in 171-173
1796	in 115	2421	in 174
1797	in 130	2422	in 175
1798	in 131	2423	in 176, 178, 181, 182, 184
1799	in 132	2424	in 179
1800	in 133	2425	in 180
1801	in 134	2426	in 185-187
1802	in 135	2427	in 188, 189
1803	in 136		

Consolidators' notes.

L. 1909, ch. 28.

'Code	Sec.	Code	Sec.
2428	in 190	3391 pt.	in 71
2429	in 191, 192, 194	3392 pt.	in 72
2430	in 193	3393 pt.	in 72, 73
2431	in 177, 195	3394 pt.	in 74
2431-a	in 277	3395 pt.	in 75
2431-b	in 268	3396 pt.	in 76
3390 pt.	in 70		

Table showing the disposition of R. S., pt. 2, ch. 5, tit. 1, art. 8, in General Corporation Law.

R. S.	Sec.	R. S.	Sec.
1	Note to § 231	38	Note to § 257
2	§ 235	39	§ 260
3	in 236	40	Note to § 263
4	§ 237	41	Note to § 262
5	§ 238	42	§ 266
6	Note to § 232	43	Note to § 264
7	§ 239	44	Note to § 264
8	§ 250	45	Note to § 268
9	Note to § 250	46, pt.	Note to § 273
10	§ 239	46, pt.	Note to § 276
11	§ 252	47	Note to § 276
12-17	Note to § 240	48	Note to § 274
18	Note to § 276	49	§ 275
19-25	§ 241	50	Note to § 275
26, pt.	§ 245	51	§ 275
26, pt.	§ 247	52	§ 275
27	§ 253	53	§ 275
28, pt.	§ 254	54	§ 275
29	§ 255, Note to § 277	55	§ 275
30	Note to § 276	56	§ 275
31	Note to § 257	57	Note to § 275
32	§ 261	58	Note to § 275
33	Note to § 257	59	Note to § 275
34	§ 261	60	§ 275
35	§ 258	61	Note to § 275
36	§ 259	62	§ 275
37	§ 259		

Table showing disposition of R. S., pt. 3, ch. 8, tit. 4, art. 3, §§ 66-89, in Consolidated General Corporation Law.

R. S.	Sec.	R. S.	Sec.
66, pt.	§ 234	80	§ 263
67, pt.	§§ 231, 232	81, pt.	§ 262
68	Note to § 239	81, pt.	§ 263
69	§ 244	82	§ 267
70	§ 250	83	§ 264
71	Note to § 193	84	§ 265
72, pt.	§ 251, Note to § 240	85, pt.	§ 273
73	Note to § 241	85, pt.	§ 274
74, pt.	§§ 253, 254	85, pt.	§ 276
74, pt.	Note to § 253	86	Note to § 268
75	§ 256	87	§ 269
76	Note to § 277	88	§ 271
77	§ 257	89, pt.	§ 270
78	§ 257	89, pt.	§ 272
79	§ 261		

Table showing the disposition of sessions laws consolidated in General Corporation Law.

L.	Ch.	§	Sec.	L.	Ch.	§	Sec.
1858	348	1	107	1881	639	1	248
1862	373	1, 4	241	1883	378	1	108, 183, 315
1877	311	1	9	1883	378	2	278
1880	537	1, 2	248	1883	378	2-a	242
1880	537	3, 4	Note to § 248	1883	378	3	313

L. 1909, ch. 28.

Consolidators' notes.

L.	Ch.	§	Sec.	L.	Ch.	§	Sec.
1883	378	4, pt.	242	1900	760	1	231
1883	378	5	242	1901	96	1	15
1883	XVI	7	311	1901	214	1	34
1883	378	8	312	1901	355	1	23-25, 27, 37, 38-41, 43
1883	378	9	314	1901	506		278
1883	378	10	315	1901	538	1	15
1884	285	1	233	1902	9	1	6
1885	40	1	249	1902	60		art. 8
1886	275		278	1902	285	1	5
1886	310	General Note.		1903	178	1	14
1890	564	57	221	1904	236	1	22
1890	564	61	220	1904	296	1	220
1891	34	1	310	1904	490	1	15
1892	19	4	6	1904	705	1	154
1894	136	1	21	1904	737	1	24
1895	672	1	3-6, 9-12, 16, 21, 27	1904	754	1	155
1895	672	2	42, 43, 320	1904	754	2	158
1896	139	1	242, 249	1904	754	3	160
1896	282	1	108, 183, 315	1904	754	4	155
1896	282	2	314	1905	256	1	37-41
1896	332	1	221	1906	228	1	13
1898	522	1	246	1906	239	1	44
1898	534	1-5	240	1906	349	1	278
1899	201	1	9	1906	349	2	242
1900	177	1	37-41	1906	349	3	Note to Schedule
1900	704	1	6	1906	531	1	5
1900	733	1	17	1907	116	1	6
1900	733	2	18	1907	476	1	241
1900	733	3	19				

GENERAL HIGHWAY TRAFFIC LAW.

L. 1917, ch. 655.—An act to provide for the uniform regulation of vehicles, animals and pedestrians on any public highway in the state, constituting chapter seventy of the consolidated laws.

(In effect May 25, 1917.)

CHAPTER LXX OF THE CONSOLIDATED LAWS.**GENERAL HIGHWAY TRAFFIC LAW.**

- Article 1. Short title; definitions; application (§§ 1-3).
2. Use of highways regulated (§§ 10-22).
3. Penalties; miscellaneous provisions (§§ 30-32).

ARTICLE I.**SHORT TITLE; DEFINITIONS.**

- Section 1. Short title.
2. Definitions.
3. Application.

Section 1. Short title.—This chapter shall be known as the “general highway traffic law.”

§ 2. Definitions.—The following terms whenever used in this chapter, except as otherwise specifically indicated, shall be defined to mean and shall be held to include each of the meanings herein below specifically set forth, and any such term used in the singular number shall be held to include the plural:

“Public highway” shall include any highway, country road, state highway, state road, public street, avenue, alley, park, parkway, or driveway, in any city, town or village within the state.

“Street” or “roadway” shall include that part of the public highway or a bridge intended for vehicles.

“Curb” shall include the boundaries of the street, whether marked by curb stone or not so marked.

“Crossing” shall include all crossings marked by a pavement or otherwise and the extension of the sidewalk space across intersecting streets.

“Street intersection” shall include the area bounded by the side lines, real or projected, of two or more streets which meet or cross each other.

“Vehicle” shall include a horse and every kind of conveyance, except a baby carriage, a street surface car and a push cart.

“Motor vehicle” shall include all vehicles propelled by any power other than muscular power, which do not run upon a rail or rails.

"Motorcycle" shall include all motor vehicles designed to travel on not more than three wheels in contact with the ground.

"Horse" shall include all domestic animals used as draught animals or beasts of burden.

"Driver" shall include a person who propels or operates or who is in charge of a vehicle.

"Pedestrian" shall include all persons making use of public highway for foot passage.

"One-way traffic" is traffic restricted to one direction.

"Parking space" shall mean that part of any street designated by local ordinance or regulation as a place for the standing of vehicles.

"City" or "village" shall include that portion of a county which is within the limits of an incorporated city or village, and "town" shall include all portions of the county outside the limits of an incorporated city or village.

"Reckless driving" for the purpose of this chapter shall include driving or using a vehicle or street surface car or any appliance or accessory thereof in a manner which unnecessarily interferes with the free and proper use of the highway, or unnecessarily endangers users of the highway.

"Safety zone" shall mean such space within a street or public highway as shall be established for persons on foot.

§ 3. Application.—The provisions of this chapter shall not apply to the city of New York.

ARTICLE II.

USE OF HIGHWAYS REGULATED.

Section 10. Pedestrians.

11. Stopping, turning, passing and waiting of vehicles.
12. Right of way and operation of vehicles.
13. Signals.
14. Speed regulations.
15. Parking, safety zones and cab stands.
16. Loading and unloading vehicles.
17. Vehicles.
18. Street surface cars.
19. Motorcycles, bicycles and similar vehicles.
20. Miscellaneous regulations.
21. Duties of local authorities.
22. Powers of local authorities.

§ 10. Pedestrians.—Pedestrians walking upon the traveled part of a street and not the sidewalk shall, when meeting or passing vehicles, be subject to and comply with the rules governing vehicles as to meeting, turning out and passing, except as to signals.

§ 11. Stopping, turning, passing, and waiting of vehicles.—1. A

vehicle turning into another street to the right shall turn the corner as near the right-hand curb as practicable.

2. A vehicle turning to the left into another street, shall, before turning, pass to the right of and beyond the center of the intersecting streets; provided, however, that if directed by a traffic officer the vehicle shall pass in front of instead of around the point of intersection.

3. In turning a corner of intersecting streets a vehicle shall be driven with extreme caution and under control.

4. A vehicle passing around a circle shall keep to the right from entrance to exit.

5. Vehicles turning around or crossing from one side of the street to another, except for the purpose of passing other vehicles or because of dangers in the streets, shall do so by turning to the left so as to head in the general direction of traffic after they have crossed the street.

6. A vehicle in overtaking or meeting a street surface car which has been stopped for the purpose of receiving or discharging a passenger or passengers, shall not pass or approach within seven feet of such car so long as such car is receiving or discharging passengers, except that in a city having a million or more population such vehicle shall not pass or approach within eight feet of such car except as indicated by a safety zone. In passing any street surface car extreme care must be used by the driver.

7. On an avenue, street or boulevard divided longitudinally by a parkway, walk, space for street surface cars, viaduct, zone of safety, cab stand, parking space or other similar obstructions, vehicles shall keep to the right of such division.

§ 12. **Right of way and operation of vehicles.**—1. When in the performance of duty the following vehicles shall have the right of way: United States mail, police, fire, fire patrol, bureau of buildings, emergency repair of public service corporations, ambulances and the military; but this shall not relieve the driver or owner of any such vehicle from consequences of the arbitrary or careless exercise of this right for injuries inflicted.

2. No vehicle and no street surface car, except as provided in subdivision one of this section, shall be driven through a procession, except with the permission or by order of a police officer. If the procession takes more than five minutes to pass, it shall be broken and traffic allowed to go through.

3. Two vehicles which are passing each other in opposite directions shall have the right of way, and, except in cities and villages, no other vehicle to the rear of either of such two vehicles shall pass or attempt to pass such two vehicles while they are passing each other.

4. Every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right; provided, that wherever traffic officers are stationed they shall have full power to regulate traffic.

5. A vehicle must not be so driven as to impede or obstruct the progress of the apparatus of the fire department or any official or employee of a city, town or village in the discharge of his duty at a fire. The driver of a vehicle must not drive through or within the established fire lines or over a line of fire hose. On the approach of fire apparatus, as evidenced by suitable and continuous warning or by street signals operated from fire headquarters, visible or audible one to another, indicating the route of the apparatus, the driver of a vehicle must immediately draw up such vehicle as near as practicable to the right-hand curb and parallel thereto, and bring it to a standstill, and the driver of a street car must immediately stop his car and keep it stationary until the apparatus has passed.

6. The vehicle having the middle line of the highway on its left shall have the right of way. In meeting both vehicles shall keep to the right, so as to insure safe passage, and this without regard to the middle line of the highway. Slowly moving vehicles must move as near to the curb as practicable; rapidly moving vehicles must occupy the space lying immediately next to and parallel with the middle of the highway.

7. A vehicle overtaking another vehicle shall pass on the left side of the overtaken vehicle and not pull over to the right thereof until entirely clear of it.

8. The driver of an overtaking vehicle shall signal his desire to pass an overtaken vehicle by a blast or stroke of the horn or other signaling device, and thereupon it shall be the duty of the overtaken vehicle, if possible, to turn to the right so as to allow the overtaking vehicle a reasonable space in which to pass, or to warn by signal the impossibility of such passage.

9. It shall be unlawful for any person to drive a vehicle within a safety zone.

10. In all passing and overtaking such assistance shall be given by the occupants of each vehicle respectively to the other as the circumstances shall demand and either request by voice or signal, and each shall exercise care and caution to get clearance and avoid accident.

11. No vehicle shall emerge from an alley, stable, garage or driveway except slowly and under control of the driver who shall give a proper warning by voice or signaling device to passing vehicles and pedestrians.

12. The use of a motor muffler cut-out is prohibited on any highway within the limits of a city or incorporated village.

13. Gong and siren whistles shall not be used on any vehicle other than ambulances and vehicles operated by a police department, fire department, sheriff, authorized public utility company when on emergency calls and the United States mail and military services.

14. A person operating or driving a motor vehicle shall on signal by raising the hand or otherwise from a person driving, leading or riding a horse or horses or other draft animal, bring such motor vehicle immediately to a stop, and if traveling in the opposite direction remain stationary

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so long as may be reasonable to allow such horse or animal to pass, and if traveling in the same direction use reasonable caution in thereafter passing such horse or animal.

§ 13. **Signals.**—1. Before turning to the right or left and, except in an emergency, before decreasing speed or stopping the driver shall warn those following either by holding his arm straight out, horizontal and at right angles to the car, or by operating an adequate mechanical signal device.

2. Upon approaching a pedestrian who is on the traveled part of any street and not upon a sidewalk, and upon approaching an intersecting street or a curve or a corner in the street where the driver's view is obstructed and where a traffic officer is not on duty, every driver of a vehicle shall slow down the same and give a timely and sufficient signal with his voice, horn or other signaling device.

3. The driver of a vehicle shall before turning while in motion or from a standstill or changing the course of such vehicle first see that there is sufficient space to make such movement in safety, and shall give a visible or audible signal to the traffic officer, if there be such, or to drivers of other vehicles following of his intentions to make such movement by signaling as provided in subdivision one of this section, and where a police officer is in charge of the traffic indicate to him the direction in which the vehicle is to be turned.

4. Before backing any vehicle the driver shall see that the way is clear and shall give adequate warning, and shall, while backing, exercise due vigilance to prevent accident.

§ 14. **Speed regulations.**—1. Reckless driving is prohibited. Every person violating this provision shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars for the first offense; and by a fine not exceeding one hundred dollars or imprisonment not exceeding six months or by both such fine and imprisonment in the discretion of the court for a second or subsequent offense.

2. Upon approaching a bridge or in passing a public hospital, fire house or a school the driver of any vehicle or street surface car shall proceed with extreme care and with vehicle or street surface car under control, provided local authorities have legible and visible signs posted, warning drivers of their approach to a bridge, fire house, public hospital or school building.

3. Street surface cars shall be brought to a full stop and all other vehicles shall use extreme caution when approaching a crossing or place designated by the sign "Traffic Point." Local authorities shall have authority from time to time to designate by ordinance, rule or regulation such crossing or other places at which such signs shall be placed.

§ 15. **Parking, safety zones and cab stands.**—1. The police commissioner, common council, board of aldermen, commission or any other body

having charge of the streets of a city and the trustees of a village are authorized to designate by ordinance or regulation such safety zones, parking spaces and cab or taxicab stands in the public streets as are, or shall be required, for the safety and convenience of the citizens and inhabitants of the city or village, and shall mark and indicate by suitable stationary and portable signs the location of such zones, spaces and stands and all persons driving, operating or having under their control any vehicle of any kind whatsoever shall obey the rules and regulations prescribed by such local authorities for safety zones, parking and cab stands, but nothing herein contained shall be construed as superseding or conflicting with section four hundred and forty-four of the penal law.

2. The driver or person in charge of a motor vehicle, before leaving the same standing unattended on the public streets, shall apply the emergency brakes. No person without authority of such driver or person in charge shall climb upon such vehicle or sound any horn or signaling device, or attempt to manipulate any of the machinery or set such vehicle in motion, or in any way interfere with such vehicle; provided, however, that for the purpose of getting away from the place of standing, a driver may move another vehicle which is so placed that he cannot get his vehicle out.

3. No person shall deface, injure, move or interfere with any sign, post, standard or any signaling device sanctioned, installed, or placed by local authorities for the purpose of directing, restricting or regulating traffic or establishing zones.

4. When a vehicle stands on a steep incline it shall be so placed that when the brake is released it will run into the curb.

5. Any vehicle when stopped parallel to the curb shall stop as near to the curb as practicable, with wheels, both front and rear, not more than six inches from the curb.

6. No vehicle shall stop with its left side to the curb, except in such streets as may be designated as one-way traffic streets and where road excavation or other legalized obstruction prevent the operation of this regulation.

7. Except in an emergency or when advised to do so by a police officer, no vehicle shall be stopped or left standing within the intersection of any cross street; within ten feet of any crosswalk or street crossing or alley corner, except where traffic officers are on duty; within ten feet of any fire hydrant unless the vehicle is actually in charge of some person capable of driving it; in such position as to prevent another vehicle already stopped near the curb from moving away; in front of or within fifteen feet of either side of the entrance to any theatre, auditorium, or other building where large assemblages of persons are being held, except to take on or to discharge passengers or freight and then only for such length of time as is necessary for such purpose; in any portion of any street where street surface cars stop to receive or discharge passengers, except as otherwise provided.

8. No vehicle shall be stopped in any street except close to the curb thereof, unless in case of emergency or to allow another vehicle, street surface car or pedestrian to cross its path. This regulation shall not be construed to prevent local officials designating portions of streets as parking spaces.

9. A person in charge or control of any vehicle standing in any street shall cause the same to be moved immediately at the request of the driver of another vehicle, the lawful movement of which is obstructed or delayed by the standing vehicle. A vehicle waiting at the curb shall promptly give place to a vehicle about to take on or discharge passengers.

§ 16. **Loading and unloading vehicles.**—Except at parking spaces or when authorized so to do by ordinance or regulation no vehicle shall remain backed to the curb except it be actually loading or unloading and then for no longer time than the actual loading and unloading reasonably requires.

§ 17. **Vehicles.**—1. A vehicle when loaded with any material extending at least four feet beyond its rear shall be provided with a red flag by day on the extreme rear end of such load.

2. No person shall drive any vehicle so constructed or closed in as to prevent the driver from having a clear view ahead and at the sides of such vehicle.

3. It shall be unlawful to make repairs to any vehicle in any street or public place in a city except in an emergency.

4. No person shall drive or conduct any vehicle which is known to him to be in such condition, so constructed or so loaded as to break down or become stalled.

5. Before removing any part of any vehicle, or any part of any harness whose removal is likely to cause accident or permit a horse or horses attached to said vehicle to run away, the horse or horses shall first be unhitched from said vehicle by the person in charge.

6. The use of a vehicle in any city or village is prohibited when it is so loaded with iron or other material as to create loud noises while in transit.

7. A vehicle unless confined to tracks shall not tow more than one other vehicle, and the connection between the two vehicles shall not be longer than sixteen feet, except that nothing in this clause shall prevent the use of more than one trailer. Each towed vehicle, except a trailer, shall have an attendant.

§ 18. **Street surface cars.**—1. During blockades or stoppages a clear space of ten feet shall be kept open between street cars opposite any alley or the center of the block if there be no alley.

2. Subject to the provisions of subdivision one of section twelve, and except by order of a member of the police force in the discharge of his duty, street cars shall have the right of way between cross streets over

all other vehicles. Every street surface car shall by any signal approved by the public service commission, warn all traffic in its rear of the stopping or turning of such car.

3. The driver of any vehicle proceeding upon the tracks in front of a street car shall turn out as soon as possible upon signal of the operator of the street car.

§ 19. **Motorcycles, bicycles and similar vehicles.**—1. No person in any city shall ride any motorcycle, bicycle or other vehicle propelled by the hands or feet of the rider along or upon and public sidewalk or footpath intended for the use of pedestrians. This section shall not apply to children under ten years of age and to persons who cannot walk by reason of invalids or crippled.

2. No person shall drive or ride a motor vehicle, motorcycle, or bicycle in the streets of any city, town or village without having a hand on the handle-bars or steering device.

3. The driver of a two-wheeled motorcycle or a bicycle shall not carry any other person thereon, except on a seat securely fastened to the machine in the rear of the driver and provided with foot rests and hand grips.

4. Bicycles shall be provided with a bell which may be heard at least one hundred feet distant, also a lamp of such illuminating power as to be visible two hundred feet ahead. Such lamp shall be lighted whenever the vehicle is ridden at any time between one-half hour after sunset and one-half hour before sunrise.

§ 20. **Miscellaneous regulations.**—1. No person shall ride upon the rear of any vehicle without the consent of the driver nor with any part of his body protruding, nor shall any person hang on to any street car or vehicle whatsoever.

2. On all automobiles requiring cranking from the street the driver thereof shall cause the brakes to remain set until after the engine is started.

3. No races or contests for speed shall be held upon any street without the permission of the authorities of the state, city, town or village having jurisdiction of such street and unless the same is fully and efficiently patrolled for the entire distance over which such race or contest for speed is to be held.

4. No person shall coast with handsleds, bobs, carts or other vehicles, on wheels or runners upon any public sidewalk in any city; nor shall any person coast with handsleds, bobs or carts or other vehicles on wheels or runners upon any public street of the city except upon such streets as may be designated by the common council, board of aldermen or commission thereof.

5. No motor vehicle shall be operated in such a way as to emit unnecessary smoke or unnecessary offensive vapors within the streets of any city, town or village.

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6. No person shall fail, neglect or refuse to comply with any lawful instruction, directions or regulations, displayed upon post, standard, sign or device installed or placed for the regulation, direction or instruction of traffic in any public street.

§ 21. Duties of local authorities.—It shall be the duty of the members of the police department of every city, town or village to enforce the provisions of this chapter strictly and impartially.

§ 22. Powers of local authorities.—1. Police commissioners, common councils, boards of aldermen, commissions or any other official body having charge of the streets in cities and boards of trustees in villages are hereby authorized to designate streets and ways in which vehicles shall pass in one direction. All vehicles shall proceed in such streets and ways only as the signboards and conspicuously displayed and visible regulation upon such street and ways shall define. The direction in which vehicles may proceed shall be so conspicuously marked with signs or signals as to indicate the rule and regulation in regard thereto and the direction in which all vehicles shall so travel.

2. Whenever the police department of a city or the president of a village shall deem it advisable during a fire or at the time of an accident or special emergency and for such period of time only as is necessitated thereby, for the public safety or convenience, temporarily to close any street or part thereof to vehicular traffic, or to vehicles of a certain description, or to divert the traffic thereof, or to divert or break a course of pedestrian traffic, said department or official shall have power and authority so to do. Local authorities may also by general rule, regulation or ordinance exclude vehicles used solely or principally for commercial purposes from any park or part of a park system where such general rule, regulation or ordinance is applicable equally and generally to all other vehicles used for the same purpose; provided, that at the entrance or at each entrance if there be more than one, to such park from which vehicles are so excluded, there is posted a sign plainly legible from the opposite side of the highway on which said park opens, plainly indicating the restriction.

3. In addition to other powers delegated by this chapter, and to restrictions hereinafter provided, local authorities in cities are hereby empowered to make, enforce and maintain such additional reasonable ordinances, rules and regulations governing traffic as special local conditions may make necessary, and to prescribe penalties therefor, provided proper notices of such regulations be posted conspicuously upon the streets to which such regulations apply. Subject to this chapter the power now or hereafter vested in local authorities to license and to regulate the use of highways for processions and assemblages shall remain in full force and effect, and all ordinances, rules and regulations which may have been or which may be hereafter enacted in pursuance of such powers shall remain in full force and effect.

4. Local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to, or inconsistent with the provisions of this chapter, or any general law affecting vehicles which has or hereafter may be enacted, and no such ordinance, rule or regulation of such local authorities now in force or hereafter enacted shall have any force or effect, provided that nothing in this chapter shall impair the validity or effect of any ordinance regulating the speed of motor vehicles heretofore or hereafter made, adopted or prescribed by cities of the first class.

ARTICLE III.

PENALTIES; MISCELLANEOUS PROVISIONS.

Section 30. Penalties.

31. Publication and distribution of regulations.

32. When to take effect.

§ 30. Penalties.—1. Except as otherwise provided, any person violating any provision of this chapter may upon conviction thereof be punished by a fine not exceeding ten dollars for the first offense and not less than ten dollars or more than twenty-five dollars for the second offense, or by imprisonment for not less than two or more than fifteen days. The third or any subsequent offense within one year shall be a misdemeanor and upon conviction therefor may be punishable by a fine not exceeding one hundred dollars or imprisonment not exceeding six months or both such fine and imprisonment in the discretion of the court.

2. All fines, penalties and forfeitures, collected under this act in a city, town or village shall be paid to the said city, town or village and credited to the general fund.

§ 31. Publication and distribution of regulations.—This chapter shall be printed in pamphlet form by the secretary of state, and a copy thereof either mailed or given by him to each person, firm or corporation to whom a motor vehicle license or chauffeur's license is issued during the period of one year from the time this chapter takes effect, and subsequently to each such person, firm or corporation to whom a license has not previously been issued during the period mentioned. The police department of each city and village shall see that this chapter is posted in all public stables, and garages and street car barns and at hack, cab and express stands and shall keep copies of it at all other stations and issue it upon application.

§ 32. When to take effect.—This chapter shall take effect immediately.

GENERAL MUNICIPAL LAW.

L. 1909, ch. 29.—“An act relating to municipal corporations, constituting chapter twenty-four of the consolidated laws.”

[In effect Feb. 17, 1909.]

CHAPTER XXIV OF THE CONSOLIDATED LAWS.**GENERAL MUNICIPAL LAW.**

- Article 1. Short title; definitions (§§ 1, 2).
 2. General municipal finances (§§ 3-20).
 2-a. Legalizing bonds or proceedings for issuance (§§ 22-29).
 3. Report of financial condition (§§ 30-38).
 4. Negligence and malfeasance of public officers; taxpayers' remedies (§§ 50-55).
 5. Powers, limitations and liabilities (§§ 70-90).
 6. Public health and safety (§§ 120-139-b).
 7. Trusts for parks and libraries in villages and towns (§§ 140-146).
 7-a. Local boards of child welfare (§§ 148-155).
 8. Cemeteries (§§ 160-163).
 9. Regulation of use of bicycles and similar vehicles (§§ 180-182).
 10. Firemen and policemen (§§ 200-207).
 11. Acquisition of lands by the United States (§§ 210-212).
 12. Railroad aid bonds (§§ 220-233).
 12-a. City and village planning commissions (§§ 234-239-a).
 13. Playgrounds and neighborhood recreation centers (§§ 240-246).
 14. Laws repealed; when to take effect (§§ 300, 301).

ARTICLE I.**SHORT TITLE; DEFINITIONS.**

- Section 1. Short title.
 2. Definitions.

§ 1. Short title.—This chapter shall be known as the “General Municipal Law”

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 1.

Consolidators' historical note.—The earliest statute classified to this subject is L. 1840, ch. 318, which provides that real and personal estate may be granted and

L. 1909, ch. 29.

Short title; definitions.

§ 2.

conveyed to the corporation of any city or village, to be held in trust for certain purposes.

The public officers having the care and custody of town, village or city buildings were authorized to insure the same by L. 1847, ch. 294.

A city or county, under certain conditions, was made liable for property destroyed or injured in consequence of any mob or riot therein by L. 1855, ch. 428.

L. 1869, ch. 727, authorized cities and villages to acquire title to certain lands for burial purposes and to levy taxes for the payment of the same.

L. 1869, ch. 907, known as the "General railroad bonding act," authorized certain cities, towns or villages to issue bonds and invest the same or the proceeds thereof in the stock or bonds of a certain railroad corporation.

In the first instance, this act did not apply to the whole state, but by frequent amendments, the scope of this law was increased to a very great extent.

The first legislation providing for a "taxpayer's action," was L. 1872, ch. 161. This remedy was subsequently improved by later legislation.

L. 1878, ch. 75, authorized any village, city, town or county to pay and retire its then present indebtedness by the issuance of bonds of the same amount.

The investigation of the expenditures of towns and villages was authorized by L. 1879, ch. 307.

By L. 1892, ch. 685, nearly all the statutes pertaining to this subject were revised and incorporated therein, and the act was known as "The General Municipal Law."

Subsequent to the year 1892, a number of acts relating to municipal corporations were passed by the legislature. One of the most important of these is L. 1905, ch. 705, which provides for annual reports by and the examination of the accounts of certain counties, cities and villages and the tabulation of statistics.

This act with the others has been consolidated in the law submitted herewith.

§ 2. Definitions.—The term "municipal corporation," as used in this chapter, includes only a county, town, city and village. The term "governing board" includes the board of supervisors of a county, the town board of a town, the common council of a city, and the board of trustees of a village.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 1, in part.

References.—Term "municipal corporation" defined generally, General Corporation Law, § 3. Under certain conditions term "person" includes a municipal corporation, General Construction Law, § 37; reference to municipal officers, *Id.* § 32. County as a municipal corporation, County Law, §§ 3, 4.

Powers of municipalities.—Town and other municipal corporations are organized for governmental purposes and their powers are limited and defined by statute under which they are constituted. They possess only such powers as are expressly conferred or necessarily implied. *Wells v. Town of Salina* (1890), 119 N. Y. 280, 23 N. E. 879, 7 L. R. A. 759; *People ex rel. Read v. Town Auditors* (1895), 85 Hun 114, 32 N. Y. Supp. 668.

Capacity to sue.—A town, being a municipal corporation, may sue in all courts in like case as a natural person. *Town of Hempstead v. Lawrence* (1910), 138 App. Div. 473, 122 N. Y. Supp. 1037.

Section cited.—*Adde v. Arnow* (1895), 91 Hun 329, 36 N. Y. Supp. 1020; *Kennedy v. County of Queens* (1900), 47 App. Div. 250, 253, 62 N. Y. Supp. 276; *O'Bryan v. State of New York* (1910), 68 Misc. 618, 125 N. Y. Supp. 490, *revd.* (1911), 148 App. Div. 542, 132 N. Y. Supp. 1098; *Matter of Smith* (1906), 49 Misc. 567, 100 N. Y. Supp. 179; *Lattin v. Town of Oyster Bay* (1901), 34 Misc. 568, 70 N. Y. Supp. 386; *Wadsworth v. Supervisors of Livingston* (1908), 115 N. Y. Supp. 8 *revd.* (1910), 139 App. Div. 832, 124 N. Y. Supp. 334.

ARTICLE II.

GENERAL MUNICIPAL FINANCES.

Section 3. Limitation of indebtedness.

4. Investigation of expenditures of towns and villages.
5. Temporary loans.
6. Funded debt.
7. Payment of municipal bonds.
8. Funded and bonded debts.
9. Issuance of municipal bonds.
10. Registry of municipal bonds.
11. Conversion of coupon into registered bonds.
12. Defects not invalidating municipal bonds.
13. Municipal taxes of railroads payable to county treasurer.
14. Appointment of railroad commissioners.
15. Oath and undertaking of commissioners.
16. Abolition of office of railroad commissioners.
17. Exchange or sale of railroad stock and bonds.
18. Annual report of commissioners and payment of bonds.
19. Accounts and loans by commissioners.
20. Reissue of lost or destroyed bonds.
21. Maximum rate of interest on municipal bonds.

§ 3. Limitation of indebtedness.—No county containing a city of more than one hundred thousand inhabitants, nor any such city shall contract any debt, the amount of which, exclusive of its outstanding debt, shall exceed a sum equal to five per centum of the aggregate valuation of the real property within its bounds, as assessed for state and county purposes upon the then last corrected assessment-roll, nor shall it contract any such debt if the amount thereof inclusive of its outstanding debts shall exceed a sum equal to ten per centum of such valuation. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes of amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. Nor shall this section be construed to prevent the issuing of bonds to provide for the supply of water, but the term of the bonds issued to provide for the supply of water shall not exceed twenty years, and the sinking fund shall be created on the issuing of said bonds for their redemption by raising annually a sum which will produce an amount equal to the amount of the principal of said sum and interest of said bonds at their maturity. This section shall not apply to debts contracted for the purpose of retiring or paying any existing indebtedness pursuant to the provisions of this chapter.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 2, as amended by L. 1893, ch. 349; originally revised from L. 1853, ch. 603, § 3.

References.—Limitation of indebtedness of municipalities, see Const., art. 8, § 10, superseding this section. Borrowing money for county purposes, County Law, § 12, subd. 6. Indebtedness of towns and counties limited, Id. §§ 13, 14. Limita-

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General municipal finances.

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tion of indebtedness of villages, Village Law, §§ 100, 130; of towns, Town Law, § 195.

Power to borrow money is dependent on statute. Municipalities have not the inherent power. Power to "raise" money does not involve the power to borrow. *Wells v. Town of Salina* (1890), 119 N. Y. 280, 23 N. E. 879, 7 L. R. A. 759, distgd. in *Birge v. Berlin Iron Bridge Co.* (1892), 133 N. Y. 477, 486, 31 N. E. 609.

Officers of municipal corporations are special agents, and everyone dealing with them is presumed to know the precise extent of their powers to bind the corporation they represent. *People ex rel. Childs v. Cartwright* (1876), 9 Hun 159.

§ 4. Investigation of expenditures of towns and villages.—If twenty-five freeholders in any town or village shall present to a justice of the supreme court of the judicial district in which such town or village is situated, an affidavit, stating that they are freeholders and have paid taxes on real property within such town or village within one year, that they have reason to believe that the moneys of such town or village are being unlawfully or corruptly expended, and the grounds of their belief, such justice, upon ten days' notice to the supervisor, and the officers of the town disbursing the funds to which such moneys belong, or the trustees and treasurer of the village, shall make a summary investigation into the financial affairs of such town or village, and the accounts of such officers, and, in his discretion, may appoint experts to make such investigation, and may cause the result thereof to be published in such manner as he may deem proper.

The costs incurred in such investigation shall be taxed by the justice, and paid, upon his order, by the officers whose expenditures are investigated, if the facts in such affidavit be substantially proved, and otherwise, by the freeholders making such affidavit. If such justice shall be satisfied that any of the moneys of such town or village are being unlawfully or corruptly expended, or are being appropriated for purposes to which they are not properly applicable, or are improvidently squandered or wasted, he shall forthwith grant an order restraining such unlawful or corrupt expenditure, or such other improper use of such moneys.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 3; originally revised from L. 1879, ch. 307.

References.—Taxpayers' action to restrain waste. See § 51, post. Investigation of municipal accounts by comptroller, §§ 33-38, post.

Purpose of act.—This law is not intended for the punishment of acts already done, but to prevent the doing of acts prejudicial to the public interest. *Matter of Town of Eastchester* (1889), 53 Hun 181, 6 N. Y. Supp. 120.

Remedial statute.—This is a remedial statute and should be liberally construed to effect its intent. *Matter of Eastchester* (1889), 53 Hun 181, 6 N. Y. Supp. 120.

Form of petition.—*Matter of Town of Eastchester* (1889), 53 Hun 181, 6 N. Y. Supp. 120.

Special proceeding.—A proceeding instituted by freeholders of a town for an investigation of its financial affairs under this section, is a special proceeding within the meaning of that term as defined in the Code of Civil Procedure. *Matter of Town of Hadley* (1904), 44 Misc. 265, 89 N. Y. Supp. 910; *Matter of Town of Hempstead* (1898), 32 App. Div. 6, 52 N. Y. Supp. 618.

Scope of investigation.—See *Matter of Town of Hempstead* (1899), 36 App. Div. 321, 55 N. Y. Supp. 345, affd. (1899), 160 N. Y. 685, 55 N. E. 1101.

Unlawful or corrupt expenditures—not mere errors of judgment—are included in the statute. What are corrupt expenditures. See *Matter of East Syracuse* (1887), 20 Abb. N. C. 131.

Power of court.—The court said in *matter of Town of Hempstead* (1898), 32 App. Div. 6, 52 N. Y. Supp. 618, that it may be in such a proceeding the court could restrain action whose only offense is that of improvidence. It is difficult, however, to see how such an interpretation can be read into the statute.

Form of orders.—*Matter of Town of Eastchester* (1889), 53 Hun 181, 6 N. Y. Supp. 120.

Costs.—The court may impose the cost of the proceeding on the parties in fault. *Matter of Town of Hempstead* (1898), 32 App. Div. 6, 52 N. Y. Supp. 618.

The costs of an investigation, if any are awarded, must be restricted by force of § 3240 of the Code of Civil Procedure to those allowed for similar services in an action. *Matter of Taxpayers of Plattsburgh* (1898), 157 N. Y. 78, 51 N. E. 512, revg. (1898), 27 App. Div. 353, 50 N. Y. Supp. 356, on other points.

Review.—Order of justice is reviewable by court of appeals as a final order in a special proceeding. *Matter of Taxpayers of Plattsburgh* (1898), 157 N. Y. 78, 51 N. E. 512, revg. (1898), 27 App. Div. 353, 50 N. Y. Supp. 356.

Certiorari to review order of justice not allowable. Remedy is by appeal. *People ex rel. Gulbord v. Kellogg* (1897), 22 App. Div. 176, 47 N. Y. Supp. 1023; *Matter of Town of Hempstead* (1898), 32 App. Div. 6, 52 N. Y. Supp. 618.

Application of section.—*Matter of Village of Kenmore* (1908), 59 Misc. 388, 390, 110 N. Y. Supp. 1008; *Matter of Taxpayers of Plattsburgh* (1898), 27 App. Div. 353, 50 N. Y. Supp. 356, *affd.* (1898), 157 N. Y. 78, 51 N. E. 512.

§ 5. **Temporary loans.**—Moneys shall not be borrowed by a municipal corporation on temporary loan, except in anticipation of the taxes of the current fiscal year, and for the purposes for which such taxes are levied, and shall not be in excess of the amount of such taxes. Such loans shall be payable out of the taxes on account of which such loans are made, and in no case shall interest run on any such loan after such taxes are paid into the treasury of the corporation. (*Amended by L. 1916, ch. 166.*)

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 4; originally revised from L. 1853, ch. 603, §§ 3, 4.

References.—But see as to villages, Village Law, § 128. Borrowing money by union free school district in anticipation of collection of taxes, Education Law, § 310, sub. 19; by town school board, Id. § 346, as amended by L. 1917, ch. 328. Temporary loans in anticipation of collection of county taxes, County Law, § 41.

Section cited.—*People ex rel. Peene v. Carpenter* (1898), 31 App. Div. 603, 608, 52 N. Y. Supp. 781.

§ 6. **Funded debt.**—A funded debt shall not be contracted by a municipal corporation, except for a specific object, expressly stated in the ordinance or resolution proposing it; nor unless such ordinance or resolution shall be passed by a two-thirds vote of all the members elected to the board or council adopting it, or submitted to and approved by the electors of the town or county, or taxpayers of the village or city when required by law; provided, however, that a funded debt contracted by a city of the second class for the building of a school building or for the construction or reconstruction of a school building shall require for its passage only a majority vote of all the members elected to the common council adopting

it. Such ordinance or resolution shall provide for raising annually, by tax, a sum sufficient to pay the interest and the principal, as the same shall become due. (*Amended by L. 1910, ch. 677.*)

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 5; originally revised from L. 1853, ch. 603, §§ 3, 5.

"Funded debt" defined. Includes all indebtedness evidenced by a bond, payable at a time beyond the current fiscal year. *People ex rel. Peene v. Carpenter* (1898), 31 App. Div. 603, 52 N. Y. Supp. 781.

A debt incurred in the purchase of land for the establishment of a public market is not a funded debt. *Ketchum v. City of Buffalo* (1856), 14 N. Y. 356.

Application.—This section does not apply to a proposition submitted to taxpayers to acquire property at a maximum figure, since the extent of the liability therefor cannot be ascertained at the time of the passage of the resolution. *Village of Waverly v. Waverly Water Co.* (1908), 127 App. Div. 440, 444, 111 N. Y. Supp. 541, *affd.* (1909), 194 N. Y. 545, 87 N. E. 1129; *Village of Waverly v. Waverly Water Co.* (1910), 69 Misc. 373, 125 N. Y. Supp. 339.

When municipal improvements are voted with the provision that 90 per cent. of their cost shall be borne by abutting property owners and 10 per cent. by the village at large, bonds for the whole cost are not authorized by such vote; but where legislative authority is subsequently given for an issue of bonds for the whole amount of certain of the improvements, and bonds for the full amount of the remainder of the improvements are expressly authorized by a subsequent vote of the electors, they may constitute valid obligations of the municipality. *Matter of Village of Waverly v. Waverly Water Co.* (1908), 127 App. Div. 440, 444, 111 N. Y. Supp. 541, *affd.* 194 N. Y. 545, 87 N. E. 1129.

This section does not require the resolution to specify the sum which shall be raised. Thus, a bonding proposition submitted to the taxpayers of a village which provides for "a sum to be raised annually by levying a tax on all taxable property in said village sufficient to pay the interest and principal of all said bonds as the same become due," complies with this section. *Village of Bronxville v. Seymour* (1907), 122 App. Div. 377, 106 N. Y. Supp. 834.

Establishment of water works.—Where a proposition to establish village water works and issue bonds to be refunded by an annual tax upon property within the village is submitted to voters at a special election, the bonds when issued become "a funded debt." *Gould v. Village of Seneca Falls* (1910), 137 App. Div. 417, 121 N. Y. Supp. 723, *affd.* (1910), 200 N. Y. 523, 93 N. E. 1121.

Provision for payment of interest and principal.—Where a resolution proposing an issue of bonds does not comply with the provisions of the above section to the effect that such resolution shall provide for raising annually by tax a sum sufficient to pay the interest and the principal of such bonds as the same shall become due it is fatally defective. A statement in a resolution "that a sum sufficient to pay the interest and principal of said bonds as the same shall become due, be raised by an annual tax, as other taxes for general purposes in said village are raised," is not sufficient. It should state the installments in which the bonds were to be made payable and the number which were to be met in each year. *Village of Canandaigua v. Hayes* (1904), 90 App. Div. 336, 85 N. Y. Supp. 488.

This section, relating to the creation of a funded debt by municipal corporation for specific objects and providing that an ordinance authorizing such debt "shall provide for raising annually, by tax, a sum sufficient to pay the interest and the principal as the same shall become due," applies to the city of Binghamton. Hence, where a resolution passed by said city authorizing the issue of bonds to raise funds for a lighting plant does not provide for the payment of the principal and interest as required by said statute, it is void and the issuance of the bonds

will be restrained by injunction. The issuance of such bonds is governed not only by section 406 of the charter of the city of Binghamton, but also by section 6 of the General Municipal Law. *Lyon v. City of Binghamton* (1914), 160 App. Div. 222, 145 N. Y. Supp. 424.

The premium on bonds should be applied to the purpose for which the bonds were issued and cannot be applied to general purposes. If the purpose for which the bonds were issued does not exhaust the amount of the avails thereof, such balance should be applied to the redemption of such bonds. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 472.

Use of surplus proceeds.—A surplus arising from the sale of bonds issued by a town to pay its share of the cost of building county roads may not be legally used for another purpose. An effort should be made to purchase at par bonds of said issue to the extent of the surplus, thereby retiring them and reducing the indebtedness. If that cannot be done, a separate fund should be established in the depository of town funds and an agreement made as to a rate of interest to be paid thereon and the amount of the fund used only in payment of principal and interest of the bonds received. *Opinion of State Comptroller* (1916), 9 State Dept. Rep. 452.

A fund raised by a fire district under a duly adopted resolution is a funded debt within the meaning of this section. *American Metal Ceiling Co. v. New Hyde Park Fire District* (1915), 91 Misc. 236, 154 N. Y. Supp. 661.

Single resolution for two purposes.—Village bonds, issued under a single resolution of its trustees providing for borrowing a gross sum not only to purchase, construct and maintain a village waterworks, but also a village lighting system, are not valid, as the taxpayer, when voting upon the resolution, has no freedom of choice and must vote for or against both propositions when he may be in favor of one and against the other. *Village of Hempstead v. Seymour* (1901), 34 Misc. 92, 69 N. Y. Supp. 462.

§ 7. Payment of municipal bonds.—Where the bonds of a municipal corporation have been lawfully issued, and the payment of the principal or interest thereof shall not have been otherwise paid or provided for, the same shall be a charge upon such corporation, and shall be levied and assessed, collected and paid the same as other debts and charges. When for any reason any portion of the principal or interest due upon such bonds shall not have been paid, the same shall be assessed, levied and collected at the first assessment and collection of taxes by such corporation after such omission.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 6; originally revised from L. 1870, ch. 300.

References.—Action against officer by reason of wrongful issue of municipal bonds. See §§ 52–55. Payment of village bonds, *Village Loan*, § 129.

Obligation of municipality to provide for the payment of its bonds, lawfully issued. See *Marsh v. Town of Little Valley* (1876), 64 N. Y. 112.

Savings bank investment.—This section places the faith and credit back of an issue of water supply bonds by a city and makes them a proper investment for savings banks. *Rept. of Atty. Genl.* (1909) 736.

Section cited.—*Gould v. Village of Seneca Falls* (1909), 118 N. Y. Supp. affd. (1910), 137 App. Div. 417, 121 N. Y. Supp. 723, affd. (1910), 200 N. Y. 523, 93 N. E. 1121.

§ 8. Funded and bonded debts.—The bonded indebtedness of a municipal corporation, including interest due or unpaid, or any part thereof, may be

paid up or retired by the issue of the new substituted bonds for like amounts by the board of supervisors or supervisor, board, council or officers having in charge the payment of such bonds. Such new bonds shall only be issued when the existing bonds can be retired by the substitution of the new bonds therefor, or can be paid up by money realized by the sale of such new bonds. Where such bonded indebtedness shall become due within two years from the issue of such new bonds, such new bonds may be issued and sold to provide money in advance to pay up such existing bonds when they shall become due. Such new bonds shall contain a recital that they are issued pursuant to this section, which recital shall be conclusive evidence of their validity and of the regularity of the issue; shall be made payable not less than one or more than thirty years from their date; shall bear date and draw interest from the date of the payment of the existing bonds, or the receipt of the money to pay the same, at not exceeding the rate of five per centum per annum, payable quarterly, semi-annually or annually; and an amount equal to not less than two per centum of the whole amount of such new bonds may be payable each year after the issue thereof. Such new bonds shall be sold and negotiated at the best price obtainable, not less than their par value; shall be valid and binding on the municipal corporation issuing them. All bonds and coupons retired or paid shall be immediately canceled. A certificate shall be issued by the officer, board or body issuing such new bonds, stating the amount of existing bonds, and of the new bonds so issued, which shall be forthwith filed in the office of the county clerk. Except as provided in this section, new bonds shall not be issued in pursuance thereof, for bonds of a municipal corporation adjudged invalid by the final judgment of a competent court. A majority of the taxpayers of a town, voting at a general town meeting, or special town meeting duly called, may authorize the issue in pursuance of this section of new bonds for such invalid bonds, and each new bond so issued shall contain substantially the following recital: "The issue of this bond is duly authorized by a vote of the taxpayers of the said town," which shall be conclusive evidence of such fact. The payment, adjustment or compromise of a part of the bonded indebtedness of a municipal corporation shall not be deemed an admission of the validity or a recognition of any part of the bonded indebtedness of such municipal corporation not paid, adjusted or compromised. All bonds of a municipal corporation, until payable, shall be exempt from taxation for town, county, municipal or state purposes.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 7, as amended by L. 1893, chs. 122, 466; L. 1897, ch. 54; L. 1901, ch. 333; L. 1908, ch. 256; originally revised from L. 1878, ch. 75, as amended by L. 1878, ch. 317; L. 1880, chs. 12 and 204; L. 1884, ch. 244; L. 1887, ch. 282; L. 1889, ch. 522; L. 1881, ch. 522, as amended by L. 1883, ch. 453; L. 1886, ch. 316, as amended by L. 1892, ch. 330.

References.—Refunding second-class cities bonds, Second Class Cities Law, § 60. Legalizing defective bonds, §§ 22–29, post.

Constitutional.—Hills v. Peekskill Savings Bank (1886), 101 N. Y. 490, 5 N. E. 327, revg. (1882), 26 Hun 161.

§ 9.

General municipal finances.

L. 1909, ch. 29.

"Bonded indebtedness" not limited to bonds in all respects valid. *Hills v. Peekskill Savings Bank* (1886), 101 N. Y. 490, 5 N. E. 327, revg. (1882), 26 Hun 161.

Refund of bonds by agent not authorized. *People ex rel. Read v. Board of Town Auditors* (1895), 85 Hun 115, 32 N. Y. Supp. 668.

Effect of section on provisions of special charter prohibiting incurrence of debts not payable in the current year. Statute is an enabling act for all municipalities. *City of Poughkeepsie v. Quintard* (1892), 136 N. Y. 275, 32 N. E. 764. Does not dispense with additional consents required by special act. *People v. Parmeter* (1899), 158 N. Y. 385, 53 N. E. 40, revg. (1897), 19 App. Div. 632, 46 N. Y. Supp. 1098.

Provisions as to interest are merely directory and not of the essence of the power. *Lyons v. Lyons Nat. Bank* (1881), 8 Fed. 369.

Section cited.—Rept. of Atty. Genl. (1898) 219.

§ 9. Issuance of municipal bonds.—Each bond issued by a municipal corporation shall be signed by each officer issuing the same, with the designation of his office; and the interest coupons attached thereto, if any, shall be signed by one of their number. Each such bonds shall state the place of payment and, if no coupons are attached thereto, the name of the payee shall be inserted therein and registered with the treasurer, chamberlain, comptroller, supervisor, clerk or other designated official of such municipal corporation before any interest shall be paid thereon.

All bonds hereafter issued by any municipal corporation, or by any school district or civil division of the state, shall be sold, in the case of a city of the first class as required by its charter or by any special act under which such bonds are issued, in the case of a city of the second class as required by section sixty-one of the second class cities law, and in all other cases at public sale not less than five or more than thirty days after a notice of such sale, stating the amount, date, maturity and rate of interest, has been published at least once in the official paper or papers, if any, of any such municipality, provided that if there is no official paper, then such notice of sale shall be published in a newspaper published in the county in which such bonds are to be issued, or a copy thereof shall be sent to and published in a financial newspaper published and circulating in New York city. (*Amended by L. 1917, ch. 534, in effect May 17, 1917.*)

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 8; originally revised from L. 1869, ch. 907, § 4, as amended by L. 1871, ch. 925.

References.—Issue and sale of school bonds, Education Law, § 480. Execution and issuance of village bonds, Village Law, § 129. Issue and sale of second class city bonds for temporary loans, Second Class Cities Law, § 61.

Assistance in procuring sale of bonds.—Power not limited to employment of broker. *Armstrong v. Village of Ft. Edward* (1899), 159 N. Y. 315, 53 N. E. 1116, revg. (1895), 84 Hun 261, 32 N. Y. Supp. 433.

Alterations in bonds.—Burden of proof on obligor, where alleged alteration does not appear on face of instrument. *Williamsburg Savings Bank v. Town of Solon* (1893), 136 N. Y. 465, 32 N. E. 1058.

Duty to provide for payment.—It is the duty of a town to provide means for the payment of its bonds lawfully issued. In case of failure to perform this duty the holder of the bonds may maintain action against the town thereon, even if it

is made the duty of the Board of Supervisors to impose a levy and tax to pay the bonds. *Marsh v. Town Little Valley* (1876), 64 N. Y. 112.

Town bonds are not negotiable paper.—There can be no bona fide holder of town bonds within the meaning of the law applicable to negotiable paper, as they can only be issued by virtue of special authority conferred by some statute, and are only binding upon the town when issued in a way pointed out by the statute. Persons taking them must show that the provisions of the statute are complied with. *Cagwin v. Town of Hancock* (1881), 84 N. Y. 532.

Railroad aid bonds.—Regularity of issuance, time of payment, etc. *People ex rel. Haines v. Smith* (1871), 45 N. Y. 772; *People ex rel. Irwin v. Sawyer* (1873), 52 N. Y. 296; *People ex rel. Green v. Smith* (1873), 55 N. Y. 135; *Town of Duansburgh v. Jenkins* (1874), 57 N. Y. 177; *Williams v. Town of Duansburgh* (1876), 66 N. Y. 129; *People ex rel. Gillies v. Suffern* (1877), 68 N. Y. 321; *Falconer v. Buffalo & Jamestown R. R. Co.* (1877), 69 N. Y. 491; *People ex rel. Hatfield v. Trustees* (1877), 70 N. Y. 28; *Horton v. Town of Thompson* (1877), 71 N. Y. 513; *Town of Springport v. Teutonia Bank* (1878), 75 N. Y. 397; *Town of Wellsboro v. N. Y. & C. R. R. Co.* (1879), 76 N. Y. 182; *Dodge v. County of Platte* (1880), 82 N. Y. 218; *Town of Springport v. Teutonia Savings Bank* (1881), 84 N. Y. 403; *Syracuse Savings Bank v. Town of Seneca Falls* (1881), 86 N. Y. 317, *affg.* (1880), 21 Hun 304; *Town of Lyons v. Chamberlain* (1882), 89 N. Y. 578; *Potter v. Town of Greenwich* (1883), 92 N. Y. 662, *affg.* (1882), 26 Hun 326; *Brownell v. Town of Greenwich* (1889), 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685, *affg.* (1887), 44 Hun 611; *Town of Cherry Creek v. Becker* (1890), 123 N. Y. 161, 23 N. E. 369; *Hoag v. Town of Greenwich* (1892), 133 N. Y. 152, 40 N. E. 84; *Angel v. Town of Hume* (1879), 17 Hun 374; *Joslyn v. Dow* (1880), 19 Hun 494; *Rogers v. Rochester, etc., R. R. Co.* (1880), 21 Hun 44, *affd.* (1881), 86 N. Y. 625; *Town of Solon v. Williamsburgh Savings Bank* (1885), 35 Hun 1; *Mitchell v. Strough* (1885), 35 Hun 83; *Thompson v. Town of Mamakating* (1885), 37 Hun 400, *affd.* (1887), 106 N. Y. 674, 13 N. E. 937. See cases cited under § 13.

§ 10. **Registry of municipal bonds.**—Each municipal corporation shall keep in the office of its clerk suitable books, in which shall be entered a full description of the amount, rate of interest, class, number, date of issue, pursuant to what law, and maturity of all bonds issued by any of its officers, and, if such statement is not already entered, of all bonds converted from coupon into registered bonds. A bond to which no coupons are attached may be registered, at the request of the payee, in the books so kept in the office of such clerk, and a certificate of such registry shall be indorsed upon the bond by such clerk, and attested by his seal, if he has one. The clerk shall be entitled to a fee of twenty-five cents for each bond so registered. The principal and interest of a registered municipal bond shall be payable only to the payee, his legal representatives, successors or assigns, and shall be transferable only upon presentation to such clerk, with a written assignment duly acknowledged or proved. The name of the assignee shall be entered upon such bond so transferred and the books so kept in the office of the clerk. It shall be the duty of the clerk or other officer having charge of the office where such registry is kept, to transmit a statement of such indebtedness to the clerk of the board of supervisors of the county in which such office is situated, annually, on or before the first day of November. Except that in cities of the second class, the books

of the municipal corporation in which there shall be entered a description of the amount, rate of interest, class, number, date of issue, pursuant to what law, and the maturity of all bonds issued by any of its officers, and of all bonds converted from coupon into registered bonds, as above provided, shall be kept in the office of the comptroller of said city instead of in the office of the city clerk, and all the duties to be performed by the clerk of the municipal corporation, as hereinbefore provided, shall, in cities of the second class, be performed by the comptroller of said city instead of by the clerk; and all municipal bonds in cities of the second class shall be registered with the comptroller instead of with the clerk. And, except further, that in the case of the issuance of county bonds the books in which there shall be entered a description of the amount, rate of interest, class, number, date of issue, pursuant to what law, and the maturity of all bonds issued by any of its officers and of all bonds converted from coupons into registered bonds, as above provided, shall be kept in the office of the county treasurer of such county and all the duties to be performed by the clerk of the municipal corporation, as hereinbefore provided, shall, in the case of county bonds, be performed by the county treasurer of such county; and all such county bonds shall be registered by the treasurer of the county instead of the clerk of such municipal corporation. (*Amended by L. 1910, ch. 129, and L. 1915, ch. 382.*)

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 9; originally revised from L. 1869, ch. 907, § 4, as amended by L. 1871, ch. 925 and § 8; L. 1885, ch. 426, § 2.

Registration.—The general law contains provisions for the issuing, signing and registering of municipal bonds, but it cannot be construed to affect special provisions on the same subject in city or village charters or in special laws. *People v. Parmerter* (1899), 158 N. Y. 385, 53 N. E. 40.

Fee of county clerk.—The fee for registering bonds is not chargeable against the municipality but is to be paid by the payee of the bond at whose request it is registered. *People ex rel. Hawley v. Howard* (1912), 152 App. Div. 621, 137 N. Y. Supp. 496.

Section cited.—Rept. of Atty. Genl. (1895) 219.

§ 11. **Conversion of coupon into registered bonds.**—When the owner of coupon bonds of a municipal corporation shall present any such bonds to the officers who issued the same, or their successors, with a written request for their conversion into registered bonds, such officer shall cut off and destroy the coupons and stamp, print or write upon each of the bonds a statement, properly dated, of the amount and value of such coupons, and that the interest, at the rate and on the date, as was provided by the coupons, as well as the principal, is to be paid to such owner, his legal representatives, successors or assigns, at a place therein stated, which shall be the place stated in the coupons, unless changed with the written consent of the owner; and thereupon such bonds may be registered in the office of the clerk of the municipal corporation. This section shall not apply where provision is otherwise made by law or local ordinance, for the conversion or exchange of coupon for registered bonds.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 10; originally revised from L. 1885, ch. 426.

§ 12. **Defects not invalidating municipal bonds.**—When the bonds of a municipal corporation have been issued and sold by the proper authorities, and the time fixed for their maturity shall be for a longer period than provided by the law under which they were issued, a variance of not exceeding sixty days shall not affect their validity.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 11; originally revised from L. 1877, ch. 320.

References.—See cases under § 9, ante. Legalizing defective bonds in supreme court, §§ 22-29, post.

§ 13. **Municipal taxes of railroads payable to county treasurer.**—If a town, village or city has outstanding unpaid bonds, issued, or substituted for bonds issued, to aid in the construction of a railroad therein, so much of all taxes as shall be necessary to take up such bonds, except school district and highway taxes, collected on the assessed valuation of such railroad in such municipal corporation, shall be paid over to the treasurer of the county in which the municipal corporation is located. Such treasurer shall purchase with such moneys of any town, village or city, such bonds, when they can be purchased at or below par, and shall immediately cancel them in the presence of the county judge. If such bonds cannot be purchased at or below par, such treasurer shall invest such moneys in the bonds of the United States, of the state of New York, or of any town or village or city of such state, issued pursuant to law; and shall hold such bonds as a sinking fund for the redemption and payment of such outstanding railroad aid bonds. If a county treasurer shall unreasonably neglect to comply with this section, any taxpayer of the town, village or city having so issued its bonds may apply to the county judge of the county in which such municipal corporation is situated, for an order compelling such treasurer to execute the provisions of this section. Upon application of the town board of any town, the board of supervisors of the county in which said town is situated may authorize payment by the county treasurer of all moneys thus paid to him in any year by the railroads mentioned in this section, to the supervisor of such town, for its use and benefit; to be applied either to the purchase of outstanding railroad aid bonds or the payment of interest thereon, and any payment heretofore made in good faith by the treasurer of any county to any town or to the supervisor thereof, of the taxes received in any year by such treasurer, from railroad corporations in that town, is hereby validated. The county treasurer of any county in which one or more towns therein shall have issued bonds for railroad purposes, shall when directed by the board of supervisors or county judge of the county, execute and file in the office of the clerk of the county an undertaking with not less than two sureties, approved by such board or judge, to the effect that he will faithfully perform his duties pursuant to this section. The annual report of a county treasurer shall fully state, under the head of "railroad sinking fund," the name and character of all such investments made by him or his predecessors, and the condition of such fund.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 12, as amended by L. 1893, ch. 466; L. 1903, ch. 515.

References.—Railroad aid bonds are now prohibited, Const., art. 8, § 10. Payment of local taxes by railroads to county treasurer, Tax Law, § 73.

Constitutionality.—The part of this section (fifth sentence, last clause) which provides: "Any payment heretofore made in good faith by the treasurer of any county to any town, or to the supervisor thereof, of the taxes received in any year by such treasurer from railroad corporations in that town is hereby validated," is unconstitutional so far as it attempts to take from a town an existing cause of action. *Town of Walton v. Adair* (1904), 96 App. Div. 75, 89 N. Y. Supp. 230.

As to constitutionality of statute generally, see *Matter of Clark v. Sheldon* (1887), 106 N. Y. 104, 12 N. E. 341.

Taxes included.—All taxes of every description are included, save those specifically excepted, and so include town, village, city, county and state taxes. *Matter of Clark v. Sheldon* (1887), 106 N. Y. 104, 12 N. E. 341.

Statute includes renewal bonds as well as originals. *Barnum v. Supervisors of Sullivan* (1893), 137 N. Y. 179, 33 N. E. 162, affg. (1891), 62 Hun 190, 16 N. Y. Supp. 513.

Town may enforce application of taxes.—*Ackerson v. Supervisors of Niagara* (1893), 72 Hun 616, 25 N. Y. Supp. 196; *Peirson v. Supervisors of Wayne* (1898), 155 N. Y. 105, 49 N. E. 766, affg. (1895), 87 Hun 605, 34 N. Y. Supp. 568.

County treasurer as trustee.—It was held under the former act that the county treasurer in reference to railroad taxes applicable to the purchase of bonds, or to investment as a sinking fund is not the agent for the county or the town, but holds them as a trust fund, for purposes expressed in the act. An action may be maintained by any taxpayer of the town for an order to compel the county treasurer to execute the law. It is no defense that he has paid over the fund to an officer of the town, or that the town has had the benefit of it for other town purposes. *Clark v. Sheldon* (1892), 134 N. Y. 333, 32 N. E. 23, 19 L. R. A. 138; *County of Ulster v. State of New York* (1904), 177 N. Y. 189, 69 N. E. 370.

Effect where taxes have been paid into general fund of county.—Where the taxes have been paid by the county treasurer into the general fund of the county, and are not identifiable, but the general fund had always exceeded the amount of such taxes, an order requiring their investment as prescribed by the statute was proper. *Spaulding v. Arnold* (1891), 125 N. Y. 194, 26 N. E. 295; *Matter of Walsh v. Richards* (1898), 22 Misc. 610, 50 N. Y. Supp. 1114.

Liability of board of supervisors for failure of its county treasurer to invest taxes as required by this section. See *Strough v. Supervisors of Jefferson* (1888), 50 Hun 55, 3 N. Y. Supp. 110, affd. in part (1890), 119 N. Y. 212, 23 N. E. 552.

Disposition of tax after payment of bonds.—It was held under the former law which provided for the application of taxes, for the period of thirty years, that a municipality which has issued railroad bonds is not entitled to any portion of taxes paid by the railroad company, after bonds have matured and been paid in full by the municipality, although within the thirty years. *People ex rel. McMillan v. Supervisors of Cayuga* (1892), 136 N. Y. 281, 32 N. E. 854.

Retention of state tax by county treasurer.—County treasurers are unauthorized to retain any portion of the taxes due from their counties to the state to apply on railroad bonds, but the proper method for securing such taxes is by application to the comptroller for repayment of the same. Such application should contain a statement sufficient to satisfy the comptroller that the amount of money claimed is really due to the county treasurer. Rept. of Atty. Genl. (1909) §36.

Liability of state to refund moneys derived from tax on railroads.—A county which, as a part of a state tax, has paid into the state treasury moneys derived from taxes

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levied upon railroads in towns which aided in their construction through the issue of bonds, may recover the amount thereof from the state upon the due presentation and proof of its claim, the liability of the state to refund the moneys illegally received being precisely identical with that of the county to refund them to the town. *County of Ulster v. State of New York* (1904), 177 N. Y. 189, 69 N. E. 370.

Receiving of moneys illegally applied.—A town may recover moneys paid by railroad company on account of taxes assessed in such town to the county treasurer, when it appears that he paid such moneys to the supervisor instead of applying them to the redemption of outstanding bond issued to aid in the construction of such railroad. *Town of Walton v. Adair* (1906), 111 App. Div. 817, 97 N. Y. Supp. 868, *affd.* (1908), 191 N. Y. 509, 84 N. E. 1121.

Where a county treasurer has applied railroad tax to the payment of ordinary county obligations instead of investing them as required by L. 1869, ch. 907, § 4 (from which this section was derived), the town has an equitable cause of action against the board of supervisors to compel the levying of a tax upon the county for the amount so misappropriated. *Kilbourne v. Supervisors of Sullivan* (1893), 137 N. Y. 170, 33 N. E. 159, *affg.* (1891), 62 Hun 210, 16 N. Y. Supp. 507.

Nature of action.—An action by a town against a county to recover misapplied railroad taxes is an action for money had and received, not a special proceeding. The Statute of Limitations commences to run from the time of the misappropriation. *Pierson v. Supervisors of Wayne* (1898), 155 N. Y. 105, 49 N. E. 766, *affg.* (1895), 87 Hun 605, 34 N. Y. Supp. 568. See also *Strough v. Supervisors of Jefferson* (1890), 119 N. Y. 212, 23 N. E. 552; *County of Ulster v. State of New York* (1904), 177 N. Y. 189, 69 N. E. 370.

Costs cannot be awarded by county judge in proceeding by taxpayer. *Matter of Hill v. Sheldon* (1889), 55 Hun 44, 8 N. Y. Supp. 399.

Parties to action.—Substitution of successor of county treasurer. *Matter of Marvin* (1891), 39 N. Y. St. Rep. 873, 15 N. Y. Supp. 500.

Insufficient defenses to an application to compel a county treasurer to apply taxes received from railroads to town bonds. *Matter of Walsh v. Richards* (1898), 22 Misc. 610, 50 N. Y. Supp. 1114; *Matter of Clark v. Sheldon* (1887), 106 N. Y. 104, 12 N. E. 341.

Enforcement of judgment requiring supervisors to invest railroad taxes.—A judgment directing a board of supervisors to deposit with the county treasurer for the benefit of a town, to be invested by him in pursuance of the above section, the taxes levied and collected on the assessed valuation of certain railroad property in such town, is not complied with by merely levying and collecting the sum specified without giving any direction for the use of the money as a sinking fund for the benefit of such town. The town may enforce the judgment by a writ of peremptory mandamus to compel the board of supervisors to again levy and collect the sum and pay it over to the county treasurer for the benefit of the town. *People ex rel. Town of Walton v. Supervisors of Delaware* (1902), 173 N. Y. 297, 66 N. E. 7, *revg.* (1902), 75 App. Div. 184, 77 N. Y. Supp. 676.

§ 14. **Appointment of railroad commissioners.**—The county judge of any county within which is a municipal corporation having or being entitled to have railroad commissioners, on October first, eighteen hundred and ninety-two, and in which the duties imposed upon such commissioners are not fully performed, shall continue to appoint and commission, upon the application of twenty freeholders within such corporation, three persons, who shall be freeholders and resident taxpayers therein, commissioners for the purpose of performing the duties and completing the business required

of them pursuant to this chapter or any law. Such commissioners shall hold their office for five years, and until others are appointed by the county judge, unless their duties shall be sooner performed, or the office shall be abolished, who shall also, in like manner, fill any vacancies that may exist therein. Such commissioners shall each receive the sum of three dollars per day for each day actually engaged in the discharge of their duties, and the necessary disbursement to be audited and paid by the usual auditing and disbursing officers of such municipal corporation. A majority of such commissioners, at a meeting of which all have notice, shall constitute a quorum.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 14; originally revised from L. 1869, ch. 907, § 3 and § 4, as amended by L. 1871, ch. 925.

References.—Different method of abolishing office. See §§ 226-230, post.

Commissioners not town officers.—Under the former law it was held that town commissioners are not town officers and that a town was not bound by the acts of its commissioners beyond the authority of the act under which they were appointed. *Horton v. Town of Thompson* (1877), 71 N. Y. 513.

§ 15. Oath and undertaking of commissoiners.—Before entering upon their duties such commissioners shall take the constitutional oath of office, and make and file with the county clerk of their county, their joint and several undertaking, with two or more sureties to be approved by the county judge of their county, to the effect that they will faithfully discharge their duties as such commissioners, and truly keep, pay over and account for all moneys belonging to such corporation coming into their hands.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 15; originally revised from L. 1873, ch. 420.

§ 16. Abolition of office of railroad commissioners.—The board of supervisors of any county may, upon the application of the auditing board of any municipal corporation therein, by resolution, abolish the office of railroad commissioners of such municipal corporation, and direct the manner of the transfer of their duties to the supervisor of the town, or the treasurer of the municipal corporation other than a town, and upon his compliance with such directions, such transferee shall be vested with all the powers conferred upon such railroad commissioners and subject to all the duties imposed upon them.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 13.

§ 17. Exchange or sale of railroad stock and bonds.—The railroad commissioners or officers of a municipal corporation, having the lawful charge and control of any railroad stock or bonds, for or in payment of which the bonds of such municipal corporation have been lawfully issued in aid of such railroad corporation, may exchange the stock or bonds of such railroad corporation for and in payment of such bonds, or the new substituted bonds of such municipal corporation, when such exchange can be made for not less than the par value of the stocks or bonds so held by them. If they can

not make such exchange they may sell such stocks or bonds at not less than par; but they may, on the application and with the approval of the governing board of the municipal corporation owing such stock or bonds, exchange, sell or dispose of such stock or bonds, at the best price and upon the best terms obtainable, for the municipal corporation they represent, and shall execute to the purchaser the necessary transfers therefor. All moneys received for any stock or bonds shall only be applied to the payment and extinguishment of the bonds of the municipal corporation, lawfully issued in aid of any such railroad, or substituted therefor; except that if the bonds so issued or substituted have all been paid, or the moneys so realized shall be more than sufficient to pay them in full, and all the costs and expenses of the sale, such proceeds or balance thereof shall be paid by the officers making the sale, to the supervisor of the town, or the treasurer of the municipal corporation, and applied to such lawful uses as the governing board of the municipal corporation, entitled to the same, may direct. The provisions of this section shall apply to all such commissioners or officers of a municipal corporation elected or appointed or acting under the provisions of any special act, and the authority hereby conferred shall not be limited by the provisions of any such special act.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 16; originally revised from L. 1875, ch. 328, §§ 1, 2, 4; L. 1875, ch. 421; L. 1875, ch. 585; L. 1880, ch. 21, as amended by L. 1881, ch. 308.

References.—Apportionment of railroad aid bonds on change of town boundaries. See §§ 220–224, post.

§ 18. **Annual report of commissioners and payment of bonds.**—The railroad commissioners of a municipal corporation, having in charge the moneys received and collected, and who are responsible for the payment of the interest of the bonds lawfully issued by such municipal corporation, in aid of railroads, shall annually report to the governing board of the municipal corporation, the total amount of the municipal indebtedness of the municipal corporation they represent, upon such bonds or such new bonds substituted therefor, the date of the bonds and when payable, the rate of interest thereon, the acts under which they were issued, the amount of principal and interest that will become due thereon before the next annual tax levy and collection of taxes for the next succeeding year, and the amount in their hands applicable to the payment of the principal or interest thereon. Each year such governing board shall levy and collect of the municipal corporation sufficient money to pay such principal and interest, as the same shall become due and payable. When collected, such moneys, with the unpaid sums on hand, shall be forthwith paid over to such commissioners, and applied by them to the purposes for which collected or held. When paid, such bonds shall be presented by such railroad commissioners to the governing board of the municipal corporation, at least five days before the annual town meeting, village or city election, or meeting of the board of supervisors, next thereafter held, who

shall cancel the same, and make and file a record thereof in the clerk's office of the municipal corporation, whose bonds were so paid or canceled.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 17; originally revised from L. 1875, ch. 328, §§ 3, 4; L. 1877, ch. 349; L. 1881, ch. 522, §§ 4, 5.

§ 19. **Accounts and loans by commissioners.**—Such railroad commissioners shall present to the auditing board of the municipal corporation they represent, at each annual meeting of such board, a written statement or report, showing all their receipts and expenditures, with vouchers. They shall also loan on proper security or collaterals, or deposit in some solvent bank or banking institution, at the best rate of interest they can obtain, or invest in the bonds of the municipal corporation they represent, or in bonds of the state, or of any town, village, city or county therein, issued pursuant to law, or in the bonds of the United States, all moneys that shall come into their hands by virtue of their office, and not needed for current liabilities; and all earnings, profits or interest accruing from such loans, deposits or investments, shall be credited to the municipal corporation they represent, and accounted for in their annual settlement with the governing board thereof.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 18; originally revised from L. 1871, ch. 537, § 1, as amended by L. 1882, ch. 293; L. 1877, ch. 349, § 4.

§ 20. **Reissue of lost or destroyed bonds.**—When any bonds lawfully issued by a municipal corporation in aid of any railroad, or in substitution for bonds so issued, shall be lost or destroyed, the railroad commissioners may issue new bonds in the place of the ones so lost or destroyed, at the same rate of interest, and to become payable at the same time, upon the owner furnishing satisfactory proof, by affidavit, of such ownership, and loss or destruction, and a written indemnity, with at least two sureties, approved as to form and sufficiency by the county judge of the county in which such municipal corporation is situated. Every new bond so issued shall state upon its face the number and denomination of the bond for which it is issued, that it is issued in the place of such bond claimed to have been lost or destroyed, that it is issued as a duplicate thereof, and that but one is to be paid. Such affidavit and indemnity, duly indorsed shall be immediately filed in the county clerk's office.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 19; originally revised from L. 1886, ch. 278.

§ 21. **Maximum rate of interest on municipal bonds.**—If in any general or special law heretofore passed authorizing or requiring an issue of bonds by a municipal corporation, or by any department, board, commission, or officer thereof, a maximum rate of interest on the bonds to be issued thereunder be prescribed, the rate of interest on such bonds hereafter issued in pursuance of such general or special law may be fixed by the department, board, commission or officer charged by law with the duty of issuing such bonds at any rate not more than the legal rate of interest, notwithstanding

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the provisions of such general or special law prescribing a different maximum rate. The term "municipal corporation" as used in this section includes a city, county, village, town, school district, sewer district, water district, lighting district or any other district or territory authorized by law to issue bonds, and the term "bonds" includes bonds, corporate stock, certificates of indebtedness or any other obligation whereby a municipal corporation agrees to pay a stated sum of money. (*Added by L. 1911, ch. 573.*)

ARTICLE II-A.

[Article added by L. 1911, ch. 769.]

LEGALIZING BONDS OR PROCEEDINGS FOR ISSUANCE.

Section 22. Legalizing proceedings.

23. Petition.

24. Notice of presentation of petition; filing; answer.

25. Hearing.

26. Determination of court.

27. Appeal.

28. Effect of determination.

29. Definitions.

§ 22. Legalizing proceedings.—Proceedings heretofore or hereafter taken by a municipal corporation authorized by law to issue bonds, or by its officers, agents or voters, pursuant to a statute authorizing or requiring such proceedings, may be legalized and confirmed by the supreme court in the manner and with the effect provided by this article. A proceeding may be instituted hereunder for the purpose of legalizing and confirming such proceedings taken prior to the issuance and sale of such bonds, or for the purpose of legalizing and confirming such preliminary proceedings and also the issuance, sale and form of such bonds. Such a proceeding may be instituted by the officer or officers of such municipal corporation authorized or required by law to sell such bonds, or if the purpose of such proceeding also includes the legalizing and confirming of the proceedings in respect to the issuance, sale and form of such bonds, by any taxpayer of the municipal corporation or by a purchaser or holder of such bonds. (*Added by L. 1911, ch. 769.*)

Constitutionality.—This article is constitutional and is not an attempted delegation of legislative functions to the judiciary in violation of article 3, section 1, and article 6, section 10, of the State Constitution. *Matter of Common Council of City of Lackawanna* (1913), 158 App. Div. 263, 143 N. Y. Supp. 198.

Application.—Where under the provisions of section 86 of the charter of the city of Lackawanna (Laws of 1909, ch. 574, as amd.) the amount of a proposed bond issue was estimated by the common council, and advertised, the subsequent raising of such amount before the submission of the proposition to the taxpayers was not a mere irregularity or technicality, but a jurisdictional defect, and the bond issue should not be legalized. *Matter of Common Council of City of Lackawanna* (1913), 158 App. Div. 263, 143 N. Y. Supp. 198.

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§ 23. **Petition.**—The officer or person commencing such proceeding shall present a verified petition to a special term of the supreme court held within the judicial district in which such municipal corporation is wholly or partly situated, stating the statute under which it is proposed to issue such bonds or under which such bonds were issued, the purpose thereof, the aggregate amount of bonds proposed to be issued or issued, the time when such bonds are payable, and all proceedings that have been taken by the municipal corporation, or by its officers, agents or voters, in respect to the issuance and sale of such bonds, and praying that such court shall investigate the law and facts in relation to such proceedings and determine whether such proceedings substantially complied with the statute under which it is proposed to issue and sell such bonds, or under which such bonds were issued and sold. Such petition may also state any particular in which the petitioner deems that such proceedings may not have complied with the statute under which it is proposed to issue and sell such bonds, or under which the same were issued and sold. (*Added by L. 1911, ch. 769.*)

§ 24. **Notice of presentation of petition; filing; answer.**—A notice stating the time and place of the presentation of such petition and briefly describing the proceedings sought to be legalized and confirmed shall be published at least twice in a newspaper, if any, published in the municipal corporation, or if no newspaper be published therein, in a newspaper published in the city, village or town nearest to such municipal corporation. Such publication shall be made at least twenty and not more than thirty days prior to the date of such hearing. Such notice shall also be posted in at least ten conspicuous public places in the municipal corporation. If such proceeding be instituted by a taxpayer, or a purchaser or holder of bonds which have been issued, such notice shall also be served upon the mayor of a city, the president of a village, the supervisor of a town, or the officer, board or commission authorized or required by law to sell such bonds, and upon any known purchaser or holder of such bonds. Such notice shall be so served personally or by mail at least twenty days before the date of such hearing and shall be accompanied by the petition proposed to be presented at such hearing, and at least ten days prior to such hearing such municipal corporation may serve on the petitioner a verified answer to such petition. If such proceeding be instituted by a municipal officer or officers, a copy of the petition proposed to be presented at the hearing shall be filed in the office of the officer or officers authorized or required by law to sell such bonds. At any time prior to such hearing a taxpayer of such municipality, or if such bonds have been issued, a holder or purchaser may file in such office a verified answer to such petition. (*Added by L. 1911, ch. 769.*)

§ 25. **Hearing.**—At the time of such hearing any taxpayer of the municipal corporation, or if such bonds have been issued, any holder or

purchaser thereof may intervene and with the consent of the court be made a party thereto. Upon such hearing any party to such proceeding may appear, by counsel, and may produce and examine witnesses as to the proceedings taken in respect to the issue and sale of such bonds. Such witnesses shall be subject to cross-examination by any party appearing at such hearing.

The court may appoint a referee to take testimony in respect to the proceeding for the issuance and sale of such bonds and may otherwise require the parties thereto to produce proof, by affidavit or otherwise, of any facts which may tend to enable the court to make a full and complete determination in respect to the proceedings for the issuance and sale of such bonds. (*Added by L. 1911, ch. 769.*)

§ 26. **Determination of court.**—If, after such hearing and investigation, such court is satisfied that the statute under which such proceedings were taken authorized bonds to be issued by the municipal corporation for the aggregate amount for which it is proposed to issue the same, or for the amount of bonds issued and sold thereunder if such bonds have been already issued and sold, and that the proceedings taken by such municipal corporation, its officers, agents or voters, prior to the issuance and sale of such bonds, or including the issuance and sale of such bonds have been already issued, substantially complied with the statute under which it is proposed to issue such bonds, or under which such bonds were issued and sold, the court may, by order, legalize and confirm the proceedings taken prior to the issue and sale of such proposed bonds, or if such bonds have been issued, including the proceedings on the issuance and sale thereof and the form of the bonds issued thereunder, with the same force and effect as though all the provisions of law in relation to such proceedings and form had been strictly complied with. The court may determine that such statute was substantially complied with if it authorized the aggregate amount of bonds proposed to be issued or issued thereunder, that the proposition to issue such bonds was adopted at the election, if any, to which it was submitted or by the required vote of the meeting of the body or board to which it was submitted, and that such bonds, if issued and sold were sold at not less than par and at a rate of interest no greater than was authorized by the statute under which such bonds were issued, notwithstanding any irregularity or technicality in the form of proposition or resolution proposing or authorizing such issue, or in the notice of the election or of the meeting of the board or body adopting such resolution or authorization, or in the time or manner of service thereof, or in the conduct of the election or meeting at which such proposition or authorization was adopted, or in that such proposition was submitted more than once within one year or other shorter period than authorized by law, or, if such bonds have already been issued in the manner of issuance or sale thereof, or in the time or times of payment thereof, or notwithstanding any

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other technical or formal irregularity of like nature in such proceedings. If the court is satisfied that the proceedings for the issuance and sale of such bonds did not substantially comply with the statute under which it was proposed to issue and sell the same or under which the same were issued and sold, he may make an order accordingly specifying the particulars in which he deems that such proceedings failed to comply with such statute. (*Added by L. 1911, ch. 769.*)

§ 27. **Appeal.**—An appeal may be taken to the appellate division from the order of the supreme court legalizing and confirming such proceedings, or refusing to legalize and confirm the same. Such appeal must be taken within ten days after the entry of the order, by the service of the notice of appeal upon all the parties to such proceedings who appeared personally or by counsel at the hearing before the supreme court. The decision of the appellate division thereon shall be final. (*Added by L. 1911, ch. 769.*)

§ 28. **Effect of determination.**—If the order of the supreme court legalizes and confirms such proceedings, upon the expiration of the time to appeal therefrom if no appeal be taken, or upon the entry of the final order of the appellate division confirming such order of the supreme court, such proceedings shall be deemed legalized and confirmed. If such proceeding was instituted to legalize and confirm proceedings prior to the issuance and sale of such bonds, the officer or officers of such municipal corporation authorized to issue such bonds may issue and sell the same accordingly, and the validity of such bonds shall not thereafter be in any manner questioned by reason of any defect or irregularity in such preliminary proceedings, and notwithstanding any such irregularity or defect shall be binding and legal obligations upon the municipal corporation issuing and selling the same. If such proceeding was instituted to legalize and confirm the proceedings for the issue and sale of bonds that were issued and sold at the time such proceeding was instituted, such bonds shall be valid and binding obligations upon the municipal corporation, in like manner, and the validity thereof shall not in any manner be questioned by reason of any irregularity or defect in the proceedings for the issue and sale of such bonds, or in the form thereof. (*Added by L. 1911, ch. 769.*)

§ 29. **Definitions.**—The term “municipal corporation” as used in this article includes a city, county, village, town, school district, sewer district, water district, lighting district or any other district or territory authorized by law to issue bonds.

The term “bonds” as used in this article includes bonds, corporate stock, certificates of indebtedness or any other obligations whereby a municipal corporation agrees to pay a stated sum of money. (*Added by L. 1911, ch. 769.*)

ARTICLE III.

REPORT OF FINANCIAL CONDITION.

Section 30. Reports.

31. Form of reports.
32. Comptroller to furnish blank forms.
33. Accounts of fiscal officers to be examined.
34. Chief accountant and examiners of accounts.
35. Powers and duties of examiners.
36. Uniform system of accounts.
37. Comparison of statistics.
38. Expenses of examination.

§ 30. Reports.—Every county, other than those comprising the city of New York, every city of the second and third classes, every incorporated village and every town shall annually make a report of its financial condition to the comptroller. Such reports shall be made by the treasurers of the various counties, the comptrollers of cities of the second and third classes, the treasurers of village and the supervisors of towns, but if, for any reason, the comptroller shall deem it necessary that additional information be furnished by any other officer of the municipalities named herein, he may require such additional information from such other officer in such form as he may deem necessary to carry into effect the purposes of this article. All reports shall be duly verified by the oath of the officer making the same and shall be filed with the comptroller within sixty days after the close of the fiscal year of such municipality. Every such officer shall also, within sixty days after the expiration of his term of office, or his resignation or removal therefrom, make a report to the comptroller of the financial condition of such municipal corporation on the date of the expiration of his term of office, or his resignation or removal from office, as the case may be. The refusal or willful neglect of such officer to file a report as herein prescribed shall be a misdemeanor. (*Amended by L. 1911, ch. 544.*)

Source.—L. 1905, ch. 705, § 1, as amended by L. 1907, ch. 215.

References.—Certified statements of indebtedness of county, town, city, village and school district to be transmitted to comptroller by clerks of boards of supervisors, County Law, § 52. Reports of town indebtedness to board of supervisors, Town Law, §§ 190-193.

§ 31. Form of reports.—The reports shall be in the form to be prescribed by the comptroller and shall contain:

1. A statement of the receipts of such municipality from all sources and of all accounts of revenue which may be due and uncollected at the close of the fiscal year.
2. A statement of the disbursements for all branches of the municipal government during the fiscal year.
3. A detailed statement of the indebtedness of the municipality at the

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close of the fiscal year, the provisions made for the payment thereof, together with the purposes for which it was incurred.

4. A statement of the costs of ownership and operation and of the income of each and every public service industry owned, maintained or operated by any such municipal corporation.

5. Such further or more specific information in relation to the cost of any branch of the municipal service or any improvement therein as may be required by the comptroller.

Source.—L. 1905, ch. 705, § 2.

§ 32. **Comptroller to furnish blank forms.**—The comptroller shall annually furnish to the officers required to make reports by the provisions of this article, at least ninety days before the time such reports are required to be filed with him, printed blanks and forms on which shall be indicated the information required, together with suitable printed instructions for filling out the same.

Source.—L. 1905, ch. 705, § 4.

§ 33. **Accounts of fiscal officers to be examined.**—The comptroller shall cause the accounts of all fiscal officers of each such municipal corporation to be inspected and examined by one or more examiners to be appointed by him at such periods as he shall deem necessary. On every such examination inquiry shall be made as to the financial condition and resources of the municipal corporation, and into the method and accuracy of its accounts. He may also, upon the request or with the consent of the commissioner of education, cause like inspections and examinations to be made by such examiners so appointed, of the accounts of the school authorities or the school officers of a city or union free school district, having a population of five thousand or more. Whenever an examination is made of the accounts of the school authorities or school officers of a city or of such union free school district, the comptroller shall transmit to and file with the fiscal officer or clerk of the school authorities of the city or school district examined and with the commissioner of education copies of the report of the examination made. (*Amended by L. 1917, ch 307, in effect May 2, 1917.*)

Source.—L. 1905, ch. 705, § 5.

§ 34. **Chief accountant and examiners of accounts.**—The comptroller shall appoint a chief accountant who, under his direction, shall be charged with the preparation of the forms of the reports required by the provisions of this article, the compilation of the comparative statistics and the inspection and examination of municipal accounts. He shall also appoint not to exceed fifteen examiners, who shall be charged with the duty of inspecting and examining the accounts of such municipal corporations. The chief accountant shall receive a salary of not to exceed two thousand five hundred dollars and his necessary traveling and other actual expenses; the

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examiners of accounts shall each receive when employed not less than five nor more than fifteen dollars a day and their necessary traveling expenses. (*Amended by L. 1910, ch. 301.*)

Source.—L. 1905, ch. 705, § 6, as amended by L. 1906, ch. 59; L. 1907, ch. 215; L. 1908, ch. 187.

Removal of examiner of municipal accounts.—An examiner of municipal accounts in the office of the State Comptroller, belonging to the competitive class, who has been removed because he gave to a newspaper a copy of a portion of a report made by him to the Comptroller, but which had been eliminated from the report after it reached the Comptroller's office, is not entitled to a writ of mandamus ordering his reinstatement, upon the ground that his removal was for political reasons within the meaning of section 25 of the Civil Service Law, where there is no claim that he was removed for any other cause, or that he did not have an opportunity to make an explanation. *People ex rel. Goldschmidt v. Travis* (1915), 167 App. Div. 475, 152 N. Y. Supp. 1058, *affd.* (1916), 219 N. Y. 589, 114 N. E. 1078.

§ 35. **Powers and duties of examiners.**—The comptroller, the chief accountant and each examiner of accounts shall have power to examine into the financial affairs of every municipal corporation enumerated herein, and to administer an oath to any person whose testimony may be required, on any such examination, and to compel the appearance and attendance of such person for the purpose of any such examination and investigation, and the production of books and papers. But no such person shall be compelled to appear or be examined elsewhere than within such municipality. Wilful false swearing in such examination shall be perjury and shall be punishable as such. A report of such examination shall be made and shall be a matter of record in the office of the comptroller and in the office of the chief fiscal officer of the municipality, each of which shall be open to public inspection.

Source.—L. 1905, ch. 705, § 7.

§ 36. **Uniform system of accounts.**—The comptroller may formulate and prescribe a system of keeping accounts, which system shall be uniform for each class of municipal corporations specified in section thirty of this chapter, and from time to time, whenever he shall deem it necessary, direct the instalment of such system by any one or more of the municipal corporations comprising such class. Any officer of such municipal corporation who shall refuse or wilfully neglect to comply with such direction of the comptroller within such reasonable time as the comptroller may prescribe shall be guilty of a misdemeanor. The comptroller, may, however, and upon good and sufficient cause shown shall, extend such prescribed time as may be reasonable and necessary. The expense of installing a system of keeping accounts in pursuance of this section shall be paid out of such appropriation as shall be made to carry this article into effect.

Source.—L. 1905, ch. 705, § 7-a, as added by L. 1907, ch. 215.

§ 37. **Comparison of statistics.**—The substance of the reports required by the provisions of this article shall be arranged by the comptroller in

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such form as shall indicate the comparative receipts from the various sources of revenue and the comparative costs of the several branches of government in the specified municipal corporations, and shall be published in an annual statement of comparative statistics, which shall be issued for each class of municipal corporations at the expense of the state as a public document and shall be submitted by the comptroller to the legislature at each regular session. Copies thereof shall also be furnished by him to each municipality named therein.

Source.—L. 1905, ch. 705, § 3.

§ 38. **Expenses of examination.**—The expenses of examining the public accounts of any municipal corporation shall be paid out of such appropriation as shall be made to carry the provisions of this article into effect.

Source.—L. 1905, ch. 705, § 8.

ARTICLE IV.

NEGLIGENCE AND MALFEASANCE OF PUBLIC OFFICERS; TAXPAYERS' REMEDIES.

Section 50. Cause of action not barred.

51. Prosecution of officers for illegal acts.
52. Holder of bond may bring action.
53. Municipal corporation may bring action against its officers.
54. Statute of limitation; order of arrest.
55. Appeals.

§ 50. **Cause of action not barred.**—A cause of action in law or equity against any municipality in the state of New York, or its proper officers, arising from the action of such municipality in derogation of its previous grant or covenant, where a previous action shall not have succeeded, in whole or in part, owing to the failure of the said municipality to produce or prove certain written evidence, which was essential to the plaintiff's claim, shall not be barred by the operation of the statutes limiting the time for the enforcement of civil remedies in favor of the successor in interest to the person entitled to any benefit or damages by reason of such grant, covenant or action of said municipality.

Source.—L. 1901, ch. 659, § 1.

§ 51. **Prosecution of officers for illegal acts.**—All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation by any person or corporation whose assessment, or by any number of persons or corpora-

tions, jointly, the sum of whose assessments shall amount to one thousand dollars, and who shall be liable to pay taxes on such assessment in the county, town, village or municipal corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon any assessment of the above-named amount within one year previous to the commencement of any such action. Such person or corporation upon the commencement of such action, shall furnish a bond to the defendant therein, to be approved by a justice of the supreme court or the county judge of the county in which the action is brought, in such penalty as the justice or judge approving the same shall direct, but not less than two hundred and fifty dollars, and to be executed by any two of the plaintiffs, if there be more than one party plaintiff, providing said two parties plaintiff shall severally justify in the sum of five thousand dollars. Said bonds shall be approved by said justice or judge and be conditioned to pay all costs that may be awarded the defendant in such action if the court shall finally determine the same in favor of the defendant. The court shall require, when the plaintiffs shall not justify as above mentioned, and in any case may require two more sufficient sureties to execute the bond above provided for. Such bond shall be filed in the office of the county clerk of the county in which the action is brought, and a copy shall be served with the summons in such action. If an injunction is obtained as herein provided for, the same bond may also provide for the payment of the damages arising therefrom to the party entitled to the money, the auditing, allowing or paying of which was enjoined, if the court shall finally determine that the plaintiff is not entitled to such injunction. In case the waste or injury complained of consists in any board, officer or agent in any county, town, village or municipal corporation, by collusion or otherwise, contracting, auditing, allowing or paying, or conniving at the contracting, audit, allowance or payment of any fraudulent, illegal, unjust or inequitable claims, demands or expenses, or any item or part thereof against or by such county, town, village or municipal corporation, or by permitting a judgment to be recovered against such county, town, village or municipal corporation, or against himself in his official capacity, either by default or without the interposition and proper presentation of any existing legal or equitable defenses, or by any such officer or agent, retaining or failing to pay over to the proper authorities any funds or property of any county, town, village or municipal corporation, after he shall have ceased to be such officer or agent, the court may, in its discretion, prohibit the payment or collection of any such claims, demands, expenses or judgments, in whole or in part, and shall enforce the restitution and recovery thereof, if heretofore or hereafter paid, collected or retained by the person or party heretofore or hereafter receiving or retaining the same, and also may, in its discretion, adjudge and declare the colluding or defaulting official personally responsible therefor, and out of his property, and that of his bondsmen, if any, provide for the collection or repayment thereof, so

as to indemnify and save harmless the said county, town, village or municipal corporation from a part or the whole thereof; and in case of a judgment the court may, in its discretion, vacate, set aside and open said judgment, with leave and direction for the defendant therein to interpose and enforce any existing legal or equitable defense therein, under the direction of such person as the court may, in its judgment or order, designate and appoint. All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state are hereby declared to be public records, and shall be open, subject to reasonable regulations to be prescribed by the officer having the custody thereof, to the inspection of any taxpayer. This section shall not be so construed as to take away any right of action from any county, town, village or municipal corporation, or from any public officer, but any right of action now existing, or which may hereafter exist in favor of any county, town, village or municipal corporation, or in favor of any officer thereof, may be enforced by action or otherwise by the persons hereinbefore authorized to prosecute and maintain actions; and whenever by the provisions of this section an action may be prosecuted or maintained against any officer or other person, his bondsmen, if any, may be joined in such action or proceeding and their liabilities as such enforced by the proper judgment or direction of the court; but any recovery under the provisions of this article shall be for the benefit of and shall be paid to the officer entitled by law to hold and disburse the public moneys of such county, town, village or municipal corporation, and shall, to the amount thereof, be credited the defendant in determining his liability in the action by the county, town, village or municipal corporation or public officer. The provisions of this article shall apply as well to those cases in which the body, board, officer, agent, commissioner or other person above-named has not, as to those in which it or he has jurisdiction over the subject-matter of its action.

Source.—L. 1881, ch. 531, as amended by L. 1887, ch. 673; L. 1892, ch. 301.

References.—Falsification of accounts by public officer, Penal Law, § 1865. Buying claims for prosecution, Id. § 1856. Misappropriation by public officers, Id. §§ 1838, 1865, 1866. Omission of duty by public officer, generally, Id. § 1857. Auditing and paying fraudulent claims, Id. §§ 1863, 1864. Public officers not to be interested in sales, leases or contracts, Id. § 1868. Unlawful taking of fees by public officer, Id. §§ 855, 1826, 1830. Extortion by public officer, Id. § 854. Actions by or against certain county, town and municipal officers, Code Civ. Pro. §§ 1926–1931. Warrant of attachment against public officer for speculation, Id. § 637.

Action against municipal officer.—An action to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the state, may be maintained against any officer thereof, or any agent, commissioner, or other person, acting in its behalf, either by a citizen, resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or incorporated village, or any public officer. [*Code Civ. Pro.* § 1925, as amended

by L. 1892, ch. 524.] This section of the Code was revised from L. 1872, ch. 161, as amended by L. 1879, ch. 526.

Action under either Code or this section.—A taxpayer's action to restrain waste or injury to the property or funds of a municipality, or to prevent any illegal official act on the part of the officers of such municipality, will, in a proper case, lie under the provisions of section 1925 of the Code of Civil Procedure, or section 51 of the General Municipal Law. The provisions of section 51 of the General Municipal Law are somewhat broader in their scope, and provide somewhat more specifically for an action to prevent illegal official acts, and, in a proper case, restitution; but the principles governing an action brought under either of the aforesaid provisions are substantially the same. *McBride v. Ashley* (1915), 91 Misc. 585, 154 N. Y. Supp. 1010, *affd.* (1916), 174 App. Div. 650, 160 N. Y. Supp. 406.

Authority to institute a taxpayer's action must be found either in section 1925 of the Code of Civil Procedure or in section 51 of the General Municipal Law, and such action can be maintained only where the acts of public officials are illegal or where fraud or collusion or bad faith exists, but not to enjoin official acts which are simply unwise or improvident. *Admiral Realty Co. v. City of New York* (1912), 76 Misc. 345, 135 N. Y. Supp. 348, *affd.* (1912), 151 App. Div. 888, 135 N. Y. Supp. 1097, *affd.* (1912), 206 N. Y. 110, 99 N. E. 241.

While section 51 of the General Municipal Law and section 1925 of the Code of Civil Procedure are independent acts, they cover common ground upon the subject of the waste of municipal funds, and an action to prevent payment of salary to an inspector of plumbing who has failed to obtain a certificate of competency, as required by section 48 of the General City Law, may be maintained under either act. *Gregory v. Simpson* (1916), 173 App. Div. 6, 159 N. Y. Supp. 1016.

The code provision mentioned above and this section are independent acts and not inconsistent with each other. *Steele v. Village of Glen Park* (1908), 193 N. Y. 341, 86 N. E. 26; *Wey v. O'Hara* (1905), 48 Misc. 82, 95 N. Y. Supp. 81.

Before the passage of this law it was held that some individual interest, other than that as a taxpayer, was required to give a party a standing in court where an alleged delinquency of public officers was called in question. *Doolittle v. Supervisors of Broome* (1858), 18 N. Y. 155; *Roosevelt v. Draper* (1861), 23 N. Y. 155; *Kilbourn v. St. John* (1874), 59 N. Y. 21.

There was no authority in the State by its Attorney-General to intervene, by action, to protect the property right and interests of municipal corporations. *People v. Ingersoll* (1874), 58 N. Y. 1.

Construction of statute; nature of remedy.—The above act is a remedial statute and is to be liberally construed for the purpose of "the protection of taxpayers." The statute gives a new right of action. Without such an act a taxpayer, whose position was not different from that of the whole body of taxpayers, had no such interest as entitled him to resort to a court of equity, to revise, restrain or set aside the action of town or municipal authorities, upon an allegation that their acts were unauthorized and illegal, or that unless arrested they would subject the plaintiff to unjust or illegal taxation. The purpose of the act is to place a taxpayer in a position where he can, before the intervention of vested rights and the equities of third parties, challenge the legality of the acts of public officials upon the same grounds which he might interpose in a legal action to protect his property against alienation under an illegal assessment or other act of the public authorities by which he was to be divested of his property. The statute assumes that any illegal official act is, or may be, injurious to the corporation when done by its servant, and allows him to be restrained simply because of the illegality. The theory of the whole law is that the taxpayer, as the ultimate bearer of the burdens of the municipality, shall have a remedy against the illegal official acts

which tend to waste the property of the public and to impose unjust burdens upon the taxpayer. *Queens County Water Co. v. Monroe* (1903), 83 App. Div. 105, 82 N. Y. Supp. 610.

The taxpayer's acts were not designed to protect the public from mistakes, errors of judgment or lack of intelligent appreciation of official duties on the part of officials. To justify the bringing of an action thereunder, some improper motive of an officer is essential. The act complained of need not be corrupt in the sense of not being induced by a desire for pecuniary gain, but it must be done to accomplish some purpose foreign to the interest of the municipality which is tantamount to fraud; bad judgment, even gross incompetency, is not bad faith. *Hearst v. McClellan* (1905), 102 App. Div. 336, 92 N. Y. Supp. 484; *Meyers v. City of New York* (1900), 32 Misc. 522, 66 N. Y. Supp. 755, *affd.* (1900), 54 App. Div. 631, 66 N. Y. Supp. 755.

The equitable remedy of an injunction under the General Municipal Law is to be granted or withheld in accordance with the general principles which govern the exercise of equitable jurisdiction. Mere inaction by a public officer will not justify the intervention of a court of equity where the legal remedy by mandamus is available and adequate. *Southern Leasing Co. v. Ludwig* (1916), 217 N. Y. 100, 111 N. E. 470, *revg.* (1915), 168 App. Div. 233, 153 N. Y. Supp. 545.

Law governing.—A taxpayer's action must be determined under the law as it exists at the time the decision therein is rendered and not as of the time the action was begun. *Admiral Realty Co. v. City of New York* (1912), 76 Misc. 345, 135 N. Y. Supp. 384, *affd.* (1912), 151 App. Div. 888, 135 N. Y. Supp. 1097, *affd.* (1912), 206 N. Y. 110, 99 N. E. 241.

When taxpayer's action will lie, in general.—The statute was not intended to subject the official acts of boards, officers or municipal bodies acting within their jurisdiction and discretion to the supervision of the courts, simply because some taxpayer might conceive the same to be unwise, improvident or based on errors of judgment. *McBride v. Ashley* (1915), 91 Misc. 585, 154 N. Y. Supp. 1010, *affd.* (1916), 174 App. Div. 650, 160 N. Y. Supp. 406.

The mere illegality of an official act in and of itself does not justify injunctive relief in an action authorized to be brought by a taxpayer under this section; but when waste or injury is not involved, it must appear that in addition to being an illegal official act the threatened act is such as to imperil the public interests or calculated to work public injury or produce some public mischief. *Altschul v. Ludwig* (1916), 216 N. Y. 459, 111 N. E. 216, *affg.* (1915), 170 App. Div. 957, 155 N. Y. Supp. 1091.

When right may be exercised; decisions generally.—The act extends to illegal acts of public officers, as such. The terms "waste" and "injury" refer only to illegal, wrongful and dishonest acts of public officials. The statute is confined to cases "where the acts complained of are without power, or where corruption, fraud or bad faith amounting to fraud" is charged. *Talcott v. City of Buffalo* (1891), 125 N. Y. 280, 26 N. E. 263, *revg.* (1890), 57 Hun 43, 10 N. Y. Supp. 370; *Ziegler v. Chapin* (1891), 126 N. Y. 342, 27 N. E. 471; *Sheehy v. McMillan* (1898), 26 App. Div. 141, 49 N. Y. Supp. 1088; *Potter v. Collis* (1897), 19 App. Div. 392, 46 N. Y. Supp. 471, *affd.* (1898), 156 N. Y. 16, 50 N. E. 413; *Paul v. City of New York* (1899), 46 App. Div. 69, 61 N. Y. Supp. 570; *Osterhoudt v. Rigney* (1885), 98 N. Y. 222; *Warrin v. Baldwin* (1882), 105 N. Y. 534, 12 N. E. 49; *Weston v. City of Syracuse* (1899), 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678; *Sheehy v. McMillan* (1898), 26 App. Div. 140, 49 N. Y. Supp. 1088; *Dunning v. County of Orange* (1910), 139 App. Div. 249, 251, 124 N. Y. Supp. 107, *affd.* (1912), 204 N. Y. 647, 97 N. E. 1104; *Rogers v. O'Brien* (1896), 1 App. Div. 397, 37 N. Y. Supp. 358. Discretion in absence of fraud will not be interfered with. *Robinson v. Gilroy* (894), 30 N. Y. Supp. 411. The mere allegation of fraud or illegality does

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not state an issuable fact. *Barhite v. Home Telephone Co.* (1900), 50 App. Div. 25, 63 N. Y. Supp. 659. See also *Rogers v. O'Brien* (1897), 153 N. Y. 357, 47 N. E. 456, in which the application of the act is discussed, and note in 22 Abb. N. C. 88, in which the earlier cases are reviewed.

Where the complaint in an action to prevent the granting of a franchise to conduct a public lighting service does not allege and the proof does not show fraud or corruption or acts of bad faith amounting to fraud in granting the franchise it will be dismissed. *Craft v. Lent* (1907), 53 Misc. 481, 103 N. Y. Supp. 366.

The court may not restrain the performance of a contract for a public work because the contract is ill-advised, or the result of gross errors of judgment, nor upon general averments of bad faith, where the opposing papers explicitly deny fraudulent intent. *Walter v. McClellan* (1905), 48 Misc. 215, 96 N. Y. Supp. 479.

An action pursuant to this section is maintainable only when the official act complained of is illegal or wrongful; thus, the mere disregard by a common council of a city of legal formalities or orderly mode of procedure prescribed by its charter will not necessarily render a resolution "illegal" within the meaning of this section. *Farley v. City of Lockport* (1908), 61 Misc. 417, 113 N. Y. Supp. 702.

Action will only lie where the acts complained of are without power or where corruption, fraud or bad faith amounting to fraud is charged. It will not lie to restrain a board of town highway commissioners from granting a franchise to a lighting company without compensation. *Craft v. Lent* (1907), 53 Misc. 484, 103 N. Y. Supp. 366.

Where a taxpayer's action, brought under this section, proceeds upon the assumption that the scheme of assessment adopted by the board of estimate and apportionment of the city of New York for raising money to defray the cost of extending Seventh avenue and widening Varick street is illegal, but there is no evidence that such scheme is unfair, that the percentage assessed by way of special benefit is greater than should justly be borne by the property within the special assessment district, or that the percentage of the cost assessed on each three boroughs is in fact excessive or unequal, the complaint should be dismissed upon the merits. *Goodale v. City of New York* (1914), 85 Misc. 603, 148 N. Y. Supp. 1076.

The word "otherwise" in the phrase "by collusion or otherwise, contracting, auditing, etc.," is to be interpreted according to the rule of *ejusdem generis*. It does not mean any auditing, but an audit due to some sinister or improper motive and in violation of a public trust. The allegation that a member of a board of supervisors consisting of three members, presented his own fraudulent bills to the board for audit, is not a sufficient declaration as against the two members not presenting claims, to hold them liable for the amount of the claims presented. *Wallace v. Jones* (1903), 83 App. Div. 152, 82 N. Y. Supp. 449.

Status of plaintiff; special injury.—In a taxpayer's action under this act the plaintiff is not bound to show that he will suffer peculiar injury; he is appearing in behalf of himself and all other taxpayers, and it is enough for him to show that he has the status as a taxpayer which the statute prescribes, and that the act of the defendant is one which the law forbids. *Warrin v. Baldwin* (1887), 105 N. Y. 534, 12 N. E. 49, revd. (1885), 35 Hun 334; *Overton v. Village of Olean* (1885), 37 Hun 47; *Guenther v. Patch* (1912), 76 Misc. 649, 135 N. Y. Supp. 629, revd. on other grounds (1913), 155 App. Div. 27, 140 N. Y. Supp. 223; *Compare Gallagher v. Keating* (1899), 40 App. Div. 81, 57 N. Y. Supp. 632; *Rogers v. Supervisors of Westchester* (1902), 77 App. Div. 501, 78 N. Y. Supp. 1081; *Wenk v. City of New York* (1902), 171 N. Y. 607, 64 N. E. 509; *Bush v. O'Brien* (1900), 164 N. Y. 205, 215, 58 N. E. 106; *Gordon v. Strong* (1899), 158 N. Y. 407, 408, 53

N. E. 33; *Ayers v. Lawrence* (1874), 59 N. Y. 192; *Gerlach v. Brandreth* (1898), 34 App. Div. 197, 199, 54 N. Y. Supp. 479.

The legal capacity of a plaintiff to maintain such an action is not affected by the mere fact that he is a tenant in common of the lands assessed on which he has paid the taxes, and that they are listed on the assessment rolls in the name of the estate of plaintiff's ancestor. *Smith v. Hedges* (1915), 169 App. Div. 115, 154 N. Y. Supp. 867.

Substantial injury need not be shown.—Where a county treasurer is accustomed to retain fees before audit, an action lies to enjoin him from so doing, irrespective of the consequences of such violation of the law. *Warrin v. Baldwin* (1887), 105 N. Y. 534, 12 N. E. 49, revg. (1885), 35 Hun 334.

The term "waste or injury" as used in this section includes only illegal, wrongful or dishonest acts. *Daly v. Haight* (1915), 170 App. Div. 459, 156 N. Y. Supp. 538.

Either waste or illegality sufficient. *Bill v. Miller* (1910), 140 App. Div. 602, 125 N. Y. Supp. 865; *Fox v. Automatic Vaudeville Co.* (1910), 140 App. Div. 926, 125 N. Y. Supp. 871; *Carpenter v. Wise* (1915), 92 Misc. 246, 155 N. Y. Supp. 996, affd. (1916), 173 App. Div. 998, 159 N. Y. Supp. 1104.

A taxpayer may bring an action to prevent an illegal act; and it necessarily follows that he may also bring an action to restrain waste where an individual assumes to act illegally in an official capacity. So where a majority of a village health board, one member of which alleged majority is illegally holding over from a prior term, votes an expenditure, a taxpayer's action will lie to prevent such expenditure. *Whitney v. Patrick* (1909), 64 Misc. 191, 120 N. Y. Supp. 550, affd. (1909), 134 App. Div. 988, 120 N. Y. Supp. 1151.

Redress of private grievance is not the purpose of this act. *Holtz v. Diehl* (1899), 26 Misc. 224, 56 N. Y. Supp. 841.

Not for review of discretionary actions.—The remedy given by this section is confined to cases where fraud or corruption or illegal official acts are shown, and was not intended to empower the courts to review discretionary action or acts of public boards or officials. *Western New York Water Co. v. Loughlin* (1916), 157 N. Y. Supp. 257.

When action premature.—An action by a taxpayer to restrain town officials from expending town funds in the repair of a highway is premature, when the only action taken was the expenditure of a small sum to determine whether the town was the owner of the highway and the cost of the improvement, and there has been no resolution showing an intention to expend any moneys in improvements until the other questions are determined. *Tinker v. O'Dell* (1909), 134 App. Div. 272, 118 N. Y. Supp. 876.

No injury threatened.—Where a public officer, by the order of a superior authority, the regularity of which it is not his business to investigate, and which it is his official duty to obey, has been commanded to do an illegal act, the fact that he has not threatened to do such act is no bar to the maintenance of an action restraining its commission. *Williams v. Boynton* (1895), 147 N. Y. 426, 42 N. E. 184.

Abstract questions not determined.—Where a taxpayer is in no danger of being required to contribute to a municipal expenditure claimed by him to be illegal, but so far as appears the officers charged therewith have refused to make the alleged wasteful expenditure, an action cannot be maintained under this section. *Hanrahan v. Terminal Station Commission* (1912), 206 N. Y. 494, 100 N. E. 414.

Residence in the municipality is not a necessary prerequisite to the bringing of a taxpayer's action. *Steele v. Village of Glen Park* (1908), 193 N. Y. 341, 86 N. E. 26.

Action to restrain letting of contract.—Taxpayer's actions are brought to allow

the illegal acts of public officials to be controlled by the courts. They are not allowed for the purpose of enabling corporations or individuals to require the award of a public contract on bids in excess of those made by other competent and responsible bidders. *Nathan v. O'Brien* (1907), 117 App. Div. 664, 102 N. Y. Supp. 947.

Where it appears that a contract was let to a person bidding a number of thousand dollars lower than his nearest competitor, an action will not lie against the officers authorized to award the contract because of a failure to comply with certain technicalities not involving the merits of the transaction. So an action cannot be maintained by a taxpayer to set aside a contract awarded to a bidder because of the fact that the bid was not deposited in the proper box, or because it was not opened immediately, as required by the rules and regulations of the board awarding the contract. *M'Cord v. Lauterbach* (1904), 91 App. Div. 315, 86 N. Y. Supp. 503.

Where a taxpayer's action, brought under this section and section 1925 of the Code of Civil Procedure, to restrain the officers of a municipality from letting certain contracts or incurring indebtedness in connection with a municipal water plant, the principal contention of the complaint is that defendants, as members of the board of water commissioners, and other public officers of the city, have been making contracts for extension of mains, etc., at a time when there were no funds lawfully obtainable for those purposes, and the affidavits in support of an injunction *pendente lite* seem to support such contention, while those submitted on behalf of defendants are from sources clearly in a much better position to know the facts than plaintiff's affiants and are equally clear that funds were and are available for the said purpose, and there is no suggestion that defendants are not personally responsible nor that there is any reason to suppose funds improperly paid out cannot be recovered from the contractors, the motion for the injunction will be denied. *Western New York Water Co. v. Laughlin* (1913), 82 Misc. 496, 143 N. Y. Supp. 737.

Trying title to office.—This section does not authorize the bringing of an action to test the right of a person to an office, or to restrain the exercise of official powers. *Jewell v. Mohr* (1912), 136 N. Y. Supp. 273.

Where a police justice for the city of Binghamton was illegally elected owing to a misapprehension as to the effect of the Second Class Cities Law, a taxpayer may maintain an action to have a tax levied to pay the salary declared illegal and void, and to restrain the collection of the same. *Wear v. Truitt* (1916), 173 App. Div. 344, 158 N. Y. Supp. 790.

A taxpayer's action cannot be brought under the above act to restrain the payment of salaries to public officers holding presumptively valid appointments in the civil service, upon the ground that although the appointments are valid in form, they are invalid in fact. When the question of title to the office is not collateral or incidental, but is the central and pivotal question, the proper remedy is a proceeding by *quo warranto*. *Greene v. Knox* (1903), 175 N. Y. 432, 67 N. E. 910, affg. (1902), 76 App. Div. 405, 78 N. Y. Supp. 779. Compare *Rogers v. Common Council of Buffalo* (1888), 22 Abb. N. C. 144, 2 N. Y. Supp. 326.

Prevention of illegal appointment to office.—Where a complaint in an action brought the day before a county clerk was about to enter on the duties of his office alleges in substance that such clerk after he had taken the oath of office publicly stated that he would, immediately upon entering upon the discharge of the duties of his office, appoint new special deputy county clerks in place of those then in office without obeying the Civil Service Law or the rules and regulations of the state civil service commission, and further alleged that such appointments would be illegal, and that by such illegal acts the property of the taxpayers would be wrongfully diverted and wasted, such threatened acts were immediately

connected with the discharge of the duties of county clerk, and so imminent that an action to restrain them should be sustained as within the fair construction of the Taxpayers' Acts. *Olmsted v. Meahl* (1916), 219 N. Y. 270, 114 N. E. 396.

Action to enjoin purchase of site and erection of school building.—An action will not lie on behalf of a taxpayer to enjoin a board of education from purchasing a site and erecting a school building thereon, where it appears that the application is based solely upon the objection that the board of education had not strictly complied with all the required technical and legal formalities, if there has been a substantial compliance with the law, and the facts show that public necessity requires the construction of the school building, and that there is no bad faith upon the part of the board. *Lawson v. Lincoln* (1903), 86 App. Div. 217, 83 N. Y. Supp. 667, *affd.* (1904), 178 N. Y. 636, 71 N. E. 1133.

A board of supervisors in auditing claims against a county exercise a judicial function; and if they act within their jurisdiction they cannot be held personally responsible for their audits. *Wallace v. Jones* (1907), 122 App. Div. 497, 499, 107 N. Y. Supp. 288, *affd.* (1909), 195 N. Y. 511, 88 N. E. 1134.

Requiring union labor on building contract.—A taxpayer's action lies to enjoin the execution of a building contract requiring the employment of union men only. *Davenport v. Walker* (1901), 57 App. Div. 221, 68 N. Y. Supp. 161.

Restraining approval of building plans.—An action may be maintained under this section by a taxpayer of the city of New York to restrain the superintendent of buildings from approving the plans for, and permitting, the erection or remodeling of a theatre in that city where such plans do not comply with the provisions of the Building Code. The erection of a theatre in violation of such provisions is a public nuisance which could be restrained by the public authorities, and as the granting of a permit to erect such a building is also an illegal act, it may be restrained in a taxpayer's action. *Altschul v. Ludwig* (1916), 216 N. Y. 459, 111 N. E. 216, *affg.* (1915), 170 App. Div. 957, 155 N. Y. Supp. 1091; *Brill v. Miller* (1910), 140 App. Div. 602, 125 N. Y. Supp. 865; *Fox v. Automatic Vaudeville Co.* (1910), 140 App. Div. 926, 125 N. Y. Supp. 871.

Restraining tax collection.—The fact that a village tax is invalid for want of notice and hearing before the assessing officers does not entitle a taxpayer to maintain an action to restrain its collection. *Trumbull v. Palmer* (1905), 104 App. Div. 51, 93 N. Y. Supp. 349.

Construction of speedway by park commissioners is not waste. *Holtz v. Diehl* (1899), 26 Misc. 224, 56 N. Y. Supp. 841.

Action against bondholder.—A taxpayer cannot sue a *bona fide* holder for value of town bonds to have them cancelled. *Alvord v. Syracuse Savings Bank* (1884), 34 Hun 143, *affd.* (1885), 98 N. Y. 599.

Purchase of land at excessive price.—Although a mere error in judgment as to the price on a proposed purchase of land by a municipality may not suffice to sustain a taxpayer's action, yet an excessive valuation so large as to indicate that the officers acting are not exercising the same fidelity, care and caution as would be expected of an individual purchasing for himself with his own money, will sustain an action to enjoin the purchase. *Winkler v. Summers* (1888), 22 Abb. N. C. 80, 5 N. Y. Supp. 723.

Employment by supervisors of member as attorney is against public policy and payment for his services may be restrained in a taxpayer's action. *Beebe v. Supervisors of Sullivan* (1892), 64 Hun 377, 19 N. Y. Supp. 629, *affd.* (1894), 142 N. Y. 631, 37 N. E. 566.

Compromise of action for penalty.—An action does not lie under this section to prevent an overseer of the poor from compromising an action for a penalty for the sale of liquor in violation of the excise laws. *Olf v. Leddick* (1891), 38 N. Y. St. Rep. 122, 14 N. Y. Supp. 41.

Action to restrain submission of claim against county.—An action brought by a taxpayer to restrain the submission to the Supreme Court, upon an agreed statement of facts, of a claim of a town against the board of supervisors is not maintainable in a case in which the defendants have acted in good faith and in the belief that the submission contained a full, fair and truthful statement of all of the facts upon which the controversy depended, and there was no intent or purpose to defraud any taxpayer of the county, unless the acts complained of were beyond the authority of the board and wholly illegal and void. *New York Central, etc., R. Co. v. Maine* (1893), 71 Hun 417, 24 N. Y. 962.

Action for accounting.—A taxpayer cannot maintain an action in equity against a public officer and the surety upon his official bond for an accounting and for judgment against the former for specified sums of public moneys alleged to have been misappropriated and against the latter for the penalty of the bond. *Gray v. Back* (1908), 59 Misc. 563, 111 N. Y. Supp. 718.

Action against state officers.—This section authorizes actions only against municipal corporations and their officers, not against State officers. Hence, an action to restrain the expenditure of State moneys on highways can be brought by the people of the State alone. *County of Albany v. Hooker* (1912), 204 N. Y. 1, 97 N. E. 403. The only officers whose illegal acts may be restrained by an action under this section are those "acting or who have acted for or on behalf of" a municipal corporation. *Matter of Reynolds* (1911), 202 N. Y. 430, 440, 96 N. E. 87, 416.

The right to maintain an action against a public officer to restrain or prevent the waste of public funds or injury to public property, or to restrain a threatened illegal official act, is entirely statutory and is confined to one against officers, agents, commissioners, or other persons acting, or who have acted, for or on behalf of any county, town, city, village or municipal corporation in this state, and is not given against any person acting for and on behalf of the state. *Olmsted v. Meahl* (1916), 219 N. Y. 270, 114 N. E. 396.

A taxpayer's action cannot be maintained to enjoin a State commission, consisting of State officers appointed by the governor from constructing a prison plant. *Long v. Johnson* (1911), 70 Misc. 308, 127 N. Y. Supp. 756. Nor can such an action be maintained to enjoin the State Board of Highway Commissioners from entering into a contract for the construction of a State highway. *Whitbeck v. Hooker* (1911), 73 Misc. 573, 133 N. Y. Supp. 534.

A taxpayer cannot sue to restrain the State Superintendent of Public Instruction from enforcing an order appointing temporarily a corps of teachers and employees for a school where the school authorities fail to act, as he is a state officer and does not come within the meaning of this section. *Hutchinson v. Skinner* (1897), 21 Misc. 729, 49 N. Y. Supp. 360.

County clerk and deputy as officers of court.—A county clerk and special deputy clerks appointed by him are, in the performance of their duties as clerks of the Supreme Court or County Court, state officers performing state functions and not subject to control by action pursuant to either of the Taxpayers' Acts (Code of Civil Procedure § 1925; Gen. Mun. L. § 51); but a county clerk in the appointment of his special deputies is performing a duty expressly imposed upon him by the legislature to be performed in his capacity as a county officer, and a taxpayer's action will lie against him upon the grounds stated in the Code and statute. *Olmsted v. Meahl* (1916), 219 N. Y. 270, 114 N. E. 396.

An agreement to pay public money to a monopoly, knowing it to be such, is an illegal contract, and any action in executing or performing the same is an illegal official act, within the meaning of the statute already referred to. *Boon v. City of Utica* (1893), 5 Misc. 391, 26 N. Y. Supp. 932.

Proposed action beneficial to city.—A taxpayer cannot sue to restrain the proposed action of a city board which would be beneficial to the city even though

the proposed act is illegal. *Gilgar v. Low* (1902), 38 Misc. 292, 77 N. Y. Supp. 852.

Restitution of public money.—An action lies under this section to compel the restitution of money illegally paid for the salary of a clerk to a county judge under a void resolution of the board of supervisors. *Shiebler v. Griffing* (1913), 83 Misc. 363, 145 N. Y. Supp. 969.

Taxpayers' action may be brought to compel restoration of town funds paid upon purchase price of steam roller under conditional contract of sale, void under the Highway Law. *Shoemaker v. Buffalo Steam Roller Co.* (1915), 165 App. Div. 836, 151 N. Y. Supp. 207.

A taxpayer may by action under this section prevent any illegal official act or waste or injury and may compel the restoration of all property and funds. But it is only when the waste or injury is by collusion or otherwise or by default in permitting a wrongful judgment or by retaining or failing to pay over any public funds or property that the court will enforce the restitution and recovery, and also in its discretion declare the official responsible, financially, therefor. *Daly v. Haight* (1915), 170 App. Div. 469, 156 N. Y. Supp. 538.

Where in a taxpayer's action against a supervisor and a person employed pursuant to a resolution of the town board to recover town moneys paid by the former to the latter for services rendered the court finds that there was no intentional wrongdoing by either the defendants, that all the moneys were paid before the commencement of the action, and that the supervisor did not receive any of them, it was error to give judgment for the plaintiff. *Daly v. Haight* (1915), 170 App. Div. 469, 156 N. Y. Supp. 538.

Action to enjoin appointment of commissioner of jurors.—A taxpayer's action will not lie to enjoin the Appellate Division from appointing a commissioner of jurors under an alleged void statute. *Melody v. Goodrich* (1901), 67 App. Div. 368, 73 N. Y. Supp. 741, *affd.* (1902), 170 N. Y. 185, 63 N. E. 133.

A preliminary injunction will not issue in a taxpayer's action to annul a city contract unless the plaintiff shows clearly that upon the law and the facts the official action complained of is illegal. *Stockton v. City of Buffalo* (1905), 108 App. Div. 171, 95 N. Y. Supp. 509.

Preventing use of public places for open markets.—In an action to restrain the use of public places for open markets an injunction *pendente lite* should not be granted, where it appears that the municipal authorities are taking steps to correct any illegal acts by the defendants. *Wiesbader v. Marks* (1915), 166 App. Div. 725, 152 N. Y. Supp. 248.

Action to prevent removal of plaintiff from certain land.—A taxpayer's action cannot be maintained to prevent the removal of the plaintiff from certain land over which the dock commissioners of the city of New York claim to have jurisdiction even though they may be wrong in their claim. *Rogers v. O'Brien* (1896), 1 App. Div. 397, 37 N. Y. Supp. 358.

Establishing town boundary line.—Where a board of supervisors in good faith and without fraud or collusion, acting under section 36 of the County Law, established the boundary line between two towns differently than it had previously been established so as to transfer fifty acres of land from one town to the other, it was held that a taxpayer's action could not be maintained to prevent the town to which the land was added from exercising jurisdiction over the same. *Govers v. Supervisors of Westchester* (1900), 55 App. Div. 40, 67 N. Y. Supp. 27, *affd.* (1902), 171 N. Y. 403, 64 N. E. 193.

A license by the dock department of New York City to lay a railroad track over reclaimed land is not a waste of municipal property. *Hart v. Mayor* (1897), 16 App. Div. 227, 44 N. Y. Supp. 767.

Ultra vires acts of private corporation.—In an action to set aside a lease made by the commissioners of the sinking fund of New York City of two ferry fran-

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chises to a railroad corporation it was held that the plaintiff taxpayer could not raise the question of lack of power of the railroad corporation to make the contract. *Starin v. Edson* (1889), 112 N. Y. 206, 19 N. E. 670.

Refusal of superintendent of buildings to revoke building permit.—Where the superintendent of buildings in the city of New York has refused to revoke a permit therefor given by him or to interfere with the work of construction being carried on under the permit, a taxpayer's action under this section of the General Municipal Law is not the proper remedy. This statute was designed to give a remedy under conditions where none had been available before, not to reach conditions and correct evils where the existing law gave an effective remedy. *Southern Leasing Co. v. Ludwig* (1916), 217 N. Y. 100, 111 N. E. 470, revg. (1915), 163 App. Div. 233, 153 N. Y. Supp. 545.

Acts of civil service commissioners.—A taxpayer's action is inappropriate as a remedy for correcting illegal action on the part of municipal civil service commissioners. *Slavin v. McGuire* (1912), 205 N. Y. 84, 98 N. E. 405, affg. (1911), 144 App. Div. 910, 128 N. Y. Supp. 1146.

Setting aside supervisors' audits.—An action may be brought by a taxpayer to set aside audits made by the board of supervisors and to recover on behalf of the county moneys alleged to have been allowed to a supervisor for services in preparing the tax rolls of the town, where certain items for which payment had been made were not properly chargeable to the county under section 23 of the County Law. *Smith v. Hedges* (1915), 169 App. Div. 115, 154 N. Y. Supp. 867.

Compelling a municipal corporation to exercise its functions.—A taxpayer's action is not an appropriate remedy to compel a municipal corporation to exercise its corporate functions. Such an action is available to prevent any illegal official act on the part of its officers or to prevent waste or injury to its property only. The proper method is by mandamus. *Wurster v. City of New York* (1910), 136 App. Div. 408, 120 N. Y. Supp. 1029, affd. (1910), 199 N. Y. 534, 92 N. E. 1108.

Unauthorized claim for compensation.—A preliminary injunction will be granted in taxpayer's action to restrain payment of unauthorized claim for compensation. *Beresford v. Donaldson* (1907), 54 Misc. 138, 103 N. Y. Supp. 600.

Individual taxpayers cannot maintain an action against the school commissioner of the school district in which they live and certain villages which had been created as separate school districts therein to restrain the defendant school commissioner from declaring the villages to be separate school districts, or from taking any other proceedings in that respect, on a complaint alleging that the villages had been created in pursuance of a fraudulent scheme on the part of their residents to avoid their due share of taxation for school purposes. Such a suit does not come within the scope of the taxpayers' suits provided for by this section, and there is nothing in said section to authorize such action. *Prankard v. Cooley* (1911), 147 App. Div. 145, 132 N. Y. Supp. 289.

Action against board of estimate and apportionment of New York City.—Where in a taxpayer's action, brought under this section, against the members of the board of estimate and apportionment of the city of New York to enjoin them from carrying out the terms of a resolution passed by them directing the preparation of a contract to carry out a plan for the operation by the Brooklyn Rapid Transit Company of new subways to be built by the city, it appears on a motion by plaintiff for an injunction *pendente lite* that the general subject of such a contract had been considered by a joint committee of the members of the board of estimate and of the Public Service Commission, which had reported in favor of the agreement with the Brooklyn Rapid Transit Company, but it further appears that such committee was a non-statutory body; that its report was binding upon neither the board of estimate nor the Public Service Commission, both of which were required by statute to approve any contract for the operation of the new

subways, and that neither the board nor the commission had officially approved of the proposed plan, which also had not been as yet subjected to a public hearing as required by law, there is no such imminence of the execution of the contract complained of as to justify a temporary injunction to prevent its execution, or even to justify an examination as to its legality. *Admiral Realty Co. v. Gaynor* (1911), 147 App. Div. 719, 132 N. Y. Supp. 220.

An action to restrain the nomination and election of delegates to a constitutional convention cannot be maintained under this section. *Schieffelin v. Komfort* (1914), 212 N. Y. 520, 106 N. E. 675.

Motive of plaintiff is immaterial. *Kingsley v. Bowman* (1898), 33 App. Div. 1, 53 N. Y. Supp. 426; compare *Hull v. Ely* (1877), 2 Abb. N. C. 440.

Where the plaintiff in a taxpayer's action shows illegal action upon the part of the city and its officials he is entitled to the assistance of the court, though he may have been induced to bring the action because of some private grievance. *Grace v. Forbes* (1909), 64 Misc. 130, 118 N. Y. Supp. 1062.

An unsuccessful bidder for a corporation contract, if a taxpayer, may bring an action to restrain a municipality from carrying out such contract when it is fraudulent and illegal and involves a waste of public funds. *Gage v. City of New York* (1905), 110 App. Div. 403, 97 N. Y. Supp. 157.

Parties.—A taxpayer's action may be maintained to restrain the collection of rents by the comptroller of the city of New York under leases of certain lands of a defunct town to whose rights the city has succeeded, which were invalid for collusion of the former town officers. In such an action the proper parties defendant are the comptroller as the acting fiscal official, the city of New York, and the lessees and their successors in interest. The officers of the former town are neither necessary nor proper parties. Any resident taxpayer of the city of New York, who is assessed the required amount, may maintain the action. *Wenk v. City of New York* (1902), 171 N. Y. 607, 64 N. E. 509, revg. (1902), 69 App. Div. 621, 75 N. Y. Supp. 1135, affg. (1901), 36 Misc. 496, 73 N. Y. Supp. 1003.

In an action brought by a taxpayer against a town supervisor and the superintendent of highways to compel them to restore moneys to the town, the town itself is not a necessary party. *It seems*, however, that the town may voluntarily come in and make itself a party. Neither need the persons to whom the illegal payments are alleged to have been made be necessarily joined as defendants, for the action is not to cancel a contract or to annul their personal rights. An allegation that the moneys were misapplied and illegally paid with knowledge that it was without warrant of law is sufficient, and it need not be averred in the words of the Code that the misappropriations were "waste or injury to" the funds of the town, for that would be a mere conclusion of law. *Hicks v. Cocks* (1915), 167 App. Div. 862, 153 N. Y. Supp. 776.

In an action to compel the restitution of county monies paid to a county judge for a clerk's salary the board of supervisors and the county treasurer are proper but not necessary parties. *Shiebler v. Griffing* (1913), 83 Misc. 363, 145 N. Y. Supp. 969.

Members of a citizens' centennial celebration committee for a county celebration are in no sense agents or commissioners of or persons acting for the county, and the fact that two of them acted as a printing committee as a sub-committee of the celebration committee and made an agreement with a publishing company to print and distribute souvenir books does not bring them within this section or render them liable. *Rice v. Glens Falls Publishing Co.* (1914), 86 Misc. 503, 149 N. Y. Supp. 311.

In an action to enjoin the city officers from issuing bonds of the city to raise funds by which a board of commissioners are to carry on a public work, the city itself and such board of commissioners are necessary parties. But con-

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tractors, land owners, etc., who expect to be paid out of the fund sought to be raised, are not necessary parties. *Hurlburt v. Banks* (1876), 1 Abb. N. C. 157, 52 How. Pr. 196, *affd.* (1876), 67 N. Y. 568.

Where a taxpayer brought an action to restrain the performance of a contract made on behalf of the city, by its property committee, for the furnishing of a revolving door at the entrance to the city hall, on the ground that certain aldermen were financially interested in the contract it was held that the city was a necessary party to the action, particularly as the door had been actually installed and had become a permanent portion of the building. *Eames v. Kellar* (1905), 102 App. Div. 20, 92 N. Y. Supp. 665.

In an action by taxpayers of a town, to vacate, on the ground of illegality or fraud, audits of town accounts made by the board of audit and to restrain a levying of a tax for their payments, the persons in whose favor the audits were made are proper and necessary parties. *Osterhoudt v. Supervisors of Ulster* (1885), 98 N. Y. 239.

Persons to whom payments have been made by the supervisor of a town upon an alleged illegal audit by the board of auditors are necessary parties to a taxpayer's action brought against the supervisor and board of auditors. *Daly v. Haight* (1914), 163 App. Div. 234, 148 N. Y. Supp. 42.

Though the public generally be interested a complainant taxpayer cannot be compelled to allow other interested parties to be joined as parties plaintiff. *Seccomb v. Wurster* (1897), 83 Fed. 856.

Officers de facto.—Proceeding against them cannot be maintained on that ground alone. *Dows v. Village of Irvington* (1883), 66 How. Pr. 93.

Complaint.—The plaintiff must allege in his complaint that there has been a waste of or injury to the funds or property of the city, either contemplated or actually consummated. When the action is brought to prevent an illegal official act, if the illegal act had been consummated before an injunction was obtained so that there was no contemplated official act which could be enjoined, there would be no cause of action. *Bush v. Coler* (1901), 60 App. Div. 56, 69 N. Y. Supp. 770, *affd.* (1902), 170 N. Y. 587, 63 N. E. 1115.

In an action by a taxpayer against city officials, mere general allegations that the contract, specifications and advertisement for bids were fraudulently prepared and issued, and that the requirements of the bids were fraudulently designed to limit competition, are demurrable for insufficiency. The facts constituting the fraud must be alleged. *Knowles v. City of New York* (1902), 37 Misc. 195, 75 N. Y. Supp. 189, *affd.* (1902), 74 App. Div. 632, 77 N. Y. Supp. 1130, *affd.* (1903), 176 N. Y. 430, 68 N. E. 86. Fraud must be alleged. *Madden v. Van Wyck* (1901), 35 Misc. 645, 72 N. Y. Supp. 135.

The complaint in a taxpayer's action against supervisors and a county treasurer should state, in each paragraph setting out a separate cause of action, the official position of the defendant against whom judgment is demanded, the capacity in which he acted, and all the facts necessary to make that cause of action complete in itself. *Wallace v. Jones* (1902), 68 App. Div. 191, 74 N. Y. Supp. 116.

A complaint in an action against the members of a board of supervisors to recover items alleged to have been collusively audited, which specifically alleges the illegality and fraudulent character of the claims allowed, and charges that each defendant presenting such claim knew that they were in excess of the fees allowed by law, is not demurrable because it fails to allege that the members of the board also knew of the illegality of the claims. *Wallace v. Jones* (1905), 182 N. Y. 37, 74 N. E. 576, *revd.* (1904), 92 App. Div. 613, 86 N. Y. Supp. 1149.

In an action by a taxpayer against a sheriff and the members of the board of supervisors who audited his bills, for the purpose of compelling the sheriff to restore to the county treasurer a portion of the money paid to him in settlement

of his bills, it is sufficient to allege that a large portion of the items in the bills were illegal charges against the county, either because they were not provided for by law or because they were in excess of the amount authorized. *Hicks v. Eggleston* (1905), 105 App. Div. 73, 93 N. Y. Supp. 909.

A taxpayer suing to restrain the Public Service Commission for the first district from executing contracts for the construction of rapid transit railroads in the city of New York must allege that the act to be restrained is an illegal act. *Hopper v. Willcox* (1913), 155 App. Div. 213, 140 N. Y. Supp. 277.

Where the complaint alleges that the principal defendant, a gas and electric company, is, without warrant of law, making excavations in a public park to set poles, to the injury and waste of the property of the municipality, and that certain other defendants, as commissioners of public parks, have permitted or are permitting this alleged waste of city property, but does not allege that such officials have granted or propose to grant the company a license or franchise to do the acts complained of, or that the officials have knowledge, either actual or constructive, of such acts, the complaint is insufficient. *Sheehy v. McMillan* (1898), 26 App. Div. 140, 49 N. Y. Supp. 1088. See also *Sheehy v. Clausen* (1899), 26 Misc. 269, 55 N. Y. Supp. 1000, *affd.* (1899), 42 App. Div. 622, 59 N. Y. Supp. 1114.

A complaint which seeks adjudication that a large amount of indebtedness and of claims has been illegally incurred in the name of the city by all or some of the board of aldermen and the mayor, made defendants, and which alleging that some have not been paid, seeks to restrain the payment of those unpaid and hold the defendants personally liable for those paid, states only a single cause of action under this section. *Barnes v. McGuire* (1900), 33 Misc. 438, 68 N. Y. Supp. 485.

Where the complaint in a taxpayer's action alleges that the defendant municipality, the owner of a valuable water power, has a cause of action against the other defendant, the owner of the water power next below that of the city, who as alleged is about to construct a dam below that of the city to a height which will cause the water to set back upon the city's land thereby considerably reducing its power, and that the governing body of the municipality had consented that the other defendant might take and appropriate to his own use without compensation the city's water power and wrongfully neglects and refuses to commence an action against him to restrain the construction of said dam, the allegations of the complaint show an illegal act—an act contrary to constitutional provisions and the charter of the municipality,—and state a cause of action under this section. Said action is maintainable against both defendants, the plaintiff in that respect under this section taking the place of the municipality as against the other defendant and then joining the municipality as a proper party. *Carpenter v. Wise* (1915), 92 Misc. 246, 155 N. Y. Supp. 996, *affd.* (1916), 173 App. Div. 998, 159 N. Y. Supp. 1104.

Complaint insufficient.—See *Kittinger v. Buffalo Traction Co.* (1899), 160 N. Y. 377, 54 N. E. 1081; *Feeley v. Wurster* (1898), 25 Misc. 544, 54 N. Y. Supp. 1060.

A complaint in a taxpayer's action brought against the supervisor, auditors and clerk of a town, which in substance merely alleges that during a certain year the supervisor unlawfully paid the town clerk a certain sum of money and that the town auditors unlawfully audited the claim, fails to state a cause of action. It is necessary to set out facts showing the illegality or fraudulent character of the claim. *Daly v. Haight* (1914), 163 App. Div. 239, 148 N. Y. Supp. 46.

Supplemental complaint.—Where an action was brought to restrain village trustees from carrying out a contract entered into for the purchase of certain land, to be paid for largely by paying off mortgages thereon, and from levying a tax to raise money therefor and after the commencement of the action, but before the granting of a preliminary injunction, a portion of the tax was collected and paid over to the owners of the mortgages it was held that the plaintiff could file a supplemental complaint, setting forth these facts, and asking not only to

restrain a further levy, but to compel those of the defendants who had received money to pay it back to the village. *Latham v. Richards* (1878), 15 Hun 131.

Where a taxpayer brings an action to prevent the comptroller of a city from paying certain judgments entered against the city upon alleged unauthorized offers of judgments made by the corporation counsel, the fact that since the commencement of the action the judgments have been paid by the comptroller, pursuant to peremptory writs of mandamus, and that a portion of the money so paid was received by a person not a party to the action as originally commenced, will not justify the service of a supplemental complaint, as such a pleading would state an entirely new and different cause of action from that which existed when the action was begun. *Bush v. O'Brien* (1901), 58 App. Div. 118, 68 N. Y. Supp. 651.

Amendment of complaint to convert suit by abutting owners into taxpayer's action, see *Guenther v. Patch* (1913), 155 App. Div. 27, 140 N. Y. Supp. 223.

Injunction.—The fact that the granting of an injunction *pendente lite* will prevent action during the term of office of officials, is not a ground for refusing it, where contemplated action is clearly illegal. *Norris v. Wurster* (1897), 23 App. Div. 124, 48 N. Y. Supp. 656. See *People ex rel. Roosevelt v. Edson* (1885), 52 Super. (20J. & S.) 53.

A taxpayer's action lies to perpetually enjoin and restrain the officials of a city from organizing its government under an unconstitutional statute (L. 1914, ch. 444). *Cleveland v. City of Watertown* (1917), 99 Misc. 66, 165 N. Y. Supp. 305.

Relief by injunction should not be granted against mere illegalities of taxation, without fraud, corruption or waste amounting to bad faith. *Fahys & Co. v. Vaughn* (1910), 68 Misc. 541, 125 N. Y. Supp. 280.

Bond.—A compliance with provision of Code requiring an injunction bond does not dispense with the bond under the statute. *Tappen v. Crissey* (1883), 64 How. Pr. 496. When filing *nunc pro tunc* not allowed. *Guenther v. Patch* (1913), 155 App. Div. 27, 140 N. Y. Supp. 225.

Appeal from judgment for costs.—Although a board of town auditors which is enjoined from auditing a claim may not appeal upon merits, yet, when fraud is alleged and disapproved, they may appeal from a judgment charging them with costs. *Fitch v. Hay* (1906), 112 App. Div. 736, 98 N. Y. Supp. 1090.

Instances of taxpayer's actions.—To vacate audit by town board. *Osterhoudt v. Rigney* (1885), 98 N. Y. 222. To restrain judgment creditors from enforcing judgment under an unlawful offer of judgment by corporation counsel. *Bush v. O'Brien* (1900), 164 N. Y. 205, 58 N. E. 106. To restrain negotiation or payment of town bonds. *Metzger v. Attica, etc., R. R. Co.* (1879), 79 N. Y. 171; *Strang v. Cook* (1888), 47 Hun 46. To prevent settlement of judgment for nominal sum. *Standart v. Burtis* (1887), 46 Hun 82. To restrain railroad operating under franchise fraudulently granted. *Adamson v. Union R. R. Co.* (1893), 74 Hun 3, 26 N. Y. Supp. 136; *Adamson v. Nassau Elec. R. R. Co.* (1895), 89 Hun 261, 34 N. Y. Supp. 1073. To restrain tax levy where items in levy are improper claims. *Squire v. Preston* (1894), 82 Hun 88, 31 N. Y. Supp. 174. To prevent levying tax to pay interest on certain bonds, and to have them declared void. *Hills v. Peekskill Savings Bank* (1882), 26 Hun 161. To set aside a contract for lease of a wharf. *Starin v. Mayor* (1886), 42 Hun 549, revd. on another ground (1889), 112 N. Y. 206, 19 N. E. 670. To prevent signing of a municipal contract. *Armstrong v. Grant* (1890), 56 Hun 226, 9 N. Y. Supp. 388. To restrain employment or payment of person in violation of Civil Service Law. *Peck v. Belknap* (1892), 130 N. Y. 394, 29 N. E. 977, revg. (1889), 55 Hun 91, 8 N. Y. Supp. 265; *Chittenden v. Wurster* (1897), 152 N. Y. 345, 368, 46 N. E. 857, 37 L. R. A. 809. To restrain illegal payment by supervisor to town clerk. *Annis v. McNulty* (1906), 51 Misc. 121, 100 N. Y. Supp. 951, *affd.* (1907), 116 App. Div. 909, 101 N. Y. Supp. 1111. To prevent

payment of salaries to city officers whose appointment was unauthorized. *Beresford v. Donaldson* (1907), 54 Misc. 138, 103 N. Y. Supp. 600. To restrain payment of a claim illegally audited by a town board. *Rockefeller v. Taylor* (1902), 69 App. Div. 176, 74 N. Y. Supp. 812. To restrain the laying of taxes by the supervisors on a town to pay claims rejected by town board. *Armstrong v. Fitch* (1908), 126 App. Div. 527, 110 N. Y. Supp. 736. To restrain a common council from electing police commissioners. *Rathbone v. Wirth* (1896), 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. To restrain the signing and delivering of a contract for removal and reduction of garbage. *Balch v. City of Utica* (1899), 42 App. Div. 562, 59 N. Y. Supp. 513, *affd.* (1901), 168 N. Y. 651, 61 N. E. 1127; *Perew v. City of North Tonawanda* (1914), 84 Misc. 494, 147 N. Y. Supp. 678. To prevent payment of village bonds issued for acquisition of park lands. *Scott v. Twombly* (1897), 20 App. Div. 535, 46 N. Y. Supp. 699. To restrain purchase of land for cemetery purposes. *Latham v. Richards* (1877), 12 Hun 360. To prevent the granting of a street railway franchise in certain streets. *Gusthal v. Strong* (1897), 23 App. Div. 315, 48 N. Y. Supp. 652; *Smith v. City of Buffalo* (1906), 51 Misc. 216, 99 N. Y. Supp. 986, *affd.* (1906), 115 App. Div. 837, 101 N. Y. Supp. 1, *affd.* (1907), 190 N. Y. 339, 83 N. E. 293. To prevent supervisors giving consent to construction of street railroad in front of county property. *Case v. County of Cayuga* (1895), 88 Hun 59, 34 N. Y. Supp. 595. To set aside and annul a contract for village sewer system. *Mead v. Turner* (1909), 134 App. Div. 691, 119 N. Y. Supp. 526. To restrain issuance of sewer bonds. *Ward v. Kropf* (1910), 120 N. Y. Supp. 476. To prevent making of sewer connections. *Kelly v. Miller* (1912), 78 Misc. 584, 139 N. Y. Supp. 991. To restrain laying of gas mains in streets. *Ghee v. Northern Union Gas Co.* (1898), 34 App. Div. 551, 56 N. Y. Supp. 450, *revd.* (1899), 158 N. Y. 510, 53 N. E. 692. To prevent letting contract for construction of bridge. *Meyers v. City of New York* (1901), 58 App. Div. 534, 69 N. Y. Supp. 529; *Barker v. Town of Oswegatchie* (1890), 10 N. Y. Supp. 834. To restrain performance of conditional sale contract for purchase of steam roller. *Gardner v. Town of Cameron* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634, *affd.* (1915), 215 N. Y. 682, 109 N. E. 1074. To restrain payment of judgments entered upon offers of judgment. *Bush v. Coler* (1901), 60 App. Div. 47, 69 N. Y. Supp. 770, *affd.* (1902), 170 N. Y. 587, 63 N. E. 1115. To restrain execution of lighting contracts. *Kimball v. Hewitt* (1889), 15 Daly 124, 3 N. Y. Supp. 756. To enjoin tax for payment of lighting contract. *Hendrickson v. City of New York* (1899), 160 N. Y. 144, 54 N. E. 680. To restrain county treasurer from paying to towns certain moneys raised by taxation by the board of supervisors on behalf of the towns under the Highway Law. *Stone v. Supervisors of Broome* (1901), 166 N. Y. 85, 59 N. E. 708. To prevent steam surface and elevated roads connecting by incline. *Gallagher v. Keating* (1899), 27 Misc. 131, 58 N. Y. Supp. 366, *affd.* (1899), 40 App. Div. 81, 57 N. Y. Supp. 632. To prevent the granting of contract to architects for a municipal building. *Hoyt v. Steers* (1912), 76 Misc. 21, 136 N. Y. Supp. 58, *affd.* (1912), 154 App. Div. 888, 138 N. Y. Supp. 1122. To annul vote of special town meeting as to allowance of claim against town, have claim declared illegal, and restrain supervisors from paying same. *McCoy v. McClarty* (1907), 53 Misc. 69, 104 N. Y. Supp. 80. To annul permit providing for operation of street cars over bridge. *Gross v. Gaynor* (1912), 78 Misc. 216, 139 N. Y. Supp. 177. To annul contract for operation of street surface cars over Williamsburgh bridge. *Schinzal v. Best* (1904), 45 Misc. 455, 92 N. Y. Supp. 754, *affd.* (1905), 109 App. Div. 917, 96 N. Y. Supp. 1145. To set aside contract for construction of reservoir. *Terrell v. Strong* (1895), 14 Misc. 258, 35 N. Y. Supp. 1000. To prevent sale of ferry franchise. *Robinson v. Gilroy* (1894), 10 Misc. 205, 30 N. Y. Supp. 411. To restrain board of public improvements from contracting for water supply. *Press Pub. Co. v. Holahan* (1899), 29

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Misc. 684, 62 N. Y. Supp. 872, *affd.* (1900), 54 App. Div. 638, 67 N. Y. Supp. 1144; *Keator v. Dalton* (1899), 29 Misc. 692, 62 N. Y. Supp. 878, *affd.* (1901), 67 App. Div. 619, 73 N. Y. Supp. 1138. To annul water supply contract because of interest of mayor in water company. *Terry v. Gleason* (1897), 21 Misc. 368, 47 N. Y. Supp. 741. To restrain making of paving contract. *Gibbs v. Luther* (1913), 81 Misc. 611, 143 N. Y. Supp. 90, *affd.* (1913), 158 App. Div. 951, 143 N. Y. Supp. 1118; *Jensen v. Board of Contract* (1911), 74 Misc. 641, 134 N. Y. Supp. 630. To restrain carrying out of paving contract. *Berghoffer v. City of New York* (1900), 31 Misc. 205, 64 N. Y. Supp. 1082. To restrain water commissioners from carrying out contract for additional filters. *Coykendall v. Harrison* (1912), 150 App. Div. 46, 134 N. Y. Supp. 446, *affd.* (1912), 206 N. Y. 657, 99 N. E. 1105. To prevent performance of water-main cleaning contract. *Daly v. O'Brien* (1909), 60 Misc. 423, 112 N. Y. Supp. 304. To have act establishing a city water department declared unconstitutional. *Sweet v. City of Syracuse* (1891), 60 Hun 28, 14 N. Y. Supp. 421, *revd.* (1891), 129 N. Y. 316, 27 N. E. 1081. To restrain use of park fence for advertising purposes. *Tompkins v. Pallas* (1905), 47 Misc. 309, 95 N. Y. Supp. 875. To restrain a supervisor from paying certain bills presented by the town highway commissioners. *Warrin v. Van Nostrand* (1888), 21 N. Y. St. Rep. 960, 3 N. Y. Supp. 151. To restrain payment of town railroad bonds. *Calhoun v. Delhi & Middletown R. R.* (1882), 28 Hun 379. To restrain a commissioner of public safety from hearing and determining charges against police officers and from receiving further compensation for his services. *Helm v. Day* (1912), 134 N. Y. Supp. 770, *affd.* (1912), 138 N. Y. Supp. 1120. To restrain levy, assessment and collection of claim for indexing deeds in county clerk's office. *Wadsworth v. Supervisors of Livingston* (1908), 115 N. Y. Supp. 8, *revd.* (1910), 139 App. Div. 832, 124 N. Y. Supp. 334. To restrain payment to police officer for expenses of defending action for assault. *Mollnow v. Rafter* (1915), 89 Misc. 495, 152 N. Y. Supp. 110. To restrain village officers from paying for services of accountant to examine past taxes and assessments and to devise bookkeeping system and instruct village officers. *Wakefield v. Brophy* (1910), 67 Misc. 298, 122 N. Y. Supp. 632. To restrain grade crossing commissioners from letting contract for grade crossing. *Erie Railroad Co. v. City of Buffalo* (1904), 96 App. Div. 458, 89 N. Y. Supp. 122, *revd.* (1904), 180 N. Y. 192, 73 N. E. 26. To have contract for elimination of grade crossings declared void. *McCutcheon v. Terminal Station Commission* (1915), 168 App. Div. 301, 154 N. Y. Supp. 711, *affd.* (1916), 217 N. Y. 127, 111 N. E. 661. To compel restoration of money expended for bridge approaches. *Edwards v. Ford* (1897), 22 App. Div. 277, 47 N. Y. Supp. 995. See also *Warrin v. Baldwin* (1887), 105 N. Y. 534, 12 N. E. 49; *Weston v. Syracuse* (1899), 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678; *McNeill v. Supervisors of Suffolk* (1908), 123 App. Div. 622, 108 N. Y. Supp. 178; *Wilson v. Bleloch* (1908), 125 App. Div. 191, 109 N. Y. Supp. 340, *affd.* (1909), 195 N. Y. 592, 89 N. E. 1115.

Taxpayer's action to recover moneys expended for electric light plant upon petition not signed by majority of taxpayers as required by the Town Law. See *Montgomery v. Smead* (1916), 97 Misc. 283, 161 N. Y. Supp. 431.

Public records open to inspection.—Municipal officers cannot avoid the requirements of section 51 of the General Municipal Law that public records shall be open to inspection by any taxpayer by depositing such documents with any person or in any place, but it is their duty to retain such control thereof as will enable them to comply with any legal right of any person. The right of a taxpayer under said section 51 is not dependent upon the fact that a taxpayer's action is actually pending but is intended to enable a taxpayer to ascertain whether facts exist which would justify such an action. *People ex rel. Brownell v. Higgins* (1916), 96 Misc. 485, 160 N. Y. Supp. 74.

The right to inspect books and papers filed with an officer, board or commission acting on behalf of a county, town or other municipality, given by this section, is as broad as the language used to bestow it and there is no limitation thereof save that found in the provision itself—making the examination subject to reasonable regulations—or in special statutes relative to the public documents in particular departments. *Matter of Egan* (1912), 205 N. Y. 147, 98 N. E. 467, 41 L. R. A. (N. S.) 280.

Even under broad publicity statutes it is necessary for the individual seeking an inspection of books and papers in a city department to show that he seeks the information for some legitimate and specific purpose and the gratification of curiosity or some speculative purpose will not suffice. A taxpayer of New York City is not entitled upon demand and without showing any interest or reason therefor to examine the records of the department of health of that city. *Matter of Allen* (1911), 148 App. Div. 26, 131 N. Y. Supp. 1027, *affd.* (1912), 205 N. Y. 158, 98 N. E. 470.

Section 1175 of the charter of the city of New York (L. 1901, ch. 466) is a special statute which provides that the board of health may establish as it shall deem wise and to promote the public good and public service, reasonable regulations "as to the publicity of any of the papers, files, reports, records and proceedings of the department of health." This empowers the board to determine whether any particular document falling within the prescribed category shall or shall not be made public. *Matter of Allen* (1912), 205 N. Y. 158, 98 N. E. 470, *dist'g.* *Matter of Egan* (1912), 205 N. Y. 147, 98 N. E. 467, 41 L. R. A. (N. S.) 280.

A writ of mandamus will lie to compel the commissioners of water supply of the city of New York to afford a taxpayer in that city an opportunity to inspect reports of engineers relating to the passing upon and awarding a contract under the provisions of chapter 724 of the Laws of 1905, which act authorizes the board to "select the bid or proposal the acceptance of which will in their judgment best secure the efficient performance of the work" when such contract has been awarded to another than the lowest bidder, although the petitioner does not allege that he has suffered special injury or that he contemplates bringing a taxpayer's action. *Matter of Egan* (1912), 205 N. Y. 147, 98 N. E. 467, 41 L. R. A. (N. S.) 280, *dist'g.* *Matter of Lord* (1901), 167 N. Y. 398, 60 N. E. 748; *People ex rel. Woodill v. Fosdick* (1910), 141 App. Div. 450, 126 N. Y. Supp. 252.

The opinions of counsel, obtained pursuant to a resolution of the common council of a city, for the use of its water commissioners are "public records" within the meaning of section 51 of the General Municipal Law. *People ex rel. Brownell v. Higgins* (1916), 96 Misc. 485, 160 N. Y. Supp. 721.

Section cited.—*Molloy v. City of New Rochelle* (1910), 198 N. Y. 402, 92 N. E. 94, 30 L. R. A. (N. S.) 126, *affg.* (1908), 123 App. Div. 642, 108 N. Y. Supp. 120; *Mixer v. Adam* (1910), 66 Misc. 238, 121 N. Y. Supp. 31, *affd.* (1910), 140 App. Div. 919, 125 N. Y. Supp. 1132; *People ex rel. Leitner v. Sipple* (1905), 109 App. Div. 788, 96 N. Y. Supp. 897; *People ex rel. Cole v. Cross* (1905), 87 App. Div. 56, 83 N. Y. Supp. 1083; *Nvalde Asphalt Paving Co. v. City of New York* (1912), 149 App. Div. 491, 134 N. Y. Supp. 50; *People ex rel. Jamaica v. Supervisors of Queens* (1892), 131 N. Y. 468, 30 N. E. 488; *Union Cemetery Assoc. v. McConnell* (1891), 124 N. Y. 88, 26 N. E. 330; *Riverdale Realty Co. v. City of New York* (1915), 168 App. Div. 103, 153 N. Y. Supp. 742; *Schleffen v. McClellan* (1909), 135 App. Div. 665, 120 N. Y. Supp. 215.

§ 52. Holder of bond may bring action.—Any bona fide purchaser and holder of any bonds or other obligations for the payment of money payable to bearer and transferable by delivery, and any such purchaser and holder

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of any interest bearing coupon or obligation originally attached to such bonds, which said bonds or coupon shall have been issued or put in circulation by means of the misfeasance, malfeasance or negligence of any public officer, of any of the civil or municipal divisions of this state, whose right of recovery or cause of action upon any such bond or coupon has been or shall be determined by the judgment of a court of competent jurisdiction in any suit or action, or who has been or shall be a privy to such suit or action, may within three years after the determination of said right of recovery and cause of action begin an action against such officer and recover all damages which said purchaser, holder or privy shall have suffered because of the misfeasance, malfeasance or negligence of such public officer.

Source.—L. 1895, ch. 792, § 1.

§ 53. **Municipal corporation may bring action against its officers.**—Any municipal corporation within this state, or any civil division of this state, which has been or shall be compelled to pay any negotiable bond, or any coupon originally attached to such bond, by the judgment of a court of competent jurisdiction, because of the misfeasance, malfeasance or negligence of any public officer or agent of such municipal corporation or civil division, may within three years from the time when such payment shall have been compelled as aforesaid, begin an action against any such officer in any court of competent jurisdiction and recover the amount so paid with interest from the time of such payment.

Source.—L. 1895, ch. 792, § 2.

References.—Actions against certain public officers, Code Civ. Pro. §§ 1926, 1927. Action triable where cause arose, Id. § 983. Actions on official bonds, Id. §§ 1888, 1889.

§ 54. **Statute of limitation; order of arrest.**—No limitation of the time for commencing an action shall affect any of the actions hereinbefore mentioned except as herein provided, and in such action an order of arrest and an execution against the person of the defendant may be issued in the manner and form provided by the code of civil procedure against a person who shall have wrongfully misappropriated money held by him in a fiduciary capacity.

Source.—L. 1895, ch. 792, § 3.

References.—Limitation of actions generally, Code Civ. Pro. §§ 362, et seq. Right of arrest of public officer in action to recover money belonging to municipality, Id. § 549. As to execution against the person, see Id. §§ 1487-1495.

§ 55. **Appeals.**—In any suit or action upon any coupon hereinbefore mentioned, or upon any bonds hereinbefore mentioned, or to recover any damages hereinbefore mentioned, any party to such action shall have and is hereby granted a right of appeal, to the general term or appellate division of the supreme court from the judgment of any trial court, or to the court of appeals, from any judgment of the general term or of the appellate division of the supreme court, although the amount in con-

troversey in such action has been or may be less than five hundred dollars. Appeals from any inferior court to any appellate court including an appeal to the court of appeals although the amount in controversy may be less than five hundred dollars, from any judgment in any suit or action to recover against any municipal corporation or civil division of this state upon any negotiable bonds or upon any coupon originally attached thereto, issued or put in circulation by the agents or officers of such municipal corporation or civil division of this state, may be taken by any person who has been or shall be bound as a privy by such judgment within sixty days after such privy shall have been served by any of the parties to such civil action, with a copy of the said judgment and with a written notice of the entry thereof, and said appeal may be taken in the name of such party without entering an order of substitution as such party by said person so bound as a privy, upon his giving the security and serving the notices of appeal prescribed by the code of civil procedure concerning an appeal by a party to such an action, and also upon giving to the party in whose name such an appeal is taken an undertaking with two sufficient sureties conditioned in the penal sum of five hundred dollars, to save such party to such action in whose name such appeal shall be taken harmless of and from all costs and disbursements which may be recovered against him upon such appeal, which said undertaking shall be approved as to its form and as to the sufficiency of the sureties thereon by justices of the supreme court. Said appeal when so taken by said privy shall be conducted and determined in the same manner as if taken by said party of the said action except as herein otherwise provided.

Source.—L. 1895, ch. 792, § 4.

Section not retroactive.—*Germania Savings Bank v. Suspension Bridge village* (1899), 159 N. Y. 362, 54 N. E. 33.

ARTICLE V.

POWERS, LIMITATIONS AND LIABILITIES.

- Section 70. Payment of judgments against municipal corporation.
71. Liability for damages by mobs and riots.
72. Acquisition of lands for erection of monuments.
- 72-a. Acquisition and development of forest lands.
73. Cities and villages may hold property in trust for certain purposes.
74. Condemnation of real property.
75. Limitation on acquisition of water rights in Dutchess county.
76. Limitation on acquisition of water rights in Westchester and Putnam counties.
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- 77-a. Military equipment for local military organizations and to provide for emergencies and the support of persons dependent upon men enlisted in the federal service, national guard or naval militia during the present war.
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80. Discrimination against non-residents.
81. Peddling and hawking farm produce.
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85. Licenses to conduct transient retail business.
- 85-a. Taxation of transient merchants.
86. Contractors not to assign contracts with municipality without its consent.
- 86-a. Salary or earnings of municipal officer or employee.
- 86-b. Retained percentages may be withdrawn.
87. Support and maintenance of charitable and other institutions.
88. Separate specifications for certain contract work.
89. Payment of debts of illegal corporations.
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§ 70. **Payment of judgments against municipal corporation.**—When a final judgment for a sum of money shall be recovered against a municipal corporation, and the execution thereof shall not be stayed pursuant to law, or the time for such stay shall have expired, the treasurer or other financial officer of such corporation having sufficient moneys in his hands belonging to the corporation not otherwise specifically appropriated, shall pay such judgment upon the production of a certified copy of the docket thereof.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 20; originally revised from R. S., pt. 3, ch. 8, tit. 4, §§ 104–106.

References.—See also §§ 82, 83, post. Section 240 of the County Law makes a judgment against the county a county charge and § 170 of the Town Law makes a judgment against a town a town charge. When money may be borrowed by town to pay judgment, Town Law, § 139; when by village, Village Law, § 128.

§ 71. **Liability for damages by mobs and riots.**—A city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot, for the damages sustained thereby, if the consent or negligence of such person did not contribute to such destruction or injury, and such person shall have used all reasonable diligence to prevent such damage, shall have notified the mayor of the city, or sheriff of the county, of a threat or attempt to destroy or injure his property by a mob or riot, immediately upon acquiring such knowledge, and shall bring an action therefor within three months after such damages were sustained. A mayor or sheriff receiving notification of a threat or attempt to destroy or injure property by a mob or riot shall take all lawful means to protect such property; and if he shall neglect or refuse, the person whose property shall be destroyed or injured, may elect to bring his action for damages against such officer instead of the city or county.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 21; originally revised from L. 1855, ch. 428.

References.—Power of mayors and sheriffs to call out troops. See *Military Law*, § 115; *Code Crim. Pro.* §§ 111–117; *Code Civ. Pro.* § 107. Riot defined, *Penal Law*, § 2090. Punishment of rioters, *Penal Law*, § 2091. Refusal to assist in suppressing, *Penal Law*, § 2095.

Constitutional.—*Darlington v. Mayor* (1865), 31 N. Y. 164; *Moody v. Supervisors of Niagara* (1866), 46 Barb. 659, *affd.* (1867), 36 N. Y. 297; *Davidson v. Mayor* (1864), 25 Super. (2 Robt.) 230; *Wolfe v. Supervisors of Richmond* (1860), 11 Abb. Pr. 270; *Luke v. City of Brooklyn* (1864), 43 Barb. 54.

The theory of the statute is that it is the duty of municipalities to preserve the peace and protect the property of all persons within their limits, and that imposing such liability would not only tend to incite the citizens and officers to greater vigilance, but that the compulsory payment of losses occasioned by riots would be a proper and just penalty for the negligence of which they have been presumptively guilty. The statute was intended to punish the inhabitants for permitting riots and unlawful assemblages and to incite them to prevent and suppress the same by making it a matter of interest to the taxpayers to give their moral support to the enforcement of the law. *Marshall v. City of Buffalo* (1900), 50 App. Div. 149, 64 N. Y. Supp. 411.

Strictly construed against plaintiff. *Salisbury v. County of Washington* (1897), 22 Misc. 41, 48 N. Y. Supp. 122, *revd.* (1898), 30 App. Div. 187, 51 N. Y. Supp. 1070.

What constitutes destruction by riot.—The destruction of an unoccupied frame building by a varying crowd of young men and boys numbering from eight to thirty, there being no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance, does not constitute the destruction of a building by a riot rendering the city liable for the damages sustained thereby. *Adamson v. City of New York* (1907), 188 N. Y. 255, 80 N. E. 937, 10 L. R. A. (N. S.) 925, *affg.* (1905), 110 App. Div. 58, 96 N. Y. Supp. 907; *Duryea v. Mayor, etc., of New York* (1882), 10 Daly 300, *affd.* (1885), 100 N. Y. 625.

In an action brought under this section it appeared that the property destroyed consisted of several unoccupied buildings located in a residence and business portion of the city. One morning a crowd of men, women, boys and girls appeared upon the premises with shovels, axes, and other tools and commenced to demolish the buildings and take the material away in wagons. One hundred to two hundred people were engaged in the work of destruction, which continued for three days until only the foundation walls were left. There was no evidence as to the preliminary movements of the crowd, or of any previous threat or warning or notice to the plaintiff. It was held that the evidence was sufficient to warrant a jury in finding that the buildings were destroyed by a riotous and disorderly mob, in the execution of a common purpose and in defiance of law and order. *Marshall v. City of Buffalo* (1900), 50 App. Div. 149, 64 N. Y. Supp. 411.

Original motive for assembling not material. *Solomon v. City of Kingston* (1881), 24 Hun 562, *affd.* (1884), 96 N. Y. 651.

Property carried away is equally within the statutes and recovery may be had therefor. *Sarles v. Mayor* (1866), 47 Barb. 447; *Solomon v. City of Kingston* (1881), 24 Hun 562, *affd.* (1884), 96 N. Y. 651.

Presentation of claim to fiscal officer seems to be unnecessary. See *McClure v. Supervisors of Niagara* (1867), 4 Abb. Pr. (N. S.) 202, *affg.* (1867), 50 Barb. 594.

Three months' limitation.—Action cannot be commenced within one year under *Code*, § 405, although dismissed by county court for want of jurisdiction. The action is maintainable solely by authority of the special law. *Hill v. Supervisors of Rensselaer* (1890), 119 N. Y. 344, 23 N. E. 921, *affg.* (1889), 53 Hun 194, 6 N. Y. Supp. 716.

Notice to public officers, not required where party injured had no information on which to base proper notice. *Ely v. Supervisors of Niagara* (1867), 36 N. Y. 297. But otherwise, where fully informed. *Loomis v. Supervisors of Oneida* (1872), 6 Lans. 269. Sufficient time must elapse to give opportunity for notice. *Moody v. Supervisors of Niagara* (1866), 46 Barb. 659, *affd.* (1867), 36 N. Y. 297; *Solomon v. City of Kingston* (1881), 24 Hun 562, *affd.* (1884), 96 N. Y. 651.

The inability on the part of a person whose property has been injured by a riot to give notice to the sheriff, under this section, of a threat or attempt to destroy the property, immediately upon acquiring such knowledge, excuses him from giving such notice. *Salisbury v. County of Washington* (1898), 30 App. Div. 187, 51 N. Y. Supp. 1070.

The object of the notice required by this section is for the purpose of protection only. It is not intended to restrict the action against a municipality to such persons as shall give notice to the sheriff that their property is threatened and in danger from rioters, if such notice would be useless for the purpose of protection. The statute should be so construed that if a person is informed of a threat, and has time to notify the sheriff, so that he can take all legal means to protect the property, then the omission to give the notice is fatal. *Schiellein v. Supervisors of Kings* (1865), 43 Barb. 490.

Where the property of an individual is destroyed by a mob, without any previous threat or attempt to injure it, and without any warning or notice to the owner thereof until after the damage is done, the city or county is liable to the owner whether or not the authorities had notice or could have prevented the damage. *Marshall v. City of Buffalo* (1900), 50 App. Div. 149, 64 N. Y. Supp. 411.

Notice is unnecessary where it appears that the mayor and sheriff had notice from other sources of the existence of an organized mob, and its threats and attempts to destroy property generally, in a city. *Newberry v. Mayor, etc. of New York* (1869), 31 Super. (1 Sweeney) 389.

Diligence of plaintiff.—The exclusion of a party damnified unless he "shall have used all reasonable diligence to prevent such damage," does not confine the requisite diligence to exertions during a riot; but the words "shall have used" refer to a time anterior to the injury done by the mob, and to previous precautions and care used to prevent destruction by a mob. *Eastman v. Mayor, etc. of New York* (1868), 28 Super. (5 Robt.) 389.

Diligence of city authorities.—It is not a question of diligence on the part of the city authorities. If the party damnified has not been guilty of any want of diligence on his part it is imperative. *Eastman v. Mayor, etc. of New York* (1868), 28 Super. (5 Robt.) 389.

The liability imposed by this section is irrespective of any inability or neglect on the part of the sheriff. *Wolfe v. Supervisors of Richmond* (1860), 11 Abb. Pr. 270.

Liability exists whether or not the authorities, if they had notice, could prevent the damage. *Marshall v. City of Buffalo* (1900), 50 App. Div. 149, 64 N. Y. Supp. 411.

House of ill-fame.—Proof that property destroyed was kept as such, is no defense. *Ely v. Supervisors of Niagara* (1867), 36 N. Y. 297; *Lawrence v. Met. El. R. Co.* (1891), 126 N. Y. 483, 27 N. E. 765, 13 L. R. A. 102; *Blodgett v. City of Syracuse* (1862), 36 Barb. 526.

Force of judgments under section. *Darlington v. Mayor* (1865), 31 N. Y. 164; *People ex rel. Mayor, etc., of N. Y. v. Assessors* (1888), 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148.

Expenses of sheriff in suppressing riot, necessity of, presents a question for the jury. *People ex rel. Nichols v. Suprvisors of Queens* (1891), 60 Hun 387, 15 N. Y. Supp. 461.

If a mob be maddened by the voluntary and unlawful act of the claimant, and the destruction of his property is the result, a good defense exists in favor of the city or county when sued for the injury occasioned by the mob. *Paladino v. Supervisors of Westchester* (1888), 47 Hun 337.

A mortgagee of land, not in possession, who does not establish any ultimate injury to the security of his debt, by the destruction of the buildings on the mortgaged premises by rioters, is not entitled to recover the value thereof, in an action against the city in which the premises are situated. *Levy v. Mayor, etc., of New York* (1863), 26 Super. (3 Robt.) 194.

Complaint.—It is not necessary to allege in the complaint that the acts complained of did not occur through the negligence or carelessness of the plaintiff. *Wolfe v. Supervisors of Richmond* (1860), 11 Abb. Pr. 270.

Evidence.—Where there is no dispute that the property of the plaintiff was destroyed unlawfully by a mob, the fact that the mob proceeded to accomplish the purpose for which it was gathered as peaceably as might be, in the absence of any opposition to its course, and that it had no malice towards the plaintiff or anyone else, but simply a desire to possess itself of the material of which the buildings destroyed were made, does not affect the plaintiff's right to recover. *Marshall v. City of Buffalo* (1901), 63 App. Div. 603, 71 N. Y. Supp. 719, *affd.* (1903), 176 N. Y. 545, 68 N. E. 1119.

It is not necessary, in an action to recover damages for the destruction of property by fire, during the existence of a riot, in order to make a city liable therefor, to establish the absolute impossibility of the occurrence of the fire unless by the agency of the rioters. It is enough to establish, by circumstantial evidence, the probability of the origin of such fire by rioters, so great as to render that of its having originated in any other way, on any ordinary principles of experience and reasoning, so remote and improbable as to make it morally, even if not physically, impossible. *Ross v. Mayor, etc., of New York* (1886), 27 Super. (4 Robt.) 49.

§ 72. Acquisition of lands for erection of monuments.—The governing board of a village or town, or the trustees of a monument association, may acquire not to exceed three acres of land, for the erection of a soldiers' monument, or a monument or other structure as a memorial of some distinguishing or important event in the history of the state or nation, and for laying out such lands as a public park or square, if such lands are vacant or have buildings thereon not exceeding two thousand five hundred dollars in value, and if a judge of the county, or a justice of the supreme court of the district, in which such memorial is to be erected, shall give his written approval of the acquisition of such lands for such purpose.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 25; originally revised from L. 1881, ch. 226.

References.—Construction of monument by county, County Law, § 40. Construction of soldiers monument by town, Town Law, § 45. Organization and powers of monument associations, Membership Corporations Law, §§ 170-173.

Acquisition of lands by town board.—A town board, with the approval of the county judge or a justice of the Supreme Court, may acquire land for the erection of a monument as a memorial of the date of the erection of the town upon which may be recited other information of general historical interest. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 508.

§ 72-a. Acquisition and development of forest lands.—The governing board of a county, town or village may severally acquire for such county,

town or village, by purchase, gift, lease or condemnation, and hold as the property of such municipality, tracts of land having forests or tree growth thereon, or suitable for the growth of trees, and may appropriate therefor the necessary moneys of the county, town or village for which the lands are acquired. Such lands shall be under the management and control of such board and shall be developed and used for the planting and rearing of trees thereon and for the cultivation thereof according to the principles of scientific forestry, for the benefit and advantage of the county, town or village. The determination of any such board to acquire lands under the provisions of this section shall be by resolution; but the question of the final adoption of such resolution shall be taken up by the board only after public notice thereof has been published for at least two weeks, as follows: If it be a resolution of a board of supervisors, the publication shall be made in the newspapers in which the session laws and concurrent resolutions are required to be published; if it be a resolution of a town board or of a board of trustees of a village, the publication shall be made in a newspaper published in the town or village, respectively. The board shall give a hearing to all persons appearing in support of or in opposition to such proposed resolution. If it be determined to purchase such lands the moneys necessary therefor may be provided as follows: If the acquisition be by a county, the board of supervisors may cause such moneys to be raised by taxation and levied and collected as other county taxes or may borrow money therefor on the credit of the county by the issuance and sale of county bonds in the manner provided by law for the issuance and sale of other county obligations; if the acquisition be by a town, the moneys necessary therefor shall constitute a town charge and be raised by taxation as other town charges, or, the town board may in its discretion, cause town bonds to be issued and sold in the manner provided by law for the issuance and sale of town bonds, under the town law, to pay judgments; if the acquisition be by a village, the moneys therefor may be raised by taxation, as other village taxes, or by the issuance and sale of village bonds in the manner provided by the laws governing such village relating to village obligations, after the adoption of a resolution therefor by the board of trustees, without other authorization. All revenues and emoluments from lands so acquired shall belong to the municipality and be paid to its chief fiscal officer for the purposes of such municipality and in reduction of taxation therein. Such forest lands shall be subject to such rules and regulations as such governing board of the municipality shall prescribe; but the principal object to be conserved in the maintenance of such lands shall be the sale of forest products in aid of the public revenues and the protection of the water supply of the municipality. Such lands or portions thereof may be sold and conveyed, or leased, if a resolution therefor be adopted by the affirmative vote of two-thirds of all the members of such governing board; but no such resolution directing an absolute conveyance shall be effectual unless adopted

after a public hearing, held upon notice given in the manner required in the case of a resolution to acquire such lands. A deed of conveyance or lease of such lands, when authorized as aforesaid, shall be executed by the county treasurer of the county, supervisor of the town or president of the village by which the conveyance or lease is made. Moneys may be appropriated for the care and maintenance of such lands and the development and use of forests thereon annually, by the county, town or village, respectively, and the amount thereof raised by taxation in the same manner that other expenditures of such county, town or village are provided for by law. (*Added by L. 1912, ch. 74.*)

§ 73. Cities and villages may hold property in trust for certain purposes.—Real and personal estate may be granted and conveyed to the corporation of any city or village of this state, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress; or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation, may be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

Source.—L. 1840, ch. 318, § 2.

References.—Control and disposition of trust property held by village for park purposes, and gifts to village for parks or squares, Village Law, §§ 169, 290, 295.

Library.—Trust for the establishment and maintenance of a public library is valid. *Cottman v. Grace* (1886), 41 Hun 345, revd. (1889), 112 N. Y. 299, 19 N. E. 339, 3 L. R. A. 145.

Religious or pious purposes are not purposes for which a city or village may hold property in trust. *Village of Corning v. Rector, etc., of Christ Church* (1890), 33 N. Y. St. Rep. 766, 11 N. Y. Supp. 762.

Home for indigent women.—This section makes valid a devise of property to a village in trust for the benefit perpetually of the worthy indigent women of the town in which the village is located. *Matter of Albright* (1916), 93 Misc. 388, 156 N. Y. Supp. 821.

A town cannot act as trustee of property given for charitable purposes. *Fosdick v. Town of Hempstead* (1891), 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715.

§ 74. Condemnation of real property.—A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation, may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 22.

References.—As to condemnation of property for public purposes, see Code Civ. Pro. (Condemnation Law) §§ 3357–3384. Acquisition of lands by condemnation by cities of second class, Second Class Cities Law, § 103; by towns for sewer systems, Town Law, §§ 265–267; for state and county highways, Highway Law, §§ 150–155. Condemnation of lands for village streets, Village Law, §§ 149–158; for parks and squares, *Id.* §§ 169, 290.

Application.—*Village of Babylon v. Bergen* (1910), 68 Misc. 433, 124 N. Y. Supp. 871; Rept. of Atty. Genl. (1894) 71.

§ 75. **Limitation on acquisition of water rights in Dutchess county.**—Notwithstanding the provisions of any general or special law, a municipal or other corporation shall not have power to acquire by condemnation for the purpose of increasing or improving its water supply, any stream or water, situated outside of the boundaries of such municipal corporation, that flows through the town of Fishkill, Wappingers or Poughkeepsie into the Hudson river, which stream or water affords the chief source of power to, or is necessary in the process of manufacturing, washing or dyeing in, a mill situated in a city or village within the county of Dutchess, the inhabitants whereof are chiefly dependent on such mill for employment and support.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 25-a, as added by L. 1904, ch. 752.

§ 76. **Limitation on acquisition of water rights in Westchester and Putnam counties.**—Notwithstanding the provisions of any general or special law, a municipal or other corporation not situated within the county of Westchester or the county of Putnam shall not have power to acquire by condemnation, for the purpose of increasing or improving the water supply of any such corporation, or for supplying the inhabitants thereof with water, any lands, easements, streams of water, or water rights within the county of Westchester or the towns of Carmel and Putnam Valley in the county of Putnam, except that this section shall not apply to the contemplated reservoir known as the Cross river reservoir, nor to the contemplated reservoir at or near Croton falls, nor to the contemplated acquisition of land in the vicinity of Rye lake; nor shall this section operate to prevent the city of New York from acquiring real estate in said counties necessary for the purpose of constructing, maintaining and operating aqueducts, dams, reservoirs, culverts, sluices, canals, bridges, tunnels, pumping works, blow-offs, shafts, filters and appurtenances for the purpose of conveying to the city of New York and to the said counties, water from sources outside of the said counties, or for the purpose of connecting supplies of water already established within said counties. (*Thus amended by L. 1909, ch. 240, § 43.*)

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 25-b, as added by L. 1905, ch. 738, and amended by L. 1908, ch. 259.

§ 77. **Leases of public buildings to Grand Army posts.**—A municipal corporation may lease, for not exceeding five years, to a post or posts of the Grand Army of the Republic, or other veteran organization of honorably discharged union soldiers, sailors or marines, a public building or part thereof, belonging to such municipal corporation, except school houses in actual use as such, without expense, or at a nominal rent, fixed by the board or council having charge of such buildings and provide furniture and

furnishings, and heat, light and janitor service therefor, in like manner. (*Amended by L. 1917, ch. 583, in effect May 21, 1917.*)

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 26; originally revised from L. 1886, ch. 644, as amended by L. 1888, ch. 62.

References.—Use of armories by Grand Army of Republic, Military Law, § 192; rooms in state capitol, Public Buildings Law, § 5.

§ 77-a. **Military equipment for local military organizations and to provide for emergencies and the support of persons dependent upon men enlisted in the federal service, national guard or naval militia during the present war.**—A county, city, town or village may provide arms, uniforms and equipments for military organizations raised within the municipality, and for the purposes of security, defense, mobilization of resources and emergency aid during the continuing of the present war and may, in its discretion, provide for the support of any person or persons residing in such municipality who may be dependent for support upon a man enlisted in the federal service, national guard or naval militia. The governing board may appropriate necessary moneys therefor and provide the same by taxes to be levied upon the taxable property of the municipality in the same manner as other municipal taxes. Such board may borrow the amount of any such appropriation upon certificates of indebtedness, one-half of which shall be payable within two years and the remaining half part within four years from date of issue. (*Added by L. 1917, ch. 235, in effect Apr. 20, 1917.*)

§ 78. **Insurance of property.**—Public officers having by law the care and custody of the public buildings and other property of a municipal corporation, may insure the same at the expense and for the benefit of such corporation.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 23; originally revised from L. 1847, ch. 294.

Insurance of county courthouse and jail.—A board of supervisors has authority to insure the county courthouse and jail. In case of its failure so to do the sheriff may effect such insurance at the expense of the county. Opinion of Atty. Genl. (1913), Vol. 2, p. 43.

Liability insurance.—A village has no legal right to insure itself against liability for accidents arising from slippery or defective sidewalks and pay the premiums out of the funds of the village. Rept. of Atty. Genl. (1912), Vol. 2, p. 99.

Nor has it a right, either by action of its board of trustees or through a vote of its taxpayers, to insure itself against liability for accidents to its employees and to pay the premiums for such insurance out of public funds. Rept. of Atty. Genl. (1912), Vol. 2, p. 361.

Insurance of employees.—A village has no legal right to insure its employees against accident and pay the premiums out of the funds of the village. Rept. of Atty. Genl. (1912), Vol. 2, p. 99. But see Workmen's Compensation Law, § 3, as to liability of municipal corporations for injuries to employees engaged in hazardous employments.

§ 79. **Free public libraries.**—Any municipal corporation may establish and maintain a free public library or museum in accordance with the

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library provisions of sections ten hundred and twenty-seven to ten hundred and forty-four, both inclusive, of education law.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 24, as amended by L. 1896, ch. 576; originally revised from L. 1872, ch. 458, as amended by L. 1885, ch. 479, and L. 1888, ch. 328.

References.—Establishment of public library by county, city, village, town or school district, Education Law, § 1118; taxes for support of public library, Id. §§ 1120, 1122; trustees of public library, Id. § 1123. Trust for libraries in towns and villages, General Municipal Law, §§ 140–146. Village may borrow money for establishment and maintenance, Village Law, § 128.

§ 80. **Discrimination against non-residents.**—Any restriction or regulation imposed by the governing board of a municipal corporation upon the inhabitants of any other municipal corporation within this state, carrying on or desiring to carry on any lawful business or calling within the limits thereof, which shall not be necessary for the proper regulation of such trade, business or calling, and shall not apply to citizens of all parts of the state alike, except ordinances or regulations in reference to traveling circuses, shows and exhibitions, shall be void.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 27; originally revised from L. 1878, ch. 212, as amended by L. 1879, ch. 417.

Licenses of vendors which discriminate against non-residents are void. Rept. of Atty. Genl. (1894) 189, 200.

Section cited.—City of Buffalo v. Reavry (1899), 37 App. Div. 228, 55 N. Y. Supp. 792.

§ 81. **Peddling and hawking farm produce.**—The governing board of municipal corporation shall not by ordinance or otherwise regulate or prohibit the pursuit or exercise of hawking and peddling farm produce except hay and straw within the limits of any such municipal corporation, if such farm produce is hawked or peddled by the producer thereof, or his servants or employees; nor shall the governing board of any such municipal corporation pass an ordinance requiring such producer of farm produce to secure a license for peddling and hawking such farm produce within the limits of such municipal corporation. Nothing contained herein shall affect any pending action or proceeding to recover penalties imposed for violations of existing ordinances and regulations. Nothing in this section shall be construed to permit wagons from which farm produce is sold to stand in front of stores or private residences for a longer time than may be necessary for the sale and delivery of produce purchased by the occupants of such stores or residences; nor to permit the congregating of such wagons upon any street or thoroughfare not set apart by the municipality as a public market for the sale of farm produce. This section shall not apply to cities of the first class.

Source.—Former Gen. Mun. L. (L. 1892, ch. 685) § 28, as added by L. 1901, ch. 389.

References.—Licenses for peddlers, generally, General Business Law, §§ 30–36. Peddlers licenses in towns, Town Law, §§ 210–214; in villages, Village Law, § 91. Public markets in cities, see Farms and Markets Law, Art. IV.

Constitutionality.—The legislature has power to authorize a municipal corporation to regulate hawking and peddling in the streets. *Village of Stamford v. Fisher* (1893), 140 N. Y. 187, 35 N. E. 500.

Farmers peddling milk, which they produce on their own farms, cannot be compelled to take out a license by local boards of health operating under city ordinances. Rept. of Atty. Genl. (1910) 798.

A board of health of a village can lawfully require a permit from milk dealers selling milk in its jurisdiction if no license fee is charged. Rept. of Atty. Genl. (1914), Vol. 2, p. 342.

Peddling by non-producer.—Hawking and peddling of farm produce by persons, who have purchased the same from others, cannot be prohibited by a village. Rept. of Atty. Genl. (1911), Vol. 2, p. 411.

Grocery business.—Calling for and delivering grocery orders is not "hawking or peddling in the public streets." *Village of Stamford v. Fisher* (1893), 140 N. Y. 187, 35 N. E. 500.

§ 82. Levy to pay a final judgment; to be in addition to amount authorized by law; money to be paid to judgment creditor.—If a final judgment for a sum of money, or directing the payment of money shall have been, or shall hereafter be recovered against any county, town, city or incorporated village within this state, and the same remains, or shall hereafter remain unpaid, and the execution thereof is not, or shall not be stayed as required by law, or if so stayed, the stay has expired, or shall hereafter expire, it shall be the duty of the board of supervisors, if the judgment is, or shall be, recovered against a county or town, or of the common council of the city, or the board of trustees of the village, if the judgment is, or shall be, recovered against a city or an incorporated village, and the said board of supervisors, common council or board of trustees is hereby empowered to assess, levy, and cause to be collected at the same time and in like manner as other moneys for the necessary expenses of the county, town, city or village, as the case may be, are then next thereafter to be assessed, levied and collected, and in addition to the moneys now authorized by law to be assessed, levied and collected for that purpose, a sum of money sufficient to pay the said judgment with the interest thereupon, and the fees and expenses chargeable by law upon the execution, if any, issued to collect the same. The moneys so assessed and levied as soon as collected and paid to the proper receiving and disbursing officer, or so much thereof as may be necessary, shall from time to time, be paid by him to the judgment creditor, administrator or assignee, or other person entitled to receive the same by reason of the said judgment, without any deduction for his fees or commissions.

Source.—L. 1880, ch. 554, § 1.

Power to raise money does not include the power to borrow. *Wells v. Town of Salina* (1890), 119 N. Y. 280, 23 N. E. 879, 7 L. R. A. 759.

Enforcement of judgment where town is divided.—This act has no application. *People ex rel. McKenzie v. Supervisors of Ulster* (1883), 94 N. Y. 263.

§ 83. Limitation as to amount of money to be raised; special provision in New York city.—No restriction or limitation imposed by law as to

the sum to be raised in any year in any city or village shall apply to the moneys to be raised for the purposes specified in the last preceding section; but the said moneys shall be raised in addition to any sum so restricted or limited.

In the city of New York the powers and duties devolved upon the common council of a city by section eighty-two of this chapter shall be exercised by the board of estimate and apportionment.

Source.—L. 1880, ch. 554, §§ 2, 3.

§ 84. **Refunding illegal assessments.**—Whenever an assessment for a local improvement has been annulled by the judgment or order of any court any sum of money which has been heretofore or shall be hereafter paid thereon, may be refunded with interest from the time of such payment. If not so refunded within one year, from the time of such judgment or order annulling such assessment, an action may be maintained to recover such sum with interest thereon.

Source.—L. 1896, ch. 910, § 1.

Necessity for annulment before action for recovery.—Where an action was brought to recover certain sums of money paid for local improvements on the ground that the assessments were invalid it was held that the action could not be maintained for the reason that the assessments, although conceded to be invalid, had not been set aside. *Palmer v. City of Syracuse* (1901), 67 App. Div. 267, 73 N. Y. Supp. 378. See also *Trimmer v. City of Rochester* (1892), 130 N. Y. 401, 29 N. E. 746.

Necessity for annulment of each assessment.—The owner assessed cannot recover money paid thereunder on proof that an assessment for the same improvement on the property of another owner has been declared illegal. *Wallace v. Mayor* (1900), 53 App. Div. 187, 65 N. Y. Supp. 855, *affd.* (1901), 165 N. Y. 658, 59 N. E. 1132.

New trial ordered where this section was not brought to the attention of the trial court. *Palmer v. City of Syracuse* (1901), 67 App. Div. 267, 73 N. Y. Supp. 378.

Statute of limitations not affected.—This section neither expressly or impliedly revives a cause of action, already barred, by repealing the six year Statute of Limitations applicable thereto. *Dennison v. City of New York* (1905), 182 N. Y. 24, 74 N. E. 486.

Section cited.—*McCall v. City of Rochester* (1904), 44 Misc. 129, 89 N. Y. Supp. 766.

§ 85. **Licenses to conduct transient retail business.**—No person whether acting as principal or as agent for another, shall conduct a transient retail business in any store in any city of the third class, village or town of this state for the sale of goods which shall be represented or advertised as a bankrupt stock, or as assigned stock, or as goods damaged by fire, water or otherwise, or by any such like representation or device, without first taking out a license therefor from the mayor of such city, president of such village or the supervisor of such town. The amount of the fee for such license in any city shall be fixed by resolution duly passed by the board of aldermen or common council, and in a village by resolution duly

passed by the board of trustees of such village; and in a town by resolution of the town board of such town. Such fee shall not be less than twenty-five dollars nor more than one hundred dollars per month in a city or an incorporated village, and not less than ten dollars nor more than fifty dollars per month in a town. No such license shall be issued for a less period than one month and it shall be renewed monthly during the continuance of such business. The sum paid as license fees shall, in a city or village, be paid to the treasurer of such city or village, and in a town to the supervisor thereof, to be used for city, village or town purposes.

Any person as principal or agent conducting a transient retail business as described in this section, without obtaining a license therefor, shall be guilty of a misdemeanor and upon conviction thereof shall be fined a sum not less than one hundred dollars nor more than two hundred dollars, and in default of the payment thereof shall be imprisoned for a period of not more than sixty days.

Source.—L. 1898, ch. 141, §§ 1, 2.

Constitutionality.—The provision, requiring certain transient retail dealers to obtain licenses from local authorities before doing business, cannot be sustained as an exercise of either the police power or of the power of taxation, and, hence is unconstitutional. *People ex rel. Moskowitz v. Jenkins* (1911), 202 N. Y. 53, 94 N. E. 1065, 35 L. R. A. (N. S.) 1079, revg. (1910), 140 App. Div. 786, 125 N. Y. Supp. 817.

§ 85-a. **Taxation of transient merchants.**—The legislative body of a city, the town board of a town or the board of trustees of a village has power to provide that a tax shall be levied upon all persons or corporations conducting transient retail business therein, and may provide for the collection of such tax by requiring a permit and bond, cash deposit or other security before the commencement of business by such persons or corporations. Such tax shall be based upon the gross amount of sales and shall be at the same rate as other property is taxed for the year in such city, town or village. If at the time such tax becomes due and payable, the tax rate for the current year of such city, town or village has not been fixed, the same shall be estimated by the assessors thereof. An ordinance or resolution providing for a tax hereunder may require verified reports to be filed from time to time relating to stock and sales, and may make such further requirements as may be necessary in order to determine the amount of such tax, and to provide for the collection thereof. A transient business is one conducted in a store, hotel, house, building or structure for the sale at retail of goods, wares or merchandise, excepting food products, and which is intended to be conducted for a temporary period of time and not permanently. If the place in which a business is conducted is rented or leased for a period of two months or less, such fact shall be presumptive evidence that the business carried on therein is a transient business. Any person or corporation failing to pay said tax, or failing to obey the provisions of an

ordinance or resolution adopted hereunder, shall be guilty of a misdemeanor. (*Added by L. 1917, ch. 199, in effect Apr. 17, 1917.*)

§ 86. Contractors not to assign contracts with municipality without its consent.—A clause shall be inserted in all specifications or contracts hereafter made or awarded by any municipal corporation, or any public department or official thereof, prohibiting any contractor, to whom any contract shall be let, granted or awarded, as required by law, from assigning, transferring, conveying, subletting or otherwise disposing of the same, or of his right, title or interest therein, or his power to execute such contract to any other person, company or corporation, without the previous consent in writing of the department or official awarding the same.

If any contractor, to whom any contract is hereafter let, granted or awarded, as required by law, by any municipal corporation in the state, or by any public department or official thereof, shall, without the previous written consent specified in the first paragraph of this section, assign, transfer, convey, sublet or otherwise dispose of the same, or his right, title or interest therein, or his power to execute such contract, to any other person, company or other corporation, the municipal corporation, public department, or official as the case may be, which let, made, granted or awarded said contract shall revoke and annul such contract, and the municipal corporation, public department or officer, as the case may be, shall be relieved and discharged from any and all liability and obligations growing out of said contract to such contractor, and to the person, company, or corporation to whom he shall assign, transfer, convey, sublet or otherwise dispose of the same, and said contractor, and his assignee, transferee, or sublessee, shall forfeit and lose all moneys, theretofore earned under said contract except so much as may be required to pay his employees; provided, that nothing herein contained shall be construed to hinder, prevent or affect an assignment by such contractor for the benefit of his creditors, made pursuant to the statutes of this state.

Source.—L. 1897, ch. 444, §§ 1, 2.

Effect and operation of section.—The above section is designed to prevent a party obtaining a municipal contract from assigning the whole or a substantial part of it to someone else, and thus relieve himself from responsibility in respect thereto. It was not designed to prevent a practical mason who obtains a contract to erect a school building in a city from subletting the carpentry work to a practical carpenter. *Ocorr & Rugg Co. v. City of Little Falls* (1902), 77 App. Div. 592, 79 N. Y. Supp. 251, *affd.* (1904), 178 N. Y. 622, 70 N. E. 1104.

Orders for money due on public contracts.—A contractor by giving an order upon a fund to accrue from the performance of a public contract, neither assigns, sublets or disposes of contract, nor his power to execute the same, and does not thereby contravene the provisions of the above section. *Brace v. City of Gloversville* (1901), 167 N. Y. 452, 60 N. E. 779.

Assignment by president of corporation to corporation.—The assignment of a town lighting district contract, without the consent of the town board, operates to relieve and discharge the town from any and all obligations growing out of

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such contract notwithstanding the fact that the assignment is made to a corporation of which the original contractor is the president and manager, and that the town had the benefit of the performance of such contract. *Suburban Electric Light Co. v. Town of Hempstead* (1899), 38 App. Div. 355, 56 N. Y. Supp. 443.

§ 86-a. **Salary or earnings of municipal officer or employee.**—No assignment of, or power of attorney to collect or other instrument affecting, the whole or any part of his salary or earnings by an officer or employee of any municipal corporation, or subdivision thereof, unless approved in writing by the head of the department, board, body or office in which such officer or employee is employed, shall in any way operate to prevent the payment of such salary or earnings directly to such officer or employee. In the event of the payment of such salary or earnings directly to such officer or employee, notwithstanding the existence of an assignment of, or power of attorney to collect or other instrument affecting, the whole or part thereof, not approved by the head of the department, board, body or office in which such officer or employee is employed, no person shall have any cause of action therefor against such municipal corporation or subdivision thereof for the recovery of any moneys by virtue of such unapproved assignment, power of attorney to collect or other instrument. (*Added by L. 1914, ch. 164.*)

§ 86-b. **Retained percentages may be withdrawn.**—A clause may be inserted in any contract hereafter made or awarded by any municipal corporation, or any public department or official thereof, providing that the contractor may, from time to time, withdraw the whole or any portion of the amount retained from payments to the contractor pursuant to the terms of the contract, upon depositing with the comptroller or disbursing officer of the municipality, corporate stock or bonds of the municipality of a market value equal to the amount so withdrawn. The said clause may further provide that the municipality shall, from time to time, collect all interest or income on the stock or bonds so deposited, and shall pay the same, when and as collected, to the contractor who deposited the stock or bonds. The said clause may further provide that if the deposit be in the form of coupon bonds, the coupons as they respectively become due shall be delivered to the contractor. The said clause may further provide that the contractor shall not be entitled to interest or coupons or income on any of the deposited stock or bonds, the proceeds of which shall be used or applied by the municipality, pursuant to the terms of the contract. (*Added by L. 1916, ch. 176.*)

§ 87. **Support and maintenance of charitable and other institutions.**—Boards of estimate and apportionment, common councils, boards of aldermen, boards of supervisors, town boards, boards of trustees of villages and all other boards or officers of counties, cities, towns and villages, authorized to appropriate and to raise money by taxation and to make payments therefrom, are hereby authorized, in their discretion, to appropriate and to

raise money by taxation and to make payments from said moneys, and from any moneys received from any other source and properly applicable thereto, to charitable, eleemosynary, correctional and reformatory institution wholly or partly under private control, for the care, support and maintenance of their inmates, of the moneys which are or may be appropriated therefor; such payments to be made only for such inmates as are received and retained therein pursuant to rules established by the state board of charities; except that boards of trustees of villages and town boards of towns in which there is no hospital located, and which are situated upon and adjoin the boundary line of a neighboring state, are hereby authorized, in their discretion, to appropriate and to raise money by taxation and to make payments from said moneys, and from any moneys received from any other source and properly applicable thereto, to hospitals in such adjoining state for the purpose of maintaining a bed or beds in such hospital for the benefit of and to be used exclusively by the inhabitants of such village or town. Boards of trustees of villages and town boards of towns situate upon the boundary line of a neighboring state, which have appropriated and raised money by taxation for the purpose of maintaining a bed or beds in a hospital in such adjoining state and have not paid the same, are hereby authorized to use said money for the purpose for which it was appropriated and raised. Payments to such hospital in an adjoining state shall be made only for such inmates as are received and retained therein pursuant to rules established by the state board of charities.

Source.—L. 1895, ch. 754, § 1, as amended by L. 1902, ch. 155.

Reference.—As to aid to denominational institutions, see Constitution, Art. 8, § 14.

Payment only for inmates received under rules of state board of charities.—The fact that a private charitable institution was authorized by its charter to take under its care the management of such children as should by the consent, in writing, of their parents and guardians, be voluntarily surrendered and intrusted to it, does not authorize the city and county of New York to pay for the support and maintenance of any inmate not received and retained therein pursuant to the rules of the state board of charities, since such payment is prohibited by the constitution itself. *Matter of New York Juvenile Asylum* (1902), 172 N. Y. 50, 64 N. E. 764.

Section cited.—*People ex rel. N. Y. Inst. for Blind v. Fitch* (1897), 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591; *People ex rel. Inebriates' Home v. Comptroller* (1897), 152 N. Y. 399, 46 N. E. 852.

§ 88. Separate specifications for certain contract work.—Every officer, board, department, commission or commissions, charged with the duty of preparing specifications or awarding or entering into contracts for the erection, construction or alteration of buildings in any county or city, or the borough of any city, when the entire cost of such work shall exceed one thousand dollars, must have prepared separate specifications for each of the following branches of work to be performed:

1. Plumbing and gas fitting.

2. Steam heating, hot water and ventilating apparatus.

Such specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by any county, city or borough, or a department, board, commission, or commissioner or officer thereof, for the erection, construction or alteration of buildings or any part thereof, shall award the respective work specified in the above subdivisions separately to responsible and reliable persons, firms or corporations. Nothing in this section shall be construed to prevent the authorities in charge of any county or municipal building from performing any such branches of work by or through their regular employees, or in the case of public institutions, by the inmates thereof. (*Added by L. 1912. ch. 514.*)

§ 89. **Payment of debts of illegal corporations.**—Whenever an attempt has been or is hereafter made to create a municipal corporation, either by special act of the legislature or by proceedings taken under the general laws of the state, and such corporation has chosen officers and has exercised the powers, duties and authority vested in it by the law under which it purports to have been created, and such corporation has become indebted to any person, association or corporation in the aggregate amount of five hundred dollars or more, and such corporation shall have been held or declared to be no corporation by a court of record of competent jurisdiction of this state, either because the special act creating it is declared to be unconstitutional, or otherwise, then such corporation shall be deemed a de facto corporation for the purpose of winding up its affairs and paying its indebtedness; and its officers shall be deemed de facto officers and shall have all the powers and authority and shall perform all the functions and duties vested in or required of them under the law pursuant to which such corporation was attempted to be created, so far as may be necessary to liquidate the affairs of such corporation and to pay its money obligations, including all the power and authority to assess, levy and collect taxes upon the taxable persons and property within the corporate limits of such illegal corporation, to such an amount as shall be sufficient to pay obligations of such corporation and the expense incident thereto.

2. Such de facto officers shall keep an accurate record of all their proceedings hereunder, including the amount of money raised by taxation and the purpose for which it was raised and the amount of money paid out, to whom and for what purpose. They shall audit all bills before payment and shall take receipts for all moneys paid out.

3. When all the indebtedness of such illegal corporation has been paid and its obligations discharged, such de facto officers shall make a full, complete and accurate report, under oath, to the county judge of the county in which such illegal corporation is located or to a justice of the supreme court of all their proceedings hereunder and on the order of such judge

or justice approving and confirming such report, such de facto officers shall be discharged and their functions and duties shall cease. Such report and order shall be filed in the office of the county clerk of the county in which such illegal corporation was located. (*Added by L. 1915, ch. 272.*)

See generally, *Rice v. Glens Falls Publishing Co.* (1914), 86 Misc. 503, 149 N. Y. Supp. 311.

§ 90. **Workmen's compensation insurance on public works.**—Each contract to which a municipality, or any public department or official thereof, is a party and which is of such a character that the employees engaged thereon are required to be insured by the provisions of chapter forty-one of the laws of nineteen hundred and fourteen, known as the workmen's compensation law, and acts amendatory thereto, shall contain a stipulation that the same shall be void and of no effect unless the person or corporation making or performing the same shall secure compensation for the benefit of, and keep insured during the life of said contract, such employees, in compliance with the provisions of said law. (*Added by L. 1916, ch. 478.*)

ARTICLE VI.

PUBLIC HEALTH AND SAFETY.

Section 120. Contracts for purification of water and sewerage.

- 120-a. Contracts for sewerage disposal.
- 120-b. Supervision of sewage system.
- 120-c. Obligations and privileges relating to sewerage contracts.
- 120-d. Officers of meeting.
- 120-e. By whom proposed district represented.
- 120-f. Contract, how executed.
- 120-g. Apportionment of cost.
- 120-h. Further provisions as to apportionment of cost.
- 120-i. Bond issues and assessments.
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- 138. General powers and duties of board of inebriety.
- 139. General powers and duties of superintendent.
- 139-a. General regulations.
- 139-b. Application of preceding sections.

§ 120. Contracts for purification of water and sewerage.—The local authorities of the several cities, towns and villages of the state having charge of the supply of water and the care of sewerage in their respective localities, are hereby authorized, on behalf of their cities, towns and villages, respectively, to enter into contracts with the owners of any process or apparatus for the purification of water and sewerage whether protected by patents or not, and either contract for the use of apparatus and process for a term of years or for the purchase of the same, as to them shall seem advisable. It shall be lawful for any two or more of such municipalities in this state, excepting only cities of the first and second class, without regard to the form of their incorporation, including towns or sewer districts of towns, to jointly construct, provide, maintain and operate a comprehensive system of sewerage including trunk lines and laterals, or a system of conveying or conducting sewerage from said municipalities from a point or points to be agreed upon to a common destination or disposal plant or plants, and to construct, maintain and operate within or without the said municipalities or any of them one or more outlet or trunk sewers, plants, works or stations for the treatment, disposal, or rendering of sewerage, or any such municipality or any such municipalities may jointly or severally contract for the construction for it or them of any such system, extension or part thereof, including any such sewers, plants, works or stations, and agree to pay annually, semi-annually or quarterly for the use or possession thereof, by way of permanent rental reserved therefor; or such lawful authorities of the respective municipalities may jointly or severally contract with any person, persons or corporation or with other municipalities or sewage districts for the removal of sewage within the boundaries of such local government, upon such reasonable terms as they may agree upon. And to that end the governing bodies or boards of any two or more municipalities, including sewer districts of a town, authorized by law to have charge of sewer systems established or to be established in said municipalities, or sewer districts of a town, respectively, may unite and jointly cause to be made at their joint expense (each district bearing a part of the ex-

pense in proportion to the assessed valuation of real estate in such district, or on such other basis or division as may be jointly agreed upon) by competent engineers, mechanics and others, surveys, maps, plans, reports and estimates of proposed works and improvements relating to such contemplated public improvement or works authorized by this act, which such municipalities may desire to jointly provide, maintain, operate or lease under the authority conferred by this act, and for such purpose they may determine upon the final route and plan for the building or construction of such sewerage system and for the making of such surveys, maps, plans, reports and estimates as provided in this section. It shall be lawful for the officers and agents of such municipalities to enter at all times upon any lands or waters for the purpose of exploring, surveying, and laying out the route of such sewerage system. (*Amended by L. 1917, ch. 709, in effect June 1, 1917.*)

Source.—L. 1894, ch. 667, § 1. Before amendment of 1917, this section consisted of first sentence only.

References.—Waterworks corporations, see Transportation Corporation Law, §§ 80-85. Water districts in towns, Town Law, §§ 281-298; sewer districts in towns, Id. §§ 230-244. Construction of sewers in villages, Village Law, §§ 260-276. Water supply in villages, Id. §§ 220-234.

Garbage.—Power to contract for removal and reduction of city garbage. See *Balch v. City of Utica* (1899), 42 App. Div. 562, 59 N. Y. Supp. 513, *affd.* (1901), 168 N. Y. 651, 61 N. E. 1127.

§ 120-a. **Contracts for sewerage disposal.**—The respective municipalities and districts may contract with each other, or they may jointly or severally contract with a third person, corporation or municipality, either for the construction, operation, maintenance or leasing of a complete comprehensive system for the removal and disposal of sewerage, or of a trunk line system with or without lateral connections, with or without the sewerage disposal plant or of a sewerage disposal plant; each of the boards or commissioners, however, binding only the municipalities or districts which they respectively represent. Such municipalities jointly acting through such board or commissioners, if they deem it expedient so to do, may contract with any other municipality or municipalities through or over whose territory such trunk sewer or sewers are intended to pass, for the construction of said outlet, trunk sewer or sewers and appurtenances located within the territory of such other municipality, in such manner as may be agreed upon between such other municipality, and the municipality theretofore jointly contracting as herein authorized, or such jointly contracting municipalities may contract in writing with any other municipality or municipalities for the privilege of connecting its or their sewers and drains with such outlet or trunk sewer or sewers so to be jointly constructed by the municipalities originally contracting for the public improvements or works hereby authorized, and it shall be lawful for such other municipality or municipalities to enter into a contract for such purpose, upon such terms and for

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such consideration and length of time as may be mutually agreed upon between all the contracting municipalities. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

References.—Sewer system in towns, Town Law, §§ 230-244; in villages, Village Law, §§ 260-276; in cities of second class, Second Class Cities Law, § 91. Discharge of sewage into waters used by municipalities, Public Health Law, § 87; rules of department of health as to sewer systems, *Id.* § 70.

§ 120-b. Supervision of sewage system.—If the public works herein provided be constructed and operated by the municipalities acting jointly, the local authorities of the contracting municipalities or districts having charge of sewage shall jointly supervise the construction and operation of such sewage system, or they may jointly engage or employ a competent sanitary engineer for such purpose. They shall jointly elect or appoint all necessary employees at the disposal plant and for the care of the trunk line sewer, and severally appoint such employees as they may be authorized so to do by the respective governing bodies to work on the system within the bounds of such municipality. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-c. Obligations and privileges relating to sewerage contracts.—No contract for the construction, use or possession of any such sewer system extension or part thereof, including any such sewers, plants, works or stations, authorized by section one hundred and twenty, or for the removal of sewage, or agreement to pay any annual, semi-annual or quarterly sum by way of permanent rental reserved therefor, shall be deemed to create an indebtedness of such city, town or village under any act limiting the amount of such indebtedness, unless and to the extent that such municipality or municipalities shall covenant to pay for such system, extension or part thereof, including any such sewers, works, plants or stations under any right reserved in such contract or otherwise. Such system, extension or part thereof shall, when accepted under such contract, and such works, plants or stations, may if so provided therein, pass into the use, possession, management and control of such municipality or municipalities, and it or they shall, by proper provision in the said contract, subject such contract to its or their right at any time to terminate all its or their liability under the same for such rental by paying for such system, extension or part thereof a price named therein or to be determined in accordance with the provisions thereof, and it or they may by proper provision in such contract, covenant to terminate its or their liability in such manner at a time or within a period named therein, but the sum or rental to be paid for such use and possession or the price which must be paid for such system, extension or part thereof in order to terminate the liability of such municipality or municipalities under such contract, shall not be fixed by said contract beyond a period of thirty years, after which and at any time thereafter, if such municipality or municipalities shall not have terminated its

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or their liability under said contract, the sum or rental to be paid for the continued use and possession of such system, extension or part thereof or the price at which the same must be paid for in order to terminate such liability, which sum or rental and which price shall be based on the value of such system, extension or part thereof at any such time, shall be fixed by agreement, or in the absence of agreement by application to a competent court and under its order, but each such agreement or order shall be limited to a period not exceeding ten years. And such local authorities may also at any time contract for the maintenance and operation of any such system, extension or part thereof, including any such works, plants or stations or of any sewerage or sewage disposal system or part thereof owned or used by any such municipality or municipalities. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-d. **Officers of meeting.**—In order to facilitate business procedure, the local authorities of the several municipalities or districts meeting jointly for the purposes herein provided shall, at a meeting at which all the municipalities and districts intending to act jointly are represented, choose from among their number a chairman, who shall act as such until his successor is chosen in a similar manner. Such meeting, when organized, shall elect a secretary who may or may not be a member of one of the local boards meeting jointly. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-e. **By whom proposed district represented.**—Until a sewer district of a town is organized as provided by the town law, the supervisor, or a member of the town board appointed by the supervisor, of the town in which the proposed sewer district is located, may act for and on behalf of the people of the territory proposed to be embraced in a sewer district, when requested so to do by a petition in writing signed by not less than five per centum of the voters of such proposed district, at such joint meeting of municipalities and districts; provided, however, that neither the town nor any property within the town, except such property as may be within such proposed district, shall be chargeable with any debt or expenses created by such municipalities or districts acting jointly. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-f. **Contract; how executed.**—No municipality or district acting jointly as herein provided shall be bound by any contract or agreement unless such contract or agreement be signed and executed by a majority of the local authorities of such municipality having care of sewerage in such municipality or district. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-g. **Apportionment of cost.**—Before any such contract for construction mentioned in section one hundred and twenty-c shall become effective, such local authorities shall determine the part or proportion of the annual

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cost thereof, if any, which is to be assessed upon the property benefited thereby, and the method of such assessment, and shall provide that any part thereof not actually paid out of such assessment shall be paid out of the general funds to be raised by a tax in such city, town, village or sewer district. In the case of a town, the petition for the creation of such sewer district, or supplemental petition, shall request the construction of such sewer system, extension or part thereof, as herein provided, and such petition shall comply in form, substance and in the manner of execution, so far as applicable thereto, to the requirements of section two hundred and thirty of the town law, except that it may state that the annual sum or rental to be paid for the use of said plant or for the removal of sewage as herein provided shall be fixed and assessed in the first instance for the full period named in any such contract, not exceeding thirty years, and that any part thereof not actually paid out of such assessment may be reassessed upon the property in such district. Before acting on any such petition, the town board shall give the notice provided in section two hundred and thirty-a of the town law, and the assessment shall be made in form and substance so far as applicable thereto as provided in section two hundred and thirty-seven of said law. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-h. Further provisions as to apportionment of cost.—Each of the contracting municipalities or districts shall pay its just and proportionate share for the public improvement authorized by this act and the general laws, including its just and proportionate share of the cost for the removal of sewage and of maintenance and carrying charges of the system. The manner of arriving at the share each local government shall bear and the method of payment thereof as hereinafter provided shall be determined by its local board or commissioners having charge of sewage, before such contract for construction or for sewerage removal becomes effective, as hereinafter provided. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-i. Bond issues and assessments.—The indebtedness created for such public works may be paid by each contracting municipality, including a sewer district of a town, wholly by a bond issue; or partly by a bond issue, and partly by assessment on the property deemed specially benefited by such improvement and partly by money raised by general taxation; or partly by a bond issue and partly by assessment on the property deemed specially benefited by such improvement. In the case of a sewer district of a town the petition for the creation thereof or a supplemental petition may state the means of payment as above provided and the assessment therein shall be made in form and substance so far as applicable as provided in section two hundred and thirty-seven of said law, except that such sewer commissioner shall assess a part of the district's proportionate share of the total cost of such system on the lands within

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such district, or extension of an existing district in proportion, as nearly as may be, to the benefit which each lot or parcel will derive therefrom. Such sewer commissioners shall determine the amount to be raised by general taxation for such expense and the amount to be raised by bond, if any. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-j. **Notes in anticipation of assessments.**—For the purpose of defraying the costs and expenses of such public improvement as is authorized hereby in respect of which an assessment for benefits may be made on lands and real estate situated in any such contracting municipality, the governing body or board having charge of the finances of any such contracting municipality may, if necessary, borrow money and secure the payment of the same by the notes or other temporary obligations of such municipality; these notes and obligations may be renewed from time to time until such improvement or works be completed or the assessment for benefits confirmed; when so confirmed the said governing body or board of such municipality shall provide the cost and expenses of such improvements in the manner herein or in general laws provided. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-k. **Payments; how made.**—It shall be lawful for the governing body or board having control of the finances of such contracting municipality, in lieu of issuing the bonds of such municipality, to pay its proportion of the costs and expenses of any improvements jointly contracted for and made under this act, with money to be raised by taxation, after the making of the public improvements herein authorized have been determined upon and a joint contract made and entered into pursuant to the provisions of this act, or by paying the whole or part of such indebtedness out of all moneys belonging to such contracting municipality not otherwise appropriated or required. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-l. **Letting of contracts.**—Whenever any work to be performed or materials to be furnished in or about any improvement to be made by two or more municipalities under the provisions of this act shall involve an expenditure of any sum of money exceeding five hundred dollars, the municipal bodies or boards of the contracting municipalities, by their official action taken in joint meeting as herein provided, shall designate a time when they will meet at their usual place of meeting to receive proposals, in writing, for doing the work or furnishing the materials, and such joint meeting shall order the chairman and secretary thereof to give notice, by advertisement inserted in one or more newspapers published or circulating in the municipalities jointly contracting, at least two weeks before the time of such meeting, of the work to be done or materials to be furnished, of which at the time of such order they shall cause to be filed in the office of such joint meeting particular specifications; all proposals received shall

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be publicly opened by such chairman in the presence and during a session of such joint meeting, and of all others who choose to attend the said meeting; not more than one proposal shall be received from any one person, directly or indirectly, for the same contract work or materials; and the said joint meeting may reject any and all of said proposals and direct its chairman and secretary to advertise for new proposals and accept such as shall in the opinion of a majority of the municipalities represented in said joint meeting be deemed most advantageous for the said municipalities, subject, however, to the reservations herein provided; the board may require a bond or deposit from the person submitting a proposal, the liability of such bond to accrue, or such deposit to be forfeited to the municipality, or municipalities, in case such person shall refuse to enter into a contract in accordance to his proposal. The proposal so accepted shall be reduced to a contract in writing, and a satisfactory bond to be approved by such joint meeting shall be required and given for its faithful performance, but all contracts when awarded shall be awarded to the lowest responsible bidder offering satisfactory security; this section shall not apply to any engineer or agent of the joint contracting municipalities engaged in supervising or directing the work of such improvements. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-m. **Application of other laws to procedure.**—Except where inconsistent with this act, or otherwise permitted hereunder the apportionment of local assessments and the manner of payment of the expense of construction of such public works shall be as provided in the town law, the village law, the general cities law, or in the manner provided in any special city and of any contracting city. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-n. **Map and plan; approval by state commissioner.**—Before taking any proceedings for the construction of any sewer or of any system of sewers or of any addition thereto or alteration thereof, such municipality or municipalities acting severally or jointly shall cause to be made a map and plan therefor, or an amendment of any map and plan previously approved, as the case may be, and shall submit the same to the state commissioner of health for his approval, and upon his approval the same shall be filed in his office. A copy of such map and plan or of any such amendment thereof shall also be filed in the office of the clerk of each such municipality. Any such map and plan shall include specifications of dimensions, connections and outlets or sewage disposal works and may also include any existing sewer which it shall be found feasible and proper to incorporate or include in the proposed system. No work of any kind shall be done on or for the construction, extension, reconstruction, removal or modification of any system of sewers or of any sewer thereof until a map and plan covering the entire system shall first have been duly approved and filed as above provided, and in the execution of the construction, extension, reconstruction, removal or modification of any system of sewers or of any sewer

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thereof no deviations from the plans as finally approved and filed shall be made until plans or descriptions adequately showing such deviations are first approved and filed as above provided. The state commissioner of health, in approving said map and plan or by a certificate supplementing any such approval, may authorize such municipality or municipalities to temporarily omit or defer the construction of any portion of any such sewer or system of sewers. A copy or copies of his approval or of any such supplemental certificate shall be certified to each such municipality and filed in the office of the clerk thereof. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-o. **Definitions.**—The words “joint meeting” as used in this act shall be construed to mean the meeting or assembly of the members of the governing bodies or boards of the several municipalities having authority to make and enter into a contract for the construction jointly of public improvements, pursuant to and by virtue of the provisions of this act. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-p. **Referendum in cities and villages.**—In any such city or village, whether acting severally or jointly, a copy of such contract, for construction mentioned in section one hundred and twenty-c, with a copy of the determination required in section one hundred and twenty-g, shall be published at least twice in one or more newspapers published therein, including the official newspaper or newspapers, if any, of such city or village, or posted in not less than five public places, and published at least twice in a newspaper circulating in such municipality if no newspaper is published therein. If, within fifteen days after the publication or posting of such contract and determination, a protest or protests against such contract shall be filed in the office of the clerk of such city or village signed either by not less than one-third of the governing body adopting such resolution or by a three per centum in number of the taxpayers thereof whose names appear on the last preceding assessment roll of real property, excluding special franchises, then such contract shall not become effective unless the governing body shall by a further resolution provide for the submission to the taxpaying voters of a proposition to ratify such contract, nor unless, within sixty days after such publication or posting such proposition shall be adopted at a general election or at a special election to be called and held for that purpose, by a majority of the voters voting on such proposition. At any such election only voters entitled to vote for an officer and women qualified to vote for an officer except as to sex, owning real property other than special franchises assessed in their names upon the last preceding assessment roll of such city or village, shall be entitled to vote upon such proposition. At least ten days' notice of any election under this section shall be given by the clerk of the city or village by publication at least twice in one or more newspapers, including the official newspaper or newspapers, if any, of such city or village, or by posting in at least five

public places, if no newspaper is published therein. Such election may be held and the result canvassed and certified as may be required by any general or special law applicable to an election upon a proposition in any such city or village, or in the absence of any such law as may be prescribed by any general ordinance. The voting shall be by ballot, prepared in the form prescribed by the election law. The facts as to the filing and sufficiency of any protests under this section, and as to the calling, holding or result of any election which may be required or held under this section or under any other statute with respect to the authorization of any such improvement or the ratification of any ordinance authorizing the same, and all facts affecting the validity of any contract mentioned in section one hundred and twenty-c, including the organizations or acts of any town or sewer district shall, for the purpose of this section, be conclusively determined by a resolution of the governing body of any such city, town or village. A copy of such resolution shall be published twice in one or more newspapers, including the official newspaper or newspapers, if any, of such city, town or village, or posted in not less than five public places if no newspaper is published therein, and the facts therein stated shall not be disputed in any action commenced after the expiration of ten days after such publication or posting involving the validity of such contract, or of any tax, assessment or other charge to meet any payment thereunder, and such contract shall be conclusively deemed to be valid unless entered into in violation of this section, section one hundred and twenty, or section one hundred and twenty-c of this chapter. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-q. **Rules and regulations.**—Such person, persons or corporation operating and maintaining such system or contracting for the removal of sewage as herein provided shall be subject to such rules, ordinances and regulations as said municipalities may establish, not inconsistent with any contract made therefor. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-r. **Cancellation of contracts.**—In the event of such person, persons or corporation failing and neglecting to keep said system of sewage in a good healthy and effective condition after due notice in writing of not less than sixty days, from any municipality using the same, their rights, of such person, persons or corporation, guaranteed under such contract may be canceled by such municipality, except that such municipality or municipalities shall pay the fair and reasonable value of such sewerage system as provided in such lease or contract. This section shall not apply if such system is under the management and control of one or more of such contracting municipalities. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

§ 120-s. **Power of joint meeting.**—The joint meeting representing any two or more of such municipalities, as aforesaid, shall have power with

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their consent and on their behalf and by its own proper officers to enter into any contract and to acquire, by purchase or condemnation, and to hold, maintain and operate any property, necessary or desirable for any of the purposes authorized as aforesaid, as fully and to the same extent as any municipality acting severally. (*Added by L. 1917, ch. 709, in effect June 1, 1917.*)

L. 1917, ch. 709, § 3. All acts and parts of acts, general, local or special, contrary to the provisions of this act, are hereby repealed.

§ 121. Establishment and maintenance of free public baths.—All cities of the first and second class shall establish and maintain such number of free public baths as the local board of health may determine to be necessary; each bath shall be kept open not less than fourteen hours for each day and both hot and cold water shall be provided. The erection and maintenance of river or ocean baths shall not be deemed a compliance with the requirements of this section. Any city, village or town having less than fifty thousand inhabitants may establish and maintain free public baths, and any city, village or town may loan its credit or may appropriate of its funds for the purpose of establishing such free public baths.

Source.—L. 1892, ch. 473, § 1, as amended by L. 1895, ch. 351.

§ 122. Refusal to take persons to hospital prohibited.—In any city, county, town or village of this state wherein exists, or is hereafter created, an ambulance system, supported wholly or partly at public expense, or which is wholly or partly under the care, management or control of the public authorities, no person in charge of an ambulance, hospital, or house or place of reception for the sick or injured, shall refuse, in answer to a call or demand for an ambulance, if such call has been answered by the attendance of an ambulance, to take such person for whom a call may be made to the hospital or place of reception for the sick or injured from which the ambulance came, for examination and treatment by the house authorities of the said hospital or place of reception for the sick or injured.

Any person neglecting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor.

This section shall apply to the drivers of and to the physician in charge of an ambulance.

Source.—L. 1896, ch. 873, §§ 1-3.

§ 123. Erection and operation of life-saving apparatus.—The common council of any city, the board of trustees of any incorporated village and the town board of any town in this state, may upon the application of ten or more taxpayers furnish, erect and locate such life-saving apparatus, appliances and paraphernalia, and do all things necessary for the practical operating of the same as they may deem advisable, along the shores or banks of any streams, rivers or waters within their respective boundaries.

Source.—L. 1900, ch. 342, § 1.

§ 124. **Supervision and charge of apparatus.**—All life-saving apparatus, appliances and paraphernalia furnished and erected as provided by section one hundred and twenty-three shall be under the supervision and charge of the respective common council, board of trustees and town board so directing the furnishing and erecting of the same, and they shall be invested with the power to make such rules and regulations as they may deem proper for the proper maintenance, care and operating of the same, and for the improving, altering or changing of the same at any time when in their judgment they deem it in the interest of their respective localities so to do.

Source.—L. 1900, ch. 342, § 2.

§ 125. **Cost and expense of operation.**—The cost and expense of the furnishing, erecting, care and operating of the apparatus, appliances and paraphernalia as provided by section one hundred and twenty-three, shall be paid in like manner as other debts and obligations of the city, village and town furnishing, erecting, maintaining and operating the same.

Source.—L. 1900, ch. 342, § 3.

§ 126. **Establishment of public general hospitals.**—The governing board of any town, city or village may by resolution determine that there shall be in said town, city or village a public general hospital for the care and treatment of the sick. In any city in which a board of estimate and apportionment or other board is required to approve appropriations for public purposes, the resolution of the governing board to establish a public general hospital shall be effective only after the necessary appropriation for lands and buildings for such public general hospital shall have been approved by said board of estimate and apportionment or other board, in the same manner and by the same vote by which it is required by law to approve other appropriations for public purposes. In any town, or in any city of the third class, or in any village, the resolution of the governing board to establish a public general hospital shall be effective only after the necessary appropriation for lands and buildings for such public general hospital shall have been approved at a town, city or village election by a majority of the voters qualified to vote upon a proposition to raise town, city or village funds. When the governing board of any town, city or village shall have voted to establish a public general hospital and the estimated expenditure for lands and buildings shall have been approved as hereinabove provided, such governing board shall have the following powers:

1. To purchase and lease real property therefor, or acquire such real property and easements therein by condemnation proceedings in the manner prescribed in the condemnation law, in any locality within the jurisdiction of such governing board.

2. To cause to be assessed, levied and collected such sums of money as shall have been approved as hereinabove provided for suitable lands and buildings, and as it shall deem necessary for equipment and improvements

for said hospital, and for the maintenance thereof, and for all other necessary expenditures therefor; and to borrow money for the purchase of a site and for the erection and equipment of such hospital on the credit of the town, city or village of which it is the governing board, and issue obligations therefor, in such manner as it may do for other town, city or village purposes, respectively.

3. To accept and hold in trust for the town, city or village of which it is the governing board, any grant or devise of land, or any gift or bequest of money or other personal property, or any donation to be applied, principal or income, or both, for the benefit of said hospital, and apply the same in accordance with the terms of the gift. (*Added by L. 1910, ch. 558.*)

§ 127. **Appointment and terms of office of managers.**—When a governing board of a town, city or village shall have determined to establish a public general hospital for the care and treatment of the sick, the supervisor of the town, the mayor of the city or the president of the board of trustees of the village shall appoint five citizens of the town, city or village, respectively, who shall constitute a board of managers of the said hospital. The term of office of each member of said board shall be five years, and the term of one of such managers shall expire annually; the first appointments, however, being made for the respective terms of five, four, three, two and one years. Appointments of successors shall be for the full term of five years, except that the appointment of a person to fill a vacancy occurring by death, resignation or cause other than the expiration of a term shall be made for the unexpired term. Failure of any manager to attend three consecutive meetings of the board shall cause a vacancy in his office, unless said absence is excused by formal action of the board of managers. The managers shall receive no compensation for their services, but shall be allowed their actual and necessary traveling and other expenses, to be audited by the governing board, and paid in the same manner as the other expenses of the hospital. Any manager may be removed from office at any time by the appointing authority after having received notice in writing of the cause of the proposed removal and after an opportunity to be heard thereon. The treasurer of the town, city or village by which the hospital is maintained shall be treasurer of the hospital. (*Added by L. 1910, ch. 558.*)

§ 128. **General powers and duties of managers.**—The board of managers shall:

1. Elect from among its members annually a president, a vice-president, and a secretary. It shall appoint a superintendent of the hospital, who shall not be a member of the board of managers, and who shall hold office at the pleasure of said board.

2. Erect all necessary buildings; make all necessary improvements and repairs and alter any existing buildings, for the use of said hospital, provided that all expenditures for new buildings or alterations, other than ordinary repairs, shall first be authorized by the governing board of the

town, city or village and the plans therefor approved by the state board of charities.

3. Fix the salary of the superintendent and the number and salaries of all other employees, within the limits of the appropriation made therefor by the governing board, and such salaries shall be compensation in full for all services rendered. The board of managers may determine the amount of time required to be spent at the hospital by said superintendent in the discharge of his duties.

4. Provide for the medical care and treatment of all persons admitted to the hospital; and shall appoint and may at pleasure remove resident, visiting and consulting physicians and surgeons; and shall establish rules and regulations governing the service thereof.

5. Have the general superintendence, management and control of the said hospital and of the grounds, buildings, officers, employees and inmates thereof; and of all matters relating to the government, discipline, contracts and fiscal concerns thereof; and make such rules and regulations as may seem to them necessary for carrying into effect the purposes of such hospital.

6. Maintain an effective inspection of said hospital, and keep itself informed of the affairs and management thereof; shall meet at the hospital at least once in every month, and at such other times as may be prescribed in the by-laws; and shall hold its annual meeting at least three weeks prior to the meeting of the governing board at which appropriations for the ensuing year are to be considered.

7. Keep in a book provided for that purpose a proper record of its proceedings, which shall be open at all times to the inspection of its members, of the members of the governing board and of duly authorized representatives of the state board of charities.

8. Certify all bills and accounts, including salaries and wages, and transmit them to the governing board, who shall provide for their payment in the same manner as other charges against the town, city or village.

9. Make to the governing board of the town, city or village by which the hospital is maintained, at such times as said board shall direct, a detailed annual report of the operations of the hospital, the number of patients received, the methods and results of their treatment, and such other matters as may be required of them. Such reports shall include full and detailed estimates of the appropriations required during the ensuing year for all purposes, including maintenance, erection of buildings, repairs, improvements and other necessary purposes. (*Added by L. 1910, ch. 558.*)

§ 129. General powers and duties of superintendent.—The superintendent shall be the chief executive officer of the hospital and, subject to the by-laws, rules and regulations thereof, and to the general control of the board of managers, shall:

1. Equip the hospital with all necessary furniture, appliances, fixtures

and other needed facilities for the care and treatment of patients and for the use of officers and employees thereof, and purchase all necessary supplies.

2. Have general supervision and control of the records, accounts, and buildings of the hospital and all internal affairs, and maintain discipline therein, and enforce compliance with, and in obedience to, all rules, by-laws, and regulations adopted by the board of managers for the government, discipline and management of said hospital, and the employees and inmates thereof. He shall make and enforce such further rules, regulations and orders as he may deem necessary, not inconsistent with law, or with the rules, regulations and directions of the board of managers.

3. Appoint such employees as he may think proper and necessary for the efficient performance of the business of the hospital, and prescribe their duties; and for cause stated in writing, after an opportunity to be heard, discharge any such employee at his discretion.

4. Cause proper accounts and records of the business and operations of the hospital to be kept regularly from day to day, in books and on forms provided for that purpose; and see that such accounts and records are correctly made up for the annual report to the governing board, as required by subdivision seven of section one hundred and twenty-eight of this chapter, and present the same to the board of managers, who shall incorporate them in their annual report to the said governing board.

5. Receive into the hospital, under rules established by the board of managers, any person in the town, city or village who is sick or maimed or injured and who is in need of hospital care, irrespective of whether such person is able to pay for his care or not; and may also receive persons from without the town, city or village, provided there is a vacancy in the hospital, and provided the reception of such persons does not interfere with the proper care and treatment of persons received from the town, city or village.

6. Cause to be kept proper records of the admission of all patients, their name, age, sex, color, marital condition, residence, occupation, place of last employment and the names and addresses of their nearest relatives or friends. He shall also cause a careful examination to be made of the physical condition of all persons admitted to the hospital; and shall cause a record to be kept of the condition of each patient when admitted, and from time to time thereafter.

7. Discharge from said hospital any patient who is found to have recovered from his illness sufficiently to be no longer in need of hospital care, or who shall wilfully or habitually violate the rules thereof, or who for any other reason is no longer a suitable patient for treatment therein; and shall make a full report thereof at the next meeting of the board of managers.

8. Collect and receive all money due the hospital, keep an accurate account of the same, report the same at the ensuing monthly meeting of

the board of managers, and transmit the same within ten days after such meeting to the treasurer of the town, city or village by which the hospital is maintained.

9. Give a bond before entering upon the discharge of his duties, in such sum as the board of managers may determine, to secure the faithful performance of such duties. (*Added by L. 1910, ch. 558.*)

§ 130. **Admission and maintenance of patients.**—Whenever a patient shall have been admitted to such hospital, the superintendent shall cause to be made such inquiry as he may deem necessary, relative to the ability of such patient, or of the relatives of such patient legally liable for his support, to pay for his care and treatment. If he find that such patient, or said relatives, are able to pay for his care and treatment in whole or in part, an order shall be made by the superintendent directing such patient, or said relatives, to pay to the treasurer of such hospital for the support of such patient a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual cost of maintenance. The superintendent shall have the same power and authority to collect such sums from the patient, or his relatives legally liable for his support, as is possessed by an overseer of the poor in like circumstances. If the superintendent find that such patient, or said relatives, are not able to pay, either in whole or in part, for his care and treatment in such hospital, the unpaid cost of his maintenance shall become a charge upon the town, city or village by which the hospital is maintained; provided, however, that in case such patient is not a resident of said town, city or village, the cost of his maintenance shall be a charge upon the civil division of the state upon which he would be a charge as a poor person. No employee of such hospital shall accept from any patient thereof any fee, payment or gratuity whatsoever for his service. (*Added by L. 1910, ch. 558.*)

§ 131. **Training school for nurses.**—The board of managers of any hospital under this act may establish and maintain in connection therewith and as a part of the public hospital a training school for nurses. The board may, in its discretion, appoint an advisory board for such training school and define the functions of such advisory board. (*Added by L. 1910, ch. 558.*)

§ 132. **Room for detention and examination of persons who are suspected of being insane.**—The board of managers may provide a suitable room for the temporary detention, observation and care of persons who are suspected of being insane and shall do so upon the direction of the governing board or of the state commission in lunacy; provided, however, that the state commission in lunacy before making such direction shall give to both the board of managers and the governing board due notice and opportunity to be heard thereon. (*Added by L. 1910, ch. 558.*)

§ 133. **Visitation and inspection.**—Members of the board of managers shall be admitted to every part of the hospital and premises, and shall have access to all books, papers, accounts and records pertaining to the hospital and shall be furnished with copies, abstracts and reports whenever required by them. All hospitals established or maintained under the provisions of section one hundred and twenty-six, one hundred and twenty-seven, one hundred and twenty-eight, one hundred and twenty-nine, one hundred and thirty, one hundred and thirty-one, one hundred and thirty-two, one hundred and thirty-three and one hundred and thirty-four of this act shall be subject to inspection by any duly authorized representative of the state board of charities, of the state charities aid association, and of the governing board of the town, city or village by which the hospital is maintained; and the resident officer in charge shall admit such representatives into every part of the hospital and premises, and give them access on demand to all records, reports, books, papers and accounts pertaining to the hospital. (*Added by L. 1910, ch. 558.*)

§ 134. **Existing town, city or village public general hospitals.**—Wherever a town, city or village has, previous to the passage of this act, established a public general hospital, the governing board of said town, city or village may by resolution provide that thereafter such hospital shall be controlled and maintained in accordance with the provisions of this act. Any public general hospital which may hereafter be established by any governing board of any town, city or village shall be subject to all the provisions of sections one hundred and twenty-six to one hundred and thirty-four, inclusive, of this chapter. (*Added by L. 1910, ch. 558.*)

§ 135. **Application of preceding sections.**—Sections one hundred and twenty-six to one hundred and thirty-four, both inclusive, shall not apply to the city of New York. (*Added by L. 1910, ch. 558.*)

§ 135-a. **Workshops in connection with tuberculosis hospitals.**—Any municipal corporation maintaining a hospital or a sanatorium for the treatment of tuberculosis may establish and maintain workshops in connection therewith for the production of articles or supplies required by such hospital or sanatorium, or by any other institution or department of such municipality. Except in a supervisory capacity no person shall be employed in such workshop or workshops unless he is or shall have been a patient suffering from tuberculosis in such hospital or sanatorium. The appropriate municipal authorities may appropriate or provide funds for the establishment and maintenance of the said workshops in the same manner as for the establishment and maintenance of such hospitals or sanatoria. Notwithstanding the provisions of the prison law in relation to the sale of articles manufactured in the state prisons, the products of such workshop may be used in such hospital or sanatorium or by any other institution or department of such municipality. Such workshops shall be under the

direction and control of the municipal authority having direction and control of the hospital or sanatorium to which they may be attached. (*Added by L. 1913, ch. 341.*)

References.—Establishment and maintenance of county tuberculosis hospitals, County Law, §§ 45–49-e. Approval of establishment of tuberculosis hospital by state commissioner of health, Public Health Law, § 319.

§ 136. **Establishment of colonies for inebriates.**—The governing board of any city of the first or second class may by resolution determine that there shall be established by said city a hospital and industrial colony for the care, treatment and occupation of inebriates. In any such city in which a board of estimate and apportionment or other board is required to approve appropriations for public purposes, the resolution of the governing board to establish a hospital and industrial colony shall be effective only after the necessary appropriation for lands and buildings for such hospital and industrial colony shall have been approved by said board of estimate and apportionment or other board, in the same manner and by the same vote by which it is required by law to approve other appropriations for public purposes. When the governing board of any city shall have voted to establish a hospital and industrial colony, and the estimated expenditure for lands and buildings shall have been approved as hereinabove authorized, such governing board shall have the following powers:

1. To purchase and lease real property therefor within or without the city, or acquire such real property and easements therein by condemnation proceedings in the manner prescribed in the condemnation law.

2. To cause to be assessed, levied and collected such sums of money as shall have been approved as hereinabove authorized for suitable lands and buildings, and as it shall deem necessary for equipment and improvements for said hospital and industrial colony, and for the maintenance thereof, and for all other necessary expenditures therefor; and to borrow money for the purchase of a site and for the erection and equipment of such hospital and industrial colony on the credit of the city of which it is the governing board, and issue obligations therefor, in such manner as it may do for other city purposes.

3. To accept and hold in trust for the city of which it is the governing board any grant or devise of land, or any gift or bequest of money or other personal property, or any donation to be applied, principal or income, or both, for the benefit of said hospital and industrial colony, and apply the same in accordance with the terms of the gift. (*Added by L. 1911, ch. 700.*)

§ 137. **Appointment and terms of office of board of inebriety.**—When the governing board of a city shall have determined to establish a hospital and industrial colony for the care, treatment and occupation of inebriates, the mayor of such city shall appoint in the manner hereinafter provided a board of inebriety which shall perform such duties as are hereinafter

specified, and which shall have charge of the management of the hospital and industrial colony. This board shall consist of seven members, five of whom, hereinafter known as the appointive members, shall be appointed by the mayor, and two of whom shall be physicians. In addition to the five appointive members, the mayor shall designate from time to time as a member of said board a magistrate of the court having jurisdiction in the first instance over arrests for public intoxication, and the overseer of the poor of the city, or such official as may be charged with the duties ordinarily performed by an overseer of the poor, shall be *ex officio* a member of the board. The term of office of the appointive members of said board shall be five years, and the term of one such member shall expire annually. The first appointments, however, shall be made for the respective terms of five, four, three, two and one years. Appointments of successors shall be for the full term of five years, except that the appointment of a person to fill a vacancy occurring by death, resignation or cause other than the expiration of a term shall be made for the unexpired term. Failure of any appointive member to attend three consecutive meetings of the board shall cause a vacancy in his office, unless said absence is excused by formal action of the board of inebriety. The members shall receive no compensation for their services, but shall be allowed their actual and necessary traveling and other expenses, to be audited by the governing board, and paid in the same manner as the other expenses of the hospital and industrial colony. Any appointive member may be removed from office at any time by the appointing authority after having received notice in writing of the cause of the proposed removal and after an opportunity to be heard thereon. The chief fiscal officer of the city by which the hospital and industrial colony is maintained shall be treasurer of the hospital and industrial colony. (*Added by L. 1911, ch. 700.*)

§ 138. General powers and duties of the board of inebriety.—The board of inebriety shall:

1. Elect from among its members annually a president, a vice-president and a secretary except as is otherwise provided in this subdivision. It shall appoint a superintendent of the hospital and industrial colony who shall be the chief executive officer of the board of inebriety. When so designated by the board, the superintendent shall act as secretary, shall devote such time to his duties as superintendent of the hospital and industrial colony as the board may direct and shall hold office at the pleasure of said board.
2. Maintain an office which shall be always open, Sundays and holidays included, and shall provide at such office for a system of records of all persons arrested for public intoxication. It shall appoint such clerks, other office employees and probation officers as may be required to perform the duties imposed upon the board of inebriety by law, and as may be authorized by the governing board; provided that in any city probation

officers already appointed may, on request of the board of inebriety of such city, be detailed by the magistrate or magistrates appointing such officers to act as probation officers under the direction of the board of inebriety.

3. Erect all necessary buildings, make all necessary improvements and repairs and alter any existing buildings, for the use of said hospital and industrial colony, provided that all expenditures for new buildings or alterations, other than ordinary repairs, shall first be authorized by the governing board of the city and the plans therefor approved by the state board of charities.

4. Fix the salary of the superintendent and the number and salaries of all other employees, within the limits of the appropriation made therefor by the governing board, and such salaries shall be compensation in full for all services rendered.

5. Admit to the hospital and industrial colony all persons committed by any court or magistrate in the city and may admit such persons from without the city as hereinafter authorized; provide for the medical care, treatment and occupation of all persons so admitted, appoint and may at pleasure remove necessary physicians, and establish rules and regulations governing such medical service. It may discharge any patient at its discretion subject to the provisions of section twelve hundred and twenty-one of the penal law.

6. Have the general superintendence, management and control of the said hospital and industrial colony, and of the grounds, buildings, officers, employees and inmates thereof; and of all matters relating to the government, discipline, contracts and fiscal concerns thereof; and make such rules and regulations as may seem to them necessary for carrying into effect the purposes of the hospital and industrial colony.

7. Maintain an effective inspection of the hospital and industrial colony, and keep itself informed of the affairs and management thereof; shall meet at least once in every month, and at such other times as may be prescribed in the by-laws; and shall hold its annual meeting at least three weeks prior to the meeting of the governing board at which appropriations for the ensuing year are to be considered.

8. Keep in a book provided for that purpose a proper record of its proceedings, which shall be open at all times to the inspection of its members, of the members of the governing board and of duly authorized representatives of the state board of charities.

9. Certify all bills and accounts, including salaries and wages, and transmit them to the governing board, who shall provide for their payment in the same manner as other charges against the city.

10. Make to the governing board of the city by which the hospital and industrial colony is maintained, at such times as said board shall direct, a detailed annual report of the operations of the hospital and industrial colony, showing the number of persons received, the methods and results of their treatment, the annual expenditures properly classified and such other

matters as may be required of them. Such reports shall include full and detailed estimates of the appropriations required during the ensuing year for all purposes, including maintenance, erection of buildings, repairs, improvements and other necessary purposes. (*Added by L. 1911, ch. 700.*)

§ 139. General powers and duties of superintendent.—The superintendent shall be a well-educated physician, a graduate of an incorporated medical college, with at least five years' experience in the actual practice of his profession; he shall be the chief executive officer of the hospital and industrial colony and, subject to the by-laws, rules and regulations thereof, and to the general control of the board of inebriety, shall:

1. Equip the hospital and industrial colony with all necessary furniture, appliances, fixtures, implements and other needed facilities for the care, treatment and occupation of inmates, and for the use of officers and employees thereof, and purchase all necessary supplies.

2. Have general supervision and control of the records, accounts, buildings and real and personal property of the hospital and industrial colony and of all its affairs, and maintain discipline therein, and enforce compliance with, and obedience to, all rules, by-laws and regulations adopted by the board of inebriety for the government, discipline and management of said hospital and industrial colony, and the employees and inmates thereof. He shall make and enforce such further rules, regulations and orders as he may deem necessary, not inconsistent with law, or with the rules, regulations and directions of the board of inebriety.

3. Appoint such employees as he may think proper and necessary for the efficient performance of the business of the hospital and industrial colony and prescribe their duties; and may discharge any such employee at his discretion after having given notice in writing of the cause of the proposed removal and opportunity to be heard thereon.

4. Cause proper accounts and records of the business and operations of the hospital and industrial colony to be kept regularly from day to day, in books and on forms provided for that purpose; and see that such accounts and records are correctly made up for the annual report to the governing board, as required by subdivision ten of section one hundred and thirty-eight of this chapter, and present the same to the board of inebriety, who shall incorporate them in their annual report to the said governing board.

5. Receive into the hospital and industrial colony, under the rules established by the board of inebriety, any person in the city committed to said hospital and industrial colony, irrespective of whether such person is able to pay for his care or not; and may also receive persons from without the city as hereinafter authorized, provided there is a vacancy in the hospital and industrial colony, and provided the reception of such persons does not interfere with the proper care, treatment and occupation of persons received from the city maintaining such hospital and industrial colony.

6. Cause to be kept proper records of the admission of all persons, their

name, age, sex, color, marital condition, residence, occupation, place of last employment and the names and addresses of their nearest relatives or friends. He shall also cause a careful examination to be made of the physical condition of all persons admitted to the hospital and industrial colony; and shall cause a record to be kept of the condition of each person when admitted, and from time to time thereafter.

7. Discharge from said hospital and industrial colony any person in accordance with rules and regulations of the board of inebriety, or upon the expiration of the maximum term for which such person was committed to the hospital and industrial colony.

8. Collect and receive all money due the hospital and industrial colony and the board of inebriety, keep an accurate account of the same, report the same at the ensuing monthly meeting of the board of inebriety and transmit the same within ten days after such meeting to the treasurer of the hospital and industrial colony.

9. Give a bond before entering upon the discharge of his duties, in such sum as the board of inebriety may determine, to secure the faithful performance of such duties. (*Added by L. 1911, ch. 700.*)

§ 139-a. General regulations.—1. Whenever, after a board of inebriety shall have been appointed in any city, and shall have certified in writing to the mayor of such city that the hospital and industrial colony of said board is ready to receive inmates, a person shall be arrested for public intoxication, the fact of such arrest, and the name and address of the person arrested, if it can readily be ascertained, shall be reported forthwith by telephone or otherwise to the office of the board of inebriety by the person in charge of the station house to which the arrested person is taken. The board shall thereupon cause an investigation to be made by one of its probation officers, concerning the person so arrested, to ascertain, as far as may be possible, the name, the address, the persons, if any, dependent upon him for support, his place of employment, if any, whether previously arrested for public intoxication, and if so how many times, consulting as a part of this investigation the system of records of arrests for public intoxication. If the investigation shows that the person has not been arrested for public intoxication for the period of twelve months next preceding, the probation officer shall, when the arrested person shall have recovered sufficiently from his intoxication, inform him that he may sign a request for his immediate release addressed to the court having jurisdiction. Such request shall give the name and address of the arrested person and shall set forth what persons, if any, are dependent upon him for support, his place of employment, if any, and shall state that he has not been arrested for public intoxication within the twelve months next preceding. If such a request be signed, the probation officer shall so inform the officer in charge of the place of custody of the arrested person and such officer shall thereupon release the person forthwith. The probation officer shall, for the use

of the court having jurisdiction of the case, transmit to said court such application, together with a report of the results of the investigation of the case made by said probation officer and a statement of the sources of such information. In case a probation officer discovers that a person arrested for public intoxication has been arrested within the twelve months next preceding, he shall report the results of his investigation to the court having jurisdiction of the case.

2. Any person who is a resident of a city maintaining a hospital and industrial colony, and who is adjudged by a court of record to be an inebriate may, upon his own application or upon the petition of a relative or of the overseer of the poor, or such official as may be charged with the duties of an overseer of the poor, or of a magistrate of a court having jurisdiction in first instance over arrests for public intoxication, and upon the certificate of two medical examiners in lunacy, be committed by such court to the board for a period of not less than one year nor more than three years. Any person who is not a resident of such city may be committed by a court of record in his own locality in accordance with the foregoing provisions of this subdivision, provided that the application or petition for the commitment of such person shall be accompanied by the written consent of a board of inebriety to receive such person when committed. The provisions of law relating to the commitment of insane persons shall, so far as may be practicable, apply to the commitment of persons as inebriates under this subdivision of this section. For the purposes of this section, an inebriate shall be a person who is incapable of properly conducting himself or his affairs, or is dangerous to himself or others, by reason of habits of periodical, frequent or constant drunkenness, induced either by the use of alcoholic or other liquors, or of opium, morphine or other narcotic or intoxicating or stupefying substance.

3. Any person who shall bring, or cause to be brought, any intoxicating liquor or narcotic drugs upon premises used by the board for patients committed to it, except upon the written order of the superintendent of such institution, or who shall furnish any patient in any institution maintained by the board any intoxicating liquor or narcotic drugs, except upon the written order of a physician who is a member of the medical staff of the institution, shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by imprisonment for not less than thirty days nor more than one year or by a fine of not less than fifty dollars nor more than five hundred dollars.

4. The board of inebriety may parole upon such terms as it may deem wise any person committed to its care and receiving treatment in its hospital and industrial colony whenever in its judgment such course would be wise. The person so paroled shall remain under the supervision of a probation officer of the board, until the board considers that such person may safely be released from its supervision, or until the expiration of the maximum term for which such person was committed to its care. A pro-

bation officer of the board or any peace officer of the state, upon a warrant issued by the president or secretary of the board, shall arrest and return to the custody of the board any person paroled from such hospital and industrial colony who shall have violated the terms of such parole. Such arrested person shall, in the discretion of the board, be returned to the hospital and industrial colony for inebriates, or taken before the court which committed such person to the board, whereupon application shall be made by said board to said court for the commitment of such person as provided in subdivision five of this section.

5. The board of inebriety may apply to the court which committed any person to said board to release it from further care and custody of such person. Such application shall set forth facts tending to show that said person, either because of infraction of the rules and regulations of the board, or because of violation of the terms of his parole, or for other reasons, is an unsuitable person for further treatment in the hospital and industrial colony of the said board or under its supervision. The court may thereupon release said board from further custody and care of such person, and shall make such disposition of a person so released as is authorized by subdivision h of section twelve hundred and twenty-one of the penal law.

6. Whenever a person shall have been admitted to such hospital and industrial colony the superintendent shall cause to be made such inquiry as he may deem necessary, relative to the ability of such person, or of the relatives of such person legally liable for his support, to pay for his care and treatment. If he find that such person, or said relatives, are able to pay for his care and treatment in whole or in part, an order shall be made by the superintendent directing such person, or said relatives, to pay to the treasurer of said hospital and industrial colony for the support of such person a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual cost of maintenance. The superintendent shall have the same power and authority to collect such sum from such person, or his relatives legally liable for his support, as is possessed by an overseer of the poor in like circumstances. If the superintendent find that such person or said relatives are not able to pay, either in whole or in part, for his care and treatment in such hospital and industrial colony, the unpaid cost of his maintenance shall become a charge upon the city by which the hospital and industrial colony is maintained; provided, however, that in case such person is not a resident of said city, the cost of his maintenance and of his return upon discharge to his place of residence shall be a charge upon the civil division of the state upon which he would be a charge as a poor person. No employee of such hospital and industrial colony shall accept from any person thereof any fee, payment or gratuity whatsoever for his service.

7. Members of the board of inebriety shall be admitted to every part of the hospital and industrial colony and premises, and shall have access to all books, papers, accounts and records pertaining to the hospital and in-

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dustrial colony, and shall be furnished with copies, abstracts and reports whenever required by them. All hospital and industrial colonies established or maintained under the provisions of sections one hundred and thirty-six, one hundred and thirty-seven, one hundred and thirty-eight, one hundred and thirty-nine and one hundred and thirty-nine-a of this act shall be subject to inspection by any duly authorized representative of the state board of charities, of the state charities aid association, and of the governing board of the city by which the hospital and industrial colony is maintained; and the resident officer in charge shall admit such representatives into every part of the hospital and industrial colony and premises, and give them access on demand to all records, reports, books, papers and accounts pertaining to the hospital and industrial colony. (*Added by L. 1911, ch. 700.*)

§ 139-b. **Application of preceding sections.**—Sections one hundred and thirty-six to one hundred and thirty-nine-a, both inclusive, shall not apply to the city of New York. (*Added by L. 1911, ch. 700.*)

ARTICLE VII.

TRUSTS FOR PARKS AND LIBRARIES IN VILLAGES AND TOWNS.

Section 140. Trusts for public parks and libraries.

141. Trustees a corporation.
142. Eligibility of trustees.
143. Management and appropriation of property.
144. Parks and libraries to be free.
145. Subject to visitation of supreme court.
146. Devises and bequests restricted.

§ 140. **Trusts for public parks and libraries.**—It shall be lawful to grant and devise real estate, and to give and bequeath personal property to trustees and their successors in trust, for the purpose of creating, continuing and maintaining, according to the terms, conditions and provisions of such grant, gift, devise or bequest, one or more public parks, or a public library, or for the purpose of aiding and instructing children, or for any one or more of such purposes, in any city, village or town of this state. The number of such trustees shall not be less than three nor more than nine. (*Amended by L. 1910, ch. 163.*)

Source.—L. 1890, ch. 160, § 1, as amended by L. 1892, ch. 25; L. 1896, ch. 53.

Statute against perpetuities is repealed *pro tanto* by the provisions of this section which permits a devise of real estate and its proceeds for the purpose of creating and maintaining public parks and libraries. *Durkee v. Smith* (1915), 90 Misc. 92, 153 N. Y. Supp. 316, *affd.* (1916), 171 App. Div. 72, 156 N. Y. Supp. 920.

§ 141. **Trustees a corporation.**—Whenever any grant, gift, devise or bequest shall have been made, under the provisions of this article, such trustees shall thereupon become and be a body politic and corporate with

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the name which shall have been specified by the donor in making the donation, and with the number of trustees, within the foregoing limits, named by the donor; and such corporation shall have full power to take and hold all property which shall have been and also which shall thereafter be granted, given, devised or bequeathed to it as aforesaid for said uses and purposes, and shall possess the powers and be subject to the provisions and restrictions contained in general corporation law. If no name shall have been specified by the donor as aforesaid, the name of the corporation shall be such as the said trustees shall adopt, certify and file in the county clerk's office of the county in which the interested city, village or town is located. (*Amended by L. 1910, ch. 163.*)

Source.—L. 1890, ch. 160, § 2, as amended by L. 1896, ch. 53, § 2.

Constitutionality.—By this article a grant of property by deed or will to trustees for certain specified public purposes has the effect of forming them into a corporation without the necessity of complying with further formalities, and there is no force in the contention that the statute is an unconstitutional delegation of power to form a corporation. *Durkee v. Smith* (1915), 90 Misc. 92, 153 N. Y. Supp. 316, *affd.* (1916), 171 App. Div. 72, 156 N. Y. Supp. 920.

§ 142. **Eligibility of trustees.**—In case of the death of a trustee or of his resignation, removal from office, or inability to discharge the duties of his office, his place shall be deemed to be vacant, and may be filled by the remaining trustees; and, in default of their so making an appointment within three months, the appointment to fill the vacancy shall be made by the supreme court, on the petition of any inhabitant of the interested city, village or town, and after due notice to the other trustees and to the mayor of the city, president of the village or supervisor of the town. Such trustees shall be subject to removal by said court for malfeasance or misfeasance in office, upon such notice and after trial in such manner as said court shall direct. (*Amended by L. 1910, ch. 163.*)

Source.—L. 1890, ch. 160, § 3, as amended by L. 1896, ch. 53, § 3.

§ 143. **Management and appropriation of property.**—Trustees created under the provisions of this article shall have the custody and management of all the property of such corporation, and shall appropriate the same, so far as the terms, provisions and conditions of the donations will permit, for the purpose of aiding and instructing children, or for providing suitable grounds for such a public park or parks and properly preparing, beautifying, embellishing and keeping up and maintaining the same, or for furnishing and supplying such library with a suitable and proper edifice, rooms, furniture, books, maps, magazines and whatever may be necessary to make, keep up and maintain a good and complete library, or for one or more of such purposes, and paying the expenses of the trust. Demising lands donated to the corporation and investing and keeping money invested at interest, and using the rents and interest therefrom for aiding and instructing children or for park purposes or library purposes, shall be deemed to

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be an appropriation of such property for said purposes. (*Amended by L. 1910, ch. 163.*)

Source.—L. 1890, ch. 160, § 4, as amended by L. 1892, ch. 25, § 2.

§ 144. **Parks and libraries to be free.**—All parks and libraries existing under this article shall be free and open to the public for use and enjoyment, subject only to such reasonable rules and regulations as the trustees from time to time shall adopt and promulgate.

Source.—L. 1890, ch. 160, § 5, as amended by L. 1892, ch. 25, § 3.

§ 145. **Subject to visitation of supreme court.**—All corporations existing under this article, together with their books and vouchers, shall be subject to the visitation and inspection of the justices of the supreme court, or of any person or persons who shall be appointed by the supreme court for that purpose; and it shall be the duty of the trustees or a majority of them, in the month of December in each year, to make and file in the office of the county clerk of the county in which the interested city, village or town is situate, a certificate under their hands, stating the names of the trustees and officers of such corporation, with an inventory of the property, effects and liabilities thereof, with an affidavit of the truth of such inventory and certificate. Said trustees shall be entitled to such compensation as said court shall fix. Said court shall also have power to control the discretion of said trustees in determining what property may be demised and for how long; also how much money may be invested and kept invested on interest to produce an income for the purpose of aiding and instructing children or to keep up and maintain the parks or libraries, or either of such purposes; and also in a summary way to determine the reasonableness of any rules and regulations, upon complaint of any inhabitant of the interested city, village or town, and upon notice to said trustees. (*Amended by L. 1910, ch. 163.*)

Source.—L. 1890, ch. 160, § 6, as amended by L. 1892, ch. 25; L. 1896, ch. 53.

§ 146. **Devises and bequests restricted.**—This article shall not be construed or held to authorize any devise or bequest whatever, unless the will was executed at least two months before the decease of the testator or testatrix, nor of more than one-half of the estate of the testator or testatrix over and above the payment of debts, liabilities and expenses, in case he or she shall leave a husband, wife, child, or parent him or her surviving.

Source.—L. 1890, ch. 160, § 7.

Validity of trust for purpose of public library and parks. *Durkee v. Smith* (1916), 171 App. Div. 72, 156 N. Y. Supp. 920.

ARTICLE 7-A.

(Article added by L. 1915, ch. 228.)

LOCAL BOARDS OF CHILD WELFARE.

Section 148. Local boards of child welfare established.

149. Appointment of boards in counties.

150. Appointment of boards in cities.

151. Members to serve without compensation. Expenses only to be paid.

152. General powers and duties of board. State board of charities may revoke allowances.

153. Regulations governing allowances.

154. Appropriations and limitations for purposes of article.

155. Penalties.

§ 148. Local boards of child welfare established.—There shall be a local board of child welfare in each county of the state not wholly within a city, and in each city wholly including one or more counties, which, pursuant to this article, may grant allowances to widowed mothers with one or more children under the age of sixteen years, in order that such children may be suitably cared for in their homes by such mothers. (*Added by L. 1915, ch. 228.*)

§ 149. Appointment of boards in counties.—The board of child welfare of a county shall consist of seven members of which the county superintendent of the poor shall be ex-officio member. If any county have more than one superintendent of the poor, the county judge shall designate, by writing, filed with the county clerk, the superintendent who shall serve as a member of such board. The other six members of the board shall be appointed by the county judge for such terms that the term of one appointive member of the board shall expire each year thereafter. Upon the expiration of the term of office of a member of the board, his successor shall be appointed by the county judge for a full term of six years. If a vacancy occur, otherwise than by expiration of term, in the office of an appointive member of the board, it shall be filled for the unexpired term. At least two members of the board shall be women. Appointments shall be made in writing and filed with the county clerk. (*Added by L. 1915, ch. 228.*)

Office of superintendent of poor.—This section did not create or establish the office of county superintendent of the poor in any county where such office was not already established. 6 State Dept. Repts. 441.

§ 150. Appointment of boards in cities.—The board of child welfare of a city wholly including one or more counties shall consist of nine members. The members of the board shall be appointed by the mayor for such terms that the term of one member of the board shall expire each year thereafter. Upon the expiration of the term of office of a member of the board, his successor shall be appointed by the mayor for a full term of nine years. If a vacancy occur, otherwise than by expiration of term in the office of a

member of the board, it shall be filled for the unexpired term. At least three members of the board shall be women. The members of such a board heretofore appointed by the mayor are continued in office until the expiration of their terms, respectively. The additional appointive member of such board shall be appointed by the mayor, within ten days after this section as amended takes effect, for a full term of nine years. (*Added by L. 1915, ch. 228, and amended by L. 1916, ch. 504.*)

§ 151. **Members to serve without compensation. Expenses, et cetera.**—The members of the board of child welfare, as herein provided, shall receive no compensation for their services as members of such board, but, after appropriations have been duly made as herein provided, they shall be entitled to the actual and necessary expenses incurred by them in properly discharging their official duties, whether while making investigations or otherwise. (*Added by L. 1915, ch. 228.*)

§ 152. **General powers and duties of board. State board of charities may revoke allowances.**—A board of child welfare shall:

1. Meet and organize within ten days after appointment, and fix the dates for its meetings, which shall be held at least monthly.
2. Elect a chairman, and appoint a secretary of the board, who shall hold office subject to the pleasure of the board.
3. Establish an office and, when specific appropriations have been made for such purposes, employ such officers and employees as may be provided for by the board of supervisors of a county or by the board of estimate and apportionment and the board of aldermen of a city.
4. Establish rules and regulations for the conduct of its business, which shall provide for the careful investigation of all applicants for allowances and the adequate supervision of all persons receiving allowances; such investigations and supervisions to be made by the board and without incurring any unnecessary expense. Reports must be filed at least quarterly by the agents, visitors or representatives of the board, with respect to the families receiving allowances granted by the board. (*Section added by L. 1915, ch. 228, and subd. amended by L. 1916, ch. 504.*)
5. Render to the board of supervisors, if in counties, and to the mayor, if in cities, a verified account of all moneys received and expended by them, or under their direction, and of all their proceedings in such manner and form as may be required by the board or the mayor, as the case may be; if required by the board of supervisors or mayor more frequent reports must be given covering fractional parts of a year. (*Subd. amended by L. 1917, ch. 551, in effect May 18, 1917.*)
6. Submit annually to the proper fiscal authorities of the county or city an estimate of the funds required to carry out the purposes of this article; in a county such estimate shall be furnished before the annual meeting of the board of supervisors for appropriating moneys and levying taxes; in

a city, it shall be submitted at the time provided by law for the submission of other departmental estimates.

7. Be subject to the general supervision of the state board of charities, and make such reports as the state board of charities may require. Any person who has knowledge that relief is being granted in violation of the requirements of this act, may file a verified complaint, in writing, with the state board of charities, setting forth the particulars of such violation, and said state board of charities shall have power, after proper investigation, to revoke allowances or to make such order as it may deem just and equitable and such order shall be complied with by the local board of child welfare. (*Added by L. 1915, ch. 228.*)

§ 153. **Regulation * governing allowances.**—The following provisions shall govern the granting of allowances pursuant to this article:

1. A board of child welfare may, in its discretion, when funds have been appropriated therefor, grant an allowance to any dependent widow residing in the county or city wherein she applies for an allowance, and who is deemed by the local board of child welfare to be a proper person mentally, morally and physically to care for and bring up such child or children, provided such widow has been a resident of the county or of the city wherein the application for an allowance is made for a period of two years immediately preceding the application, and whose deceased husband was a citizen of the United States and a resident of the state at the time of his death.

2. Such allowance shall be made by a majority vote of the board duly entered upon the minutes of any regular or special meeting, and may be increased, diminished or totally withdrawn in the discretion of the local board of child welfare.

3. Before granting an allowance the board shall not only determine that the mother is a suitable person to bring up her own children and that aid is necessary to enable her to do so, but further that if such aid is not granted the child or children must be cared for in an institutional home.

4. Such an allowance or allowances shall not exceed the amount or amounts which it would be necessary to pay to an institutional home for the care of such widow's child or children.

5. An allowance granted by the board shall be paid out of any moneys appropriated by the local authorities for such purposes, or otherwise available by the board for such purpose; such local authorities are authorized to appropriate and make available for the board of child welfare and to include in the tax levy for such county or city, such sum or sums, as in their judgment, may be necessary to carry out the provisions of this article; such moneys to be kept in a separate fund and to be disbursed by the proper county or city fiscal authorities on orders of the local board of child welfare and upon proper vouchers therefor.

* So in original.

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6. An application for allowance may be made directly to the local board of child welfare or to any member of the board.

7. A full and complete record shall be kept in every case coming either directly or indirectly within the jurisdiction of the board; such record to be available to the proper authorities of county or city interested therein.

8. An allowance made by the board shall not be for a longer continuous period than six months without renewal, which allowance may be continued from time to time at same or different amounts, for similar periods or less, either successively or intermittently or may be revoked at the pleasure of the local board of child welfare. (*Added by L. 1915, ch. 228.*)

§ 154. **Appropriations and limitations for purposes of article.**—The board of supervisors of a county, and the board of estimate and apportionment and the board of aldermen of a city to which this article is applicable, are hereby authorized and empowered annually to appropriate such a sum, if any, as, in their discretion and judgment, may be needed to carry out the provisions of this article, including expenses for administration and relief; it is further provided that no board of child welfare shall expend or contract to expend under the provisions of this act or otherwise, any public moneys not specifically appropriated as herein provided; the board of supervisors of any county may determine, as provided in section one hundred and thirty-eight of the state poor law, the same being chapter forty-two of the consolidated laws, whether or not the actual expense for the relief of widowed mothers and their children under this article shall be a charge upon the county or upon the respective towns thereof. Each such board of child welfare shall, from time to time, audit and cause to be paid all expenses for administration and the wages and salaries of its employees. (*Added by L. 1915, ch. 228, and amended by L. 1917, ch. 551, in effect May 18, 1917.*)

§ 155. **Penalties.**—1. A person who shall procure or attempt to procure, directly or indirectly, any allowance for relief under this article, for or on account of a person not entitled thereto, or shall knowingly or wilfully pay or permit to be paid any allowance to a person not entitled thereto, shall be guilty of a misdemeanor.

2. The members of a board of child welfare, established by this act, shall be appointed within sixty days after this act takes effect. (*Added by L. 1915, ch. 228.*)

ARTICLE VIII.

CEMETERIES.

Section 160. Acquisition of lands for cemetery purposes.

161. Title may be acquired by condemnation.

162. Money may be borrowed for the purpose.

163. Lot owners' rights.

§ 160. Acquisition of lands for cemetery purposes.—It shall be lawful for the common council of any city, or the trustees of any incorporated village in this state, although such cemetery is disconnected from and out of the limits of any city or village, to acquire by deed, devise or otherwise, such land as it may require for burial purposes and the proper ornamentation in connection therewith, or land for such purposes, in addition to such land as it may already hold, or is authorized to hold; and to hold, use and possess the same in like manner with the like rights, privileges and authority, and subject to the like duties and liabilities as apply to the other lands so held by said city or village.

The provisions of this section shall not apply to the counties of New York, Kings, Queens and Westchester.

Source.—L. 1869, ch. 727, § 1, as amended by L. 1870, ch. 760; L. 1873, ch. 452; L. 1875, ch. 206; L. 1892, ch. 518.

Consolidators' note.—The words "or the trustees of any incorporated cemetery association" have been omitted. They do not belong in General Municipal Law but in the Membership Corporations Law. The first statute on the subject [L. 1869, ch. 727] applied to "the common council of any city or the board of trustees of any incorporated village." The first amendatory statute [L. 1870, ch. 760] added "or the trustees of any incorporated rural cemetery association." The second amendatory statute [L. 1873, ch. 454] adds ("although such rural cemetery is disconnected from and out of the limits of any city or village"). The third amendatory statute [L. 1892, ch. 518] omits the word "rural."

References.—Acquisition of property for cemeteries by religious corporations, Religious Corporations Law, § 7; acquisition of lands for cemeteries by villages, Village Law, § 290; management of village cemeteries, *Id.* §§ 291-296. Town cemeteries, Town Law, §§ 330-337. Incorporation of cemetery corporations and transaction of business, Membership Corporation Law, §§ 60-84.

Constitutionality.—The act of 1873 (L. 1873, ch. 452) which allowed rural cemetery associations, as well as cities and villages, to take lands for cemetery purposes, was held to be unconstitutional. *Matter of Deansville Cemetery Association* (1876), 66 N. Y. 569.

Section cited.—*Power v. Village of Athens* (1885), 99 N. Y. 592, 2 N. E. 609.

§ 161. Title may be acquired by condemnation.—If the said common council or board of trustees shall be unable to agree with the owner of such lands for the purchase thereof, the said common council or board of trustees may proceed to acquire the title thereto in the manner prescribed by the condemnation law. The amount paid for such lands, by such common council or board of trustees as aforesaid, and all the expenses attending the same, with the expenses of fencing and improving the same, shall be

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assessed and collected by a general tax upon all the taxable property of such city or village, in the same manner as other city or village taxes are assessed and collected.

Source.—L. 1869, ch. 727, § 2, as amended by L. 1870, ch. 760, § 2, as re-enacted in L. 1873, ch. 452, § 2.

Consolidators' note.—That portion is omitted which directs the manner of condemnation of lands as being that which is prescribed by L. 1850, ch. 140, and the several acts amendatory thereof and supplementary thereto. By § 3383, Code Civil Procedure [being part of ch. 23, Code Civil Procedure, known as Condemnation Law], "So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for public use is repealed, except such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use, for, by, on behalf, on the part, or in the name of the corporation of the city of New York * * *." The new matter inserted refers to ch. 23, tit. 1, Code Civil Procedure [Condemnation Law].

§ 162. Money may be borrowed for the purpose.—The common council of said cities and the board of trustees of said villages are authorized to borrow the sum of money provided for by section one hundred and sixty-one of this article and in anticipation of the tax aforesaid, or so much thereof as may be necessary to purchase the burial lot as aforesaid, and procure a good title in fee to the same.

Source.—L. 1870, ch. 760, § 3, as re-enacted in L. 1873, ch. 452.

§ 163. Lot owners' rights.—Lots in such cemeteries shall be held indivisible, and upon the decease of a proprietor of such lot the title thereto shall descend to his heirs-at-law or devisees, subject, however, to the following limitations and conditions: If he leaves a widow and children, they shall have in common the possession, care and control of such lot during her life. If he leaves a widow and no children, she shall have the possession, care and control of such lot during her life. If he leaves children and no widow, they, or the survivor of them, shall in common have the possession, care and control of such lot during the life of the survivor of them. The parties having such possession, care and control of such lot during the term thereof, may erect a monument and make other permanent improvements thereon. The widow shall have the right of interment for her body in such lot, or in a tomb in such lot, and a right to have her body remain permanently interred or entombed therein, except that her body may be removed therefrom to some other family lot or tomb with the consent of her heirs. At any time when more than one person is entitled to the possession, care or control of such lot, the persons so entitled thereto shall designate in writing to the clerk of the corporation which of their number shall represent the lot, and on their failure to designate, the board of trustees or directors or commissioners of the corporation or commission shall enter of record which of said parties shall represent the lot, while such failure continues. The

widow may at any time release her right in such lot, but no conveyance or devise by any other person shall deprive her of such right.

Source.—L. 1898, ch. 543, § 1.

Editors' note.—Section 5 of L. 1898, ch. 543, applying the act to cemeteries of membership and religious corporations is omitted, being covered by the Mun. Corp. L. and Relig. Corp. L.

Rights of relatives to remove body. Matter of Cohen (1902), 76 App. Div. 401, 78 N. Y. Supp. 417.

ARTICLE IX.

REGULATION OF USE OF BICYCLES AND SIMILAR VEHICLES.

Section 180. Ordinances to regulate use of bicycles and similar vehicles.

181. Limitation of power to make ordinances.

182. Security for appearance upon arrest.

§ 180. Ordinances to regulate use of bicycles and similar vehicles.—The municipal officers and boards in the several cities, towns and villages of this state now having the authority to enact such ordinances, may pass ordinances regulating the use of bicycles, tricycles and similar vehicles on the public highways, streets, avenues, walks, parks and public places within their limits in accordance with the following provisions, and not otherwise:

1. To require all bicycles, tricycles and similar vehicles when ridden on such public highways, streets, avenues, walks or public places to have attached thereto or carried therewith a light of such illuminating power as to be plainly seen two hundred feet ahead, and kept lighted between one hour after sunset and one hour before sunrise; but this section shall not apply to any rider whose light has become extinguished or who is necessarily absent from his home without a light, when going at a pace not exceeding six miles an hour, when an audible signal is given as provided in subdivision two of this section, as often as thirty feet are passed over.

2. To require riders of all such bicycles, tricycles or similar vehicles to give an alarm by bell, whistle or otherwise, which may be heard one hundred feet distant, when about to meet or pass pedestrians and when about to meet or pass other vehicles.

3. To regulate the rate of speed at which it may be lawful to ride such bicycles, tricycles or similar vehicles; provided, however, that cyclists shall not be restricted to a rate of speed slower than is allowed any other kind or class of vehicle.

4. To regulate or prohibit coasting or proceeding by inertia or momentum with the feet off the pedals; the carrying of children under five years of age upon bicycles; the observance by cyclists, of such rules of the road as are established by the highway law; to permit the authorities of such municipality having charge of the public highways, streets, squares or parks, in their discretion, upon any special occasion, to grant permits to any person or persons to ride such machines during a specified time, upon

specified portions of the public streets or highways of such city, town or village, at any rate of speed, and annex such other reasonable conditions to such permits as they shall deem proper; and the said authorities of such municipality may also, under such conditions as they may deem proper, permit the use of velocipedes and other similar machines by children on any sidewalk in any public way, square or park in such municipality.

5. To regulate or prohibit the riding of any bicycles, tricycles or similar vehicles upon the sidewalks, within the limits of any city, town or village; except that no city, town or village shall have any power to prohibit the riding of any bicycles upon any sidewalk within the limits of such city, town or village when said sidewalk shall have been or shall be hereafter constructed solely at the expense of wheelmen or cyclists by and with the consent of the officers having jurisdiction therein, unless the road or street in front of said sidewalk is paved with some smooth and permanent pavement like asphalt or brick, and maintained in a condition suitable for the use of cycles. The term "sidewalk," as used in this article, means any sidewalk laid out as such by any city, town or village, or by the owners of the abutting lands, which is reserved by custom for the use of pedestrians, and which has been especially prepared for their use, but not including foot-paths or portions of public roads lying outside of the thickly settled parts of cities and towns which are worn only by travel, and are not improved by the public authorities, or by the abutting owners.

6. To provide that every person violating any such ordinances shall be punished by a fine not exceeding the sum of five dollars for each offense, and in case of the nonpayment of such fine, by imprisonment in the county jail not exceeding one day for each dollar of such fine, in the discretion of the court or magistrate.

Source.—L. 1899, ch. 634, § 1.

References.—As to regulation motor vehicle traffic, see Highway Law, §§ 280-308, and General Highway Traffic Law.

Town officers may make ordinances that will govern bicycle riding in unincorporated villages. Rept. of Atty. Genl. (1900) 239.

§ 181. Limitation of power to make ordinances.—No city, town or village shall have any power to make any ordinance, by-law or regulation respecting the use of bicycles or tricycles except as provided in this article; and except as provided in this article, no ordinance, by-law or regulation heretofore or hereafter made by a city, town or village in respect to bicycles or tricycles shall have any force or effect. Nothing in this article shall affect the jurisdiction of sidepath commissioners nor the use of sidepaths.

Source.—L. 1899, ch. 634, § 2.

§ 182. Security for appearance upon arrest.—Any person arrested for the violation of any of the provisions of any ordinance or by-law adopted as provided in this article, may tender at the time of his arrest, or at any time before the hearing thereon, either five dollars in current money, or his

bicycle or similar vehicle, as security for his appearance in court to make answer to the charge of violating the provisions of any ordinance or by-law adopted as provided in this article; and the officer making the arrest shall accept the security which the rider may offer, as aforesaid, for his appearance, before the most convenient court or magistrate, to be specified by said officer at a time to be fixed by him not less than one day, in said city, village or town having jurisdiction of the offense, and such security shall be forthwith delivered, by such officer, to such court or magistrate. In case the person arrested shall fail to appear and answer to such charge at the time so specified or at such other time to which the matter shall have been adjourned, such security shall be forfeited, and if money, shall be disposed of in the same manner as other fines are disposed of by such court or magistrate; and if a bicycle or similar vehicle, it may be sold under the direction of such court or magistrate at public sale, a notice of which sale shall be posted in three public places in such city, town or village, and a copy thereof served personally or by mail upon the person who tendered the same at least six days before such sale, and five dollars of the money received upon such sale shall be disposed of in the same manner as other fines collected by such court or magistrate, and the remainder of the money received upon such sale shall be paid to the owner of such bicycle or other similar vehicle on demand.

Source.—L. 1899, ch. 634, § 3.

ARTICLE X.

FIREMEN AND POLICEMEN.

Section 200. Defining qualifications of exempt volunteer firemen.

200-a. Exempt volunteer firemen.

201. Rights and privileges of exempt volunteer firemen.

202. Certificate to be issued to exempt volunteer firemen.

203. List of exempt volunteer firemen to be filed.

204. Qualifications necessary to entitle to certain * privileges.

205. Payments to injured or representatives of deceased volunteer firemen.

206. Certificate to policemen and firemen; free transportation; use of telegraph lines and telephones.

207. Penalty for improper use of certificates.

§ 200. Defining qualifications of exempt volunteer firemen.—An exempt volunteer fireman is hereby declared to be a person who as a member of a volunteer fire company duly organized under the laws of the state of New York shall have at any time after attaining the age of eighteen years faithfully actually performed service in the protection of life and property from fire within the territory immediately protected by the company of which he is a member and while a bona fide resident and, if of full age, an elector

* So in original. See § 204.

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therein for a period of five consecutive years, or, if such company shall have been sooner disbanded upon the organization of a paid fire department, for a period of at least one year and shall also have been a member of such volunteer fire company at the time it shall have been disbanded; but the limitation of one year's service shall not apply to a volunteer fireman who was a member of a fire company which was disbanded prior to January first, nineteen hundred and two.

Source.—L. 1908, ch. 325, § 1.

References.—Volunteer firemen's organizations in fire districts, County Law, §§ 37, 38, 39; in villages, Village Law, § 202; in towns, Town Law, §§ 310-314.

Effect of section 200-205 is to repeal and supersede section 209 of the Village Law and section 15 of the General City Law. Rept. of Atty. Genl. (1911), Vol. 2, p. 322.

Section cited.—Matter of Cooper v. Paris (1911), 73 Misc. 244, 130 N. Y. Supp. 1043.

§ 200-a. Exempt volunteer firemen.—When any person has served as a volunteer fireman as provided in section two hundred, for less than five years, and while in good standing in the company or department of which he was a member, has resigned therefrom or has been transferred from one company to another, he shall be entitled to a certificate as provided in section two hundred and two for the time he has actually served. And when any person has served five years as a volunteer fireman in one or more companies or departments as provided in section two hundred, with an intermission of not more than three months between his time of service in one company or department and another, he shall be deemed an exempt volunteer fireman and entitled to all the rights of a volunteer fireman in the same manner and to the same extent as if he had served the full period of five years in one company or department. (*Added by L. 1910, ch. 119.*)

§ 201. Rights and privileges of exempt volunteer firemen.—In case any city, town or village in this state shall organize a paid fire department and thereby deprive any volunteer fireman who has faithfully actually performed service in the protection of life and property within the territory immediately protected by his company and while a bona fide resident and if of full age an elector therein, of the right to serve a full term of five consecutive years such fireman shall be entitled to a full and honorable discharge; and to all the rights and privileges granted by the laws of this state to volunteer firemen, provided, however, that if such paid department has been organized since the first day of January in the year nineteen hundred and two, he shall have so served for a consecutive period of at least one year immediately preceding the installation of said paid fire department.

Source.—L. 1908, ch. 325, § 2.

References.—Exemptions from jury duty, Judiciary Law, §§ 546, 635, 720; mili-

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tary duty, Military Law, § 1; from taxation in villages, Village Law, § 132. Special privileges as to removal from civil service, Civil Service Law, § 22.

§ 202. Certificate to be issued to exempt volunteer firemen.—Any person described in sections two hundred or two hundred and one shall be entitled to a certificate from the company in which he served or of which he was a member at the time of its disbandment which shall show the date of the entrance of such fireman upon his service, the period of his consecutive service, that he was a bona fide resident and if of full age an elector within the territory immediately protected by his company during the time of such service, that he was honorably discharged from such company after five years' consecutive service; was in good standing in his company after completing such five years of consecutive service and at the time of applying for such certificate; or that he was in good standing in his company at the time of the disbandment thereof. Such certificate shall be signed by the president, captain, foreman or secretary of the company and shall be acknowledged by such officers before an officer commissioned to take acknowledgments, and shall also have attached thereto a certificate attested by the affidavit of the secretary, clerk or other person having the custody of the company's record of membership, that the statements of fact contained in said certificate are true, and the affidavit and acknowledgment shall be substantially in the following form:

State of New York, }
County of..... } ss.

On this day of, in the year, before me personally came, to me known and by me known to be the same person described in and who executed the foregoing certificate and they severally duly acknowledged to me that they executed the same and the said being by me duly sworn, deposes and says, that he is of the company aforesaid and is the custodian of the records of its membership and that the facts above stated relating to the service and residence of the person described in such certificate are true.

.....,
Notary Public.

Such certificate so attested shall in all courts of the state and in the offices of all persons clothed with power of appointment or removal in the service of this state and in the several cities, counties, towns and villages thereof, be presumptive evidence of the facts therein stated. (*Amended by L. 1909, ch. 240, § 44.*)

Source.—L. 1908, ch. 325, § 3.

Certificate as evidence.—The certificate provided for by this section is not exclusive evidence of the qualifications necessary to entitle one to the exemptions specified in section 204 of the General Municipal Law. *People ex rel. McBride v. Atchinson* (1910), 68 Misc. 115, 123 N. Y. Supp. 577, *affd.* (1911), 142 App. Div. 927, 126 N. Y. Supp. 1142.

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§ 203. List of exempt volunteer firemen to be filed.—In case of a company disbanded by the organization of a paid department in lieu thereof, the officers of every volunteer fire, engine, hose and hook and ladder company shall within ninety days after such company has been disbanded file in the office of the clerk of the county in which said company was located a list containing the name of every person who was a member of such volunteer company and who is entitled to the exemption certificate in accordance with the provisions of this article. Upon such list being filed the county clerk of the county in which such company operated shall sign and deliver the exemption certificate provided for in this article to the person entitled thereto whose name appears upon the list filed with him as aforesaid, but the same shall, nevertheless, be attested by the secretary or clerk or other person having the custody of the membership records of the disbanded company and in the manner specified in this article.

Source.—L. 1908, ch. 325, § 4.

§ 204. Qualifications necessary to entitle to certain * exemptions.—No person who became a member of a volunteer fire organization within the state since the first day of January nineteen hundred and two, or who shall have thereafter become such member who shall not possess the qualifications prescribed by this article shall be entitled to any of the exemptions and privileges secured to volunteer firemen by the civil service law of this state.

Source.—L. 1908, ch. 325, § 5.

Evidence of exemption qualifications.—The certificate provided for by section 202 *ante*, is not exclusive evidence of the qualifications necessary to entitle one to the exemptions specified in this section. *People ex rel. McBride v. Atchinson* (1910), 68 Misc. 115, 123 N. Y. Supp. 577, *affd.* (1911), 142 App. Div. 927, 126 N. Y. Supp. 1142.

§ 205. Payments to injured or representatives of deceased volunteer firemen.—First. If an active member of a volunteer fire company in any city, incorporated village or in any fire district of a town outside of an incorporated village or in any part of a town protected by a volunteer fire company incorporated under the provisions of the membership corporations law, dies from injuries incurred while in the performance of his duties as such fireman within one year thereafter, the city, village, or town shall pay as follows:

a. If such volunteer fireman is a member of a volunteer fire company located in any city in which a pension fund is maintained, the relatives of such volunteer fireman shall be entitled to a pension in the same manner and at the same rates as if he were a member of the paid fire department of such city.

b. If in a city not maintaining a pension fund for the benefit of the members of the paid fire department therein, such city shall pay to the

* So in original.

executor or administrator of such deceased volunteer fireman the sum of twenty-five hundred dollars.

c. If in any other place the sum of fifteen hundred dollars shall be paid to the executor or administrator of such deceased volunteer fireman.

Second. Any such volunteer fireman who shall become permanently incapacitated for performing the full duties of a volunteer fireman by reason of disease or disability caused or induced by actual performance of the duties of his position, without fault or misconduct on his part, shall

a. If a member of a volunteer fire company located in any city in which a pension fund is maintained, be paid a pension in the same manner and at the same rate as if he were a member of the paid fire department of such city.

b. If a member of a volunteer fire company in any other place, be paid one-half the amount which would have been payable in case of death to his executor or administrator under the provisions of subdivision first of this section.

Third. In cities such sum shall be a city charge and shall be audited and paid in the same manner as other city charges, except that no part of the moneys payable under this section shall be paid from the pension funds of the paid departments therein. In villages such sum shall be a village charge and shall be audited and paid in the same manner as village charges, and shall be assessed upon the property and persons liable to taxation in said village, and levied and collected in the same manner as village taxes. If such fireman was a member of a fire company in a fire district outside of a city or an incorporated village, such sum shall be a town charge, audited and paid in the same manner as town charges, and shall be assessed upon the property and persons in such fire district liable to taxation, and levied and collected in the same manner as town charges. If such fireman was a member of a fire company incorporated under the membership corporations law, located outside of a city, village or fire district, such sum shall be a town charge audited and paid as town charges and shall be assessed upon the property and persons liable to taxation in the territory protected by such fire company and levied and collected in the same manner as town charges therein.

Provided, however, that any money paid to an executor or administrator under any of the provisions of this section shall be distributed in the manner provided by law for the distribution of personal property, and all money paid under this section shall be exempt from any process for the collection of debts either against the volunteer fireman or any beneficiary to whom the same is paid under the provisions of this section.

Fourth. Any controversy arising at any time under the provisions of this section shall be determined by the county judge of the county in which the volunteer fire company is located and of which such volunteer fireman is a member. For that purpose, any party may present a petition to such county judge, setting forth the facts and rights which are claimed.

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A copy of such petition and notice of the time and place when the same will be presented shall be served on all persons interested therein, at least eight days prior to such presentation. (*Amended by L. 1914, ch. 400.*)

Source.—L. 1906, ch. 49, § 1.

Payment of death benefit on death of call fireman.—The charter of the city of Fulton, which was incorporated after this section (L. 1895, ch. 615) of the General Municipal Law was in effect, provides (L. 1902, ch. 63, §§ 4, 119) that the call men connected with its fire department shall be entitled to the same privileges as are accorded by the law to volunteer firemen. One of these call men, while performing his duties as such, received injuries from which he died. The claim for payment of the sum designated to be paid a volunteer fireman under the general statute, which was presented by his widow, was rejected by the city, and such proceedings were had thereon as that the Appellate Division has held that she is not entitled to payment thereof. It was held upon examination and construction of the statutes cited, that the word "privileges" as used in the provision giving to the call men "the same privileges and exemptions as are accorded by the laws of this state to volunteer firemen" is synonymous with the word "rights," and hence when plaintiff's intestate became one of the call firemen there was read into his contract with the city the provision of the statute providing for payment to him, if injured, the sum specified by the statute or to his representatives in case of his death. *Matter of Hammond v. City of Fulton* (1917), 220 N. Y. 337, 115 N. E. 998, revg. 176 App. Div. 343, 163 N. Y. Supp. 51.

§ 206. **Certificate to policemen and firemen; free transportation; use of telegraph lines and telephones.**—The mayor of each city of this state and the president of each incorporated village may issue, under the seal of his office, to each policeman and fireman appointed by the duly-constituted authorities of such city or village, a certificate of the appointment and qualification of such policeman or fireman as such, and specifying the duration of his term of office; and it shall thereupon be the duty of every street surface and elevated railroad company carrying on business within such city or village, to transport every such policeman or fireman free of charge while he is traveling in the course of the performance of the duties of his office. Every telegraph or telephone company engaged in business within such city or village, shall afford to such policeman or fireman the use of its telegraph lines or telephones for the purpose of making and receiving reports and communications in the course of the performance of his official duties.

Source.—L. 1895, ch. 417, § 1.

Consolidators' note.—L. 1895, ch. 417, is consolidated as §§ 200 and 201. This statute was held unconstitutional in *Wilson v. United Traction Company*, 72 App. Div. 233. The case, however, does not adjudicate as to companies which came into existence subsequent to the passage of the act. It is therefore consolidated.

Section cited.—*Matter of Cooper v. Paris* (1911), 73 Misc. 244, 130 N. Y. Supp. 1043.

§ 207. **Penalty for improper use of certificates.**—Every policeman or fireman who shall permit any other person to use the certificate issued to him as provided by the last section, or shall present or make use of the

same, except while acting in the course of the performance of his official duties, or who shall use such certificate after the expiration of his term of office or his resignation or removal therefrom, shall be deemed guilty of a misdemeanor.

Source.—L. 1895, ch. 417, § 2.

ARTICLE XI.

ACQUISITION OF LANDS BY THE UNITED STATES.

Section 210. United States may acquire land in cities.

211. Certified copy of transfer to be filed.

212. Jurisdiction of state not affected.

§ 210. United States may acquire land in cities.—The United States is hereby authorized to acquire by condemnation, purchase or gift in conformity with the laws of this state, one or more pieces of land not exceeding two acres in extent, in any city or village of this state, for the purpose of erecting and maintaining thereon a public building for the accommodation of post-offices and other governmental offices in any such city or village.

Source.—L. 1899, ch. 242, § 1, as amended by L. 1907, ch. 375, § 1.

References.—Acquisition of state land by United States government, State Law, §§ 35, 36, 50-57. Entry on lands to make surveys, Id. § 60.

§ 211. Certified copy of transfer to be filed.—Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of state of this state, certified copies of the record or transfer to the United States of any such pieces of land which had been acquired by the United States for the purposes specified in section two hundred and ten of this article, together with maps and descriptions of such lands by metes and bounds, exclusive jurisdiction, except as provided in section two hundred and twelve, is thereupon ceded to the United States over the lands so described, during the time that the United States shall be or remain the owner thereof.

Source.—L. 1899, ch. 242, § 2.

§ 212. Jurisdiction of state not affected.—The jurisdiction ceded to the United States as prescribed by this article shall not prevent the execution on the land acquired for the purposes specified in section two hundred and ten of any process civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States thereon.

Source.—L. 1899, ch. 242, § 3.

ARTICLE XII.

RAILROAD AID BONDS.

- Section 220. Apportionment on formation of new towns.
221. Duty of railroad commissioners.
222. Assessors to make separate lists.
223. Duty of supervisor.
224. Application of the last four sections.
225. Supervisor to execute a bond.
226. Transfer of duties of railroad commissioners to supervisors.
227. Such supervisor to give security.
228. Railroad commissioners to deliver to supervisor property.
229. Penalty of bond to be fixed by town auditors.
230. Compensation of supervisor.
231. Presentation of claims to court of claims.
232. Investment and application of award.
233. Award or judgment.

§ 220. Apportionment on formation of new towns.—Whenever any board of supervisors shall form a new town within its respective county, from parts of other towns, or town which shall have bonded to aid in the construction of any railroad under any act authorizing the same, and such bonds, or any part thereof, shall remain unpaid, or when any board of supervisors shall change the line of any town which shall have bonded to aid in the construction of any railroad in this state, and such bonds, or any part thereof, shall remain unpaid, the new town so formed and the part taken from a town and added to another town shall pay a proportionate share of such bonds as shall remain unpaid, which share shall be ascertained from the assessed valuation of such town or towns as contained in the last equalized valuation of the assessment-roll, made prior to the formation of such town or the change of any such town line.

Source.—L. 1880, ch. 336, § 1.

Consolidators' note.—By amendment to the Constitution in 1884 and continued in the Constitution of 1894, aid to railroads by municipal corporations was prohibited. Information obtained at the office of the state railroad commissioners shows a number of municipal corporations are still indebted on bonds issued prior to the constitutional prohibition. It has been considered proper to include in the General Municipal Law the provisions of the statutes which legalized the issue of railroad aid bonds.

§ 221. Duty of railroad commissioners.—It shall be the duty of the railroad commissioners of the town, any part of whose territory shall have been detached as aforesaid, to render a true statement to the board of supervisors, as required by law, of the amount necessary to pay the proportionate share belonging to the territory detached from their town, which may be then coming due, and the board of supervisors shall add such proportionate share to the sums to be collected from the town so formed,

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or to the part which shall have been detached from a town and added to another town, to be collected as prescribed by law.

Source.—L. 1880, ch. 336, § 2.

§ 222. **Assessors to make separate lists.**—The assessors of the town to which shall have been added a part of another town, shall yearly, until such bonds be paid, make a separate and distinct list of the taxable inhabitants and lands contained in the territory so annexed in the assessment-roll of the said town, in all respects similar in form and manner to the assessment-roll as now made. Said list shall be designated in such roll "List of annexed lands and inhabitants."

Source.—L. 1880, ch. 336, § 3.

§ 223. **Duty of supervisor.**—Such proportionate share of moneys collected as provided in section two hundred and twenty-one of this article shall be paid by the supervisor of the town wherein collected to the railroad commissioners of the town or towns from which such territory shall have been detached, and such commissioners shall use such moneys for the payment of the bonds issued in the same manner as they are required to use the moneys raised in their own town.

Source.—L. 1880, ch. 336, § 4.

§ 224. **Application of the last four sections.**—The provisions of sections two hundred and twenty to two hundred and twenty-three, inclusive, shall apply to all cases where a new town shall have been formed, or the line of any town shall have been changed by the board of supervisors of any county since the first day of January, eighteen hundred and seventy-nine, where no proceedings have been taken under chapter five hundred and ninety-seven of the laws of eighteen hundred and seventy.

Source.—L. 1880, ch. 336, § 5.

§ 225. **Supervisor to execute a bond.**—The supervisor of any town or ward of any city receiving or disbursing any funds on account of the bonded railroad debt of said town or ward, before receiving or disbursing any such funds by virtue of any law of this state, shall execute to the town a bond with sureties who shall be able to justify in at least double the amount of the money to be received by him, as near as can be ascertained, said bond to be approved by the town clerk and conditioned for the proper and due disbursement of moneys received on account of bonded railroad debt and the faithful accounting thereof, which bond when given will be filed with the town clerk.

Source.—L. 1882, ch. 68, § 1.

§ 226. **Transfer of duties of railroad commissioners to supervisors.**—Every town in which railroad commissioners heretofore appointed or elected under the provisions of any general or special statute of this state authorizing towns to incur indebtedness in aid of the construction of any

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railroad, remain in office, and in which the duties imposed by such statutes, upon such commissioners, are not yet fully performed, is hereby authorized and empowered, at an annual town meeting, or at a special town meeting called for such purpose in the manner prescribed by law, to authorize the transfer of the powers and duties of such railroad commissioner or commissioners to the supervisor of such town, by a resolution to such effect passed and adopted by a majority vote of all persons voting at such town meeting.

Source.—L. 1889, ch. 402, § 1.

Adoption of resolution.—A town may vote *viva voce* upon the question of transferring the powers of the railroad commissioners to the supervisor. It is not necessary that the town clerk give notice that the resolution will be offered. After the resolution is passed it is obligatory upon the town officers to carry such resolution into effect. Rept. of Atty. Genl. (1891) 65.

§ 227. Such supervisor to give security.—Within twenty days after the passage of such resolution at such town meeting the said supervisor shall file in the office of the town clerk of said town a bond running to the people of the state of New York, executed by himself and two or more sureties, in a penalty to be fixed by the board of town auditors of said town as hereinafter provided, and conditioned for the faithful performance of the duties of railroad commissioners transferred to him under said resolution, and the payment over according to law of all moneys coming into his hands by reason of such transfer; such bonds also to be approved as to form and sufficiency of sureties by the county judge of the county in which said town is located.

Source.—L. 1889, ch. 402, § 2.

§ 228. Railroad commissioners to deliver to supervisor property.—Forthwith, upon the filing of such bond as aforesaid, the town clerk of the town shall indorse upon copies of such bond to be provided by the said supervisor, a certificate to the effect that the said bond has been filed in the office of such town clerk, and said supervisor shall serve such copies and certificate upon the railroad commissioners respectively, and thereupon it shall be the duty of such railroad commissioners to pay over to such supervisor all moneys remaining in their hands as railroad commissioners of such town, and to deliver all books, papers, securities and other property belonging to said town and remaining in their hands as such commissioners unto the said supervisor, and to take his receipt therefor, which receipt shall be to them a proper and sufficient voucher. Immediately upon the delivery of said moneys and property by the said railroad commissioners to the supervisor, as aforesaid, and in the manner aforesaid, the office of railroad commissioner of such town shall wholly cease, and the said supervisor shall thereupon be invested with all the powers conferred upon such railroad commissioners by the statute and proceedings under and by which they were appointed, and shall be subject to all the duties imposed

upon such commissioners by such statute, and all securities and evidences of debt transferred by said commissioners to said supervisor as aforesaid, which by the terms thereof are payable to the said railroad commissioners, shall be paid when due to said supervisor, upon his indorsement as supervisor, in the same manner and to the same effect as if indorsed by said railroad commissioners.

Source.—L. 1889, ch. 402, § 3.

§ 229. **Penalty of bond to be fixed by town auditors.**—The board of town auditors shall meet for the purpose of fixing the penalty of the bond of said supervisor, as provided in section two hundred and twenty-seven of this article, at the office of the town clerk within ten days after the town meeting at which the resolution hereinbefore provided for was passed, upon a day to be fixed by said town clerk, whereof each member of said board shall be notified by said clerk either personally or by mail, at least three days before the time fixed for said meeting. In fixing the penalty of the bond to be given by said supervisor under the provisions of section two hundred and twenty-seven of this article, said board of town auditors shall take into consideration the amount of moneys likely to come into the hands of such supervisor by reason of the additional duties imposed upon him by this article. Hereafter, in a town in which the duties of railroad commissioner have been transferred to the supervisor, the general bond given by such officer, conditioned to safely hold and pay over all moneys coming into his hands and belonging to the town, shall be deemed to include and be a security for the payment over of all moneys coming into the hands of such supervisor under and by reason of the provisions of this article.

Source.—L. 1889, ch. 402, § 4.

§ 230. **Compensation of supervisor.**—For the performance of the additional duties devolved upon him under the provisions of this article, such supervisor shall be entitled to reasonable compensation, to be fixed by the board of town auditors of such town.

Source.—L. 1889, ch. 402, § 5.

§ 231. **Presentation of claims to court of claims.**—Any county of this state, containing one or more towns, villages or cities which have heretofore issued bonds to aid in the construction of any railroad passing through such towns, villages or cities, may present to the court of claims a claim for the amount of state taxes collected from or paid by any such railroad within the several towns, villages or cities of such county which were so bonded to aid in the construction of any such railroad, since the eighteenth day of May, eighteen hundred and sixty-nine, and which said taxes were paid by the county treasurer of such county to the state treasurer. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine

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such claims and to make awards and render judgments therefor against the state and in favor of such claimants.

Source.—L. 1907, ch. 237, § 1.

Liability of state under statute.—County of Ulster v. State of New York (1904), 177 N. Y. 189, 69 N. E. 370, affg. (1903), 79 App. Div. 277, 80 N. Y. Supp. 128.

§ 232. Investment and application of award.—The amount which shall be awarded to any county as provided in section two hundred and thirty-one of this chapter, shall be paid to the county treasurer of such county; and such county treasurer shall invest or apply the same in the manner and for the purpose provided by section thirteen of this chapter, except that in case such county shall have heretofore paid to any such town, village or city, such state taxes or any portion thereof, or in case such county treasurer has heretofore set aside such state taxes or any portion thereof, for the benefit of such town, village or city, in the manner provided by said section thirteen of this chapter, then and in that case, such moneys or the portion thereof so paid or set aside as aforesaid, shall be used and applied by such county treasurer for the general purposes of the county.

Source.—L. 1907, ch. 237, § 2.

§ 233. Award or judgment.—No award shall be made or judgment rendered herein against the state unless the facts proved shall make out a case against the state, which would create a liability, were the same established in a court of law or equity against an individual or corporation or municipality; and in case such liability shall be satisfactorily established, then the court of claims shall award to and render judgment for the claimants for such sums as shall be just and equitable, notwithstanding the lapse of time since the accruing of said damages, provided any claim hereunder accruing prior to the twenty-ninth day of April, nineteen hundred and seven, shall have been filed with the court of claims within one year thereafter and provided any claim hereunder accruing after said twenty-ninth day of April, nineteen hundred and seven, shall be filed with the court of claims within two years after the accrual thereof.

Source.—L. 1907, ch. 237, § 3.

ARTICLE XII-A.

(Article added by L. 1913, ch. 699.)

CITY AND VILLAGE PLANNING COMMISSIONS.

Section 234. Creation, appointment and qualifications.

235. Officers, expenses and assistance.

236. General powers.

237. Maps and recommendations.

238. Private streets.

239. Rules.

239-a. Construction of article.

§§ 234-236.

City and village planning associations.

L. 1909, ch. 29.

§ 234. **Creation, appointment and qualifications.**—Each city and incorporated village is hereby authorized and empowered to create a commission to be known as the city or village planning commission. Such commission shall be so created in incorporated villages by resolution of the trustees, in cities by ordinance of the common council, except that in cities of the first class, having more than a million inhabitants, it shall be by resolution of the board of estimate and apportionment or other similar local authority. In cities of the first class such commission shall consist of not more than eleven, in cities of the second class of not more than nine, in cities of the third class and incorporated villages of not more than seven members. Such ordinance or resolution shall specify the public officer or body of said municipality, that shall appoint such commissioners, and shall provide that the appointment of as nearly as possible one third of them shall be for a term of one year, one third for a term of two years, and one third for a term of three years; and that at the expiration of such terms, the terms of office of their successors shall be three years; so that the term of office of one third of such commissioners, as nearly as possible, shall expire each year. All appointments to fill vacancies shall be for the unexpired term. Not more than one third of the members of said commission shall hold any other public office in said city or village. (*Added by L. 1913, ch. 699.*)

§ 235. **Officers, expenses and assistance.**—The commission shall elect annually, a chairman from its own members. It shall have the power and authority to employ experts, clerks, and a secretary, and to pay for their services and such other expenses as may be necessary and proper, not exceeding, in all, the annual appropriation that may be made by said city or village for said commission. The body creating the commission shall by ordinance or resolution provide what compensation if any, each of such commissioners shall receive for his services as such commissioner. Each city and incorporated village is hereby authorized and empowered to make such appropriation as it may see fit for such expenses and compensation, such appropriations to be made by those officers or bodies in such city or village having charge of the appropriation of the public funds. (*Added by L. 1913, ch. 699.*)

§ 236. **General powers.**—The body creating such planning commission may, at any time, by ordinance or resolution, provide that the following matters, or any one or more of them, shall be referred for report thereon, to such commission by the board, commission, commissioner or other public officer or officers of said city or village which is the final authority thereon before final action thereon by such authority: the adoption of any map or plan of said city or incorporated village, or part thereof, including drainage and sewer or water system plans or maps, and plans or maps for any public water front, or marginal street, or public structure upon, in or in connection with such front or street, or for any dredging, filling or

fixing of lines with relation to said front; any change of any such maps or plans; the location of any public structure upon, in or in connection with, or fixing lines with relation to said front; the location of any public building, bridge, statue or monument, highway, park, parkway, square, playground or recreation ground, or public open place of said city or village. In default of any such ordinance or resolution all of said matters shall be so referred to said planning commission.

The body creating such planning commission may, at any time, by ordinance or resolution, fix the time within which such planning commission shall report upon any matter or class of matters to be referred to it, with or without the further provision that in default of report within the time so fixed, the planning commission shall forfeit the right further to suspend action, as aforesaid with regard to the particular matter upon which it has so defaulted. In default of any such ordinance or resolution, no such action shall be taken until such report is so received, and no adoption, change, fixing or location as aforesaid by said final authority, prior thereto, shall be valid. No ordinance or resolution shall deprive said planning commission of its right or relieve it of its duty, to report, at such time as it deems proper upon any matter at any time referred to it.

This section shall not be construed as intended to limit or impair the power of any art commission, park commission or commissioner, now or hereafter existing by virtue of any provision of law, to refuse consent to the acceptance by any municipality of the gift of any work of art to said municipality, without reference of the matter, by reason of its proposed location or otherwise, to said planning commission. Nor shall this section be construed as intended to limit or impair any other power of any such art commission or affect the same, except in so far as it provides for reference or report, or both, on any matter before final action thereon by said art commission. (*Added by L. 1913, ch. 699.*)

§ 237. **Maps and recommendations.**—Such planning commission may cause to be made a map or maps of said city or village or any portion thereof, or of any land outside the limits of said city or village so near or so related thereto that in the opinion of said planning commission it should be so mapped. Such plans may show not only such matters as by law have been or may be referred to the planning commission, but also any and all matters and things with relation to the plan of said city or village which to said planning commission seem necessary and proper, including recommendations and changes suggested by it; and any report at any time made, may include any of the above. Such planning commission may obtain expert assistance in the making of any such maps or reports, or in the investigations necessary and proper with relation thereto. (*Added by L. 1913, ch. 699.*)

§ 238. **Private streets.**—The body creating such planning commission may at any time, by ordinance or resolution provide that no plan, plot

§§ 239-240.

Playgrounds and recreation centers.

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or description, showing the layout of any highway or street upon private property, or of building lots in connection with or in relation to such highway or street shall, within the limits of any municipality having a planning commission, as aforesaid, be received for record in the office of the clerk of the county where such real property is situated, until a copy of said plan, plot or description has been filed with said commission and it has certified, with relation thereto, its approval thereof. Such certificate shall be recorded as a part of the record of said original instrument containing said plan, plot, or description. No such street or highway which has not received the approval of the planning commission shall be accepted by said city or village until the matter has been referred to such commission under the provision of section two hundred and thirty-six of this article. But if any such street is plotted or laid out in accordance with the map of said municipality, adopted according to law, then it shall not be necessary to file such copy, or obtain or record such certificate. (*Added by L. 1913, ch. 699.*)

§ 239. **Rules.**—Such commission may make rules not contrary to law, to govern its action in carrying out the provisions of this article. (*Added by L. 1913, ch. 699.*)

§ 239-a. **Construction of article.**—This article shall be construed as the grant of additional power and authority to cities and incorporated villages, and not as intended to limit or impair any existing power or authority of any city or village.

Any city or incorporated village in order to appoint a planning commission under this article shall recite, in the ordinance or resolution so creating the commission, the fact that it is created under this article. (*Added by L. 1913, ch. 699.*)

ARTICLE XIII.

(Article added by L. 1917, ch. 245, in effect Apr. 19, 1917.)

PLAYGROUNDS AND NEIGHBORHOOD RECREATION CENTERS.

Section 240. Application of article.

- 241. Dedication or acquisition of land or buildings for playgrounds or neighborhood recreation centers.
- 242. Equipment and operation.
- 243. Recreation commission.
- 244. Organization of commission.
- 245. Expenses incurred under article.
- 246. Annual appropriation.

§ 240. **Application of article.**—This article shall apply to cities of the second and third class and villages. (*Added by L. 1917, ch. 245, in effect Apr. 19, 1917.*)

§ 241. **Dedication or acquisition of land or buildings for playgrounds or neighborhood recreation centers.**—The board of estimate and apportionment of a city, or if there be no such board, the common council, board of aldermen or corresponding legislative body, or the board of trustees of a village, may designate and set apart for use as playgrounds or neighborhood recreation centers any land or building owned by such city or village and not dedicated or devoted to another inconsistent public use; or such city or village may, with the approval of such local authorities and in such manner as may be authorized or provided by law for the acquisition of land for public purposes in such city or village, acquire lands in such city or village for playgrounds or neighborhood recreation centers, or if there be no law authorizing such acquisition, the board of estimate and apportionment of such city, or if there be no such board, the common council, board of aldermen or corresponding legislative body, or the board of trustees of a village, may acquire land for such purpose by gift, private purchase or by condemnation, or may lease lands or buildings in such city or village for temporary use for such purpose. (*Added by L. 1917, ch. 215, in effect Apr. 19, 1917.*)

§ 242. **Administration, equipment and operation.**—The authority to establish and maintain playgrounds and neighborhood recreation centers may be vested in the school board, park board, or other existing body or in a recreation commission as the board of estimate and apportionment, common council, board of aldermen or corresponding legislative body, or the board of trustees in a village, shall determine. The local authorities of a city or village designated to equip, operate and maintain playgrounds and neighborhood recreation centers as authorized by this article, may equip such playgrounds and recreation centers, and the buildings thereon, and may construct, maintain and operate in connection therewith public baths and swimming pools. Such local authorities may, for the purposes of carrying out the object of such playgrounds or recreation centers, employ play leaders, playground directors, supervisors, recreation secretary, superintendent or such other officers or employees as they deem proper. (*Added by L. 1917, ch. 215, in effect Apr. 19, 1917.*)

§ 243. **Recreation commission.**—If the board of estimate and apportionment, or if there be no such board, the common council, board of aldermen, or corresponding legislative body, or the board of trustees of a village, shall determine that the power to equip, operate and maintain playgrounds and recreation centers shall be exercised by a recreation commission, they may, by resolution, establish in such city or village a recreation commission, which shall possess all the powers and be subject to all the responsibilities of local authorities under this article. Such a commission, if established, shall consist of five persons who are residents of such city or village, to be appointed by the mayor of such city or the trustees of such village to serve for terms of five years or until their successors are appointed, except that

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the members of such commission first appointed shall be appointed for such terms that the term of one commissioner shall expire annually thereafter. Members of such commission shall serve without pay. Vacancies in such commission occurring otherwise than by expiration of term shall be for the unexpired term and shall be filled in the same manner as original appointments. (*Added by L. 1917, ch. 215, in effect Apr. 19, 1917.*)

§ 244. **Organization of commission.**—The members of a recreation commission established pursuant to this article shall elect from their own number a chairman and secretary and other necessary officers to serve for one year, and may employ such persons as may be needed, as authorized by this act and pursuant to law. Such a recreation commission shall have power to adopt rules of procedure for the conduct of all business within its jurisdiction. (*Added by L. 1917, ch. 215, in effect Apr. 19, 1917.*)

§ 245. **Expenses incurred under article.**—All expenses incurred under this article coming within the annual appropriation therefor (as provided in section two hundred and forty-six of this article) shall be a city or village charge, payable from the current funds of such city or village; but the local authorities may provide that the bonds of such city or village may be issued in the manner provided by law for the acquisition of lands or buildings for playgrounds or neighborhood recreation centers, subject, however, to the adoption of a proposition therefor at a city or village election, if the adoption of such a proposition is a prerequisite to the issuance of bonds of such city or village for public purposes generally. (*Added by L. 1917, ch. 215, in effect Apr. 19, 1917.*)

§ 246. **Annual appropriation.**—The local authorities of a city or village having power to appropriate money therein may annually appropriate and cause to be raised by taxation in such city or village a sum sufficient to carry out the provisions of this article. (*Added by L. 1917, ch. 215, in effect Apr. 19, 1917.*)

ARTICLE XIV.

(Article renumbered by L. 1917, ch. 215.)

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 300. Laws repealed.

301. When to take effect.

§ 300. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed. (*Renumbered by L. 1917, ch. 215.*)

§ 301. **When to take effect.**—This chapter shall take effect immediately. (*Renumbered by L. 1917, ch. 215.*)

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Laws repealed.

SCHEDULE OF LAWS REPEALED.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
			except so far as it applies to the city		
1843	57	All	of New York		
1847	294	All	1886	644	All
1853	603	All	1887	282	All
1855	334	All	1887	525	All
1855	428	All	1887	673	All
1862	281	All	1888	62	All
1866	695	All	1888	328	All
1869	727	All	1889	402	All
1869	907	All	1889	526	All
1870	173	All	1890	160	All
1870	300	All	1892	25	All
1870	780	All	1892	301	All
1870	789	All	1892	330	All
1871	64	All	1892	456	All
1871	146	All	1892	473	All
1871	260	All	1892	518	All
1871	283	All	1892	685	All
1871	388	All	1893	122	All
1871	537	All	1893	349	All
1871	925	All	1893	466	All
1872	54	All	1893	490	All
1872	62	All	1894	667	All
1872	161	All	1895	350	All
1872	307	All	1895	351	All
1872	458	All	1895	417	All
1872	516	All	1895	615	All
1872	689	All	1895	754	All
1873	452	All	1895	792	All
1873	720	All	1896	53	All
1875	206	All	1896	576	All
1875	328	All	1896	873	All
1875	421	All	1896	910	All
1875	585	All	1897	54	All
1877	320	All	1897	444	Part
1877	349	All	relating to counties and municipal corporations		
1878	75	All	1898	141	All
1878	212	All	1898	543	All
1878	317	All	except part relating to religious corporations		
1879	62	All	1899	242	All
1879	307	All	1899	634	All
1879	417	All	1900	342	All
1879	526	All	1900	449	All
1880	12	All	1901	333	All
1880	21	All	1901	389	All
1880	204	All	1901	659	All
1880	336	1-5	1902	155	All
1880	435	All	1903	515	All
1880	554	All	1904	752	All
1881	226	All	1905	705	All
1881	308	All	1905	738	All
1881	522	All	1906	49	All
1881	531	All	1906	59	All
1882	68	All	1907	215	All
1882	293	All	1907	237	All
1883	124	All	1907	375	All
1883	453	All	1908	187	All
1884	244	All	1908	256	All
1885	426	All	1908	259	All
1885	479	All	1908	325	All
1886	278	All			
1886	316	All			
1886	572	All			

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Where a statute has been specifically repealed that and the repealing statute are given without explanatory note.

L. 1840, ch. 318, § 2.—Consolidated in General Municipal Law, § 73.

L. 1866, ch. 695.—Prescribes the place where the original written consent of the taxpayers to the loaning of money on the faith and credit of any town or city to aid in the construction of any railroad in the state shall be recorded. Const., art. 8, §§ 10, 11 as added in 1874, prohibits such loaning of money on credit. The statute cited is therefore obsolete and inoperative.

L. 1869, ch. 727.—This was an act entitled "An act authorizing cities and villages to acquire titles to property for burial purposes and to levy taxes for the payment of the same." It was amended by L. 1870, ch. 760, being a substantial re-enactment of the statute of 1869, and adding a new § 3. Section 1 of L. 1870, ch. 760, was amended by L. 1873, ch. 452, which latter statute also re-enacted § 2 of L. 1870, ch. 760. This series of statutes was amended finally by L. 1898, ch. 543, by adding §§ 4 and 5. The original act prior to the amendment of 1898 was applicable to cities, incorporated villages and incorporated rural cemetery associations. The statute therefore has been consolidated in the General Municipal Law covering cities and villages and has been considered as covered by the provisions of the Membership Corporations Law as to corporations. The act of 1898 which added a new section to the original statutes made that section applicable to cemetery corporations mentioned in the original acts and to cemetery corporations provided for in art. 3 of the Membership Corporations Law and cemeteries belonging to religious corporations. The provisions of the statutes of 1898, therefore, have been consolidated in the Membership Corporations Law and in the Religious Corporations Law. Thus all of the provisions of the statute of 1869 and its amendments have been provided for and all of the statutes have been repealed in their respective consolidated laws.

L. 1870, ch. 173.—Amends L. 1869, ch. 907, "general railroad bonding act," by making same applicable to Seneca, Yates and Ontario counties, but was all repealed by L. 1892, ch. 685, § 28. Obsolete and inoperative.

L. 1870, ch. 760, §§ 2, 3.—Relates to cemeteries in cities or villages. Superseded by L. 1873, ch. 452, § 2, which re-enacts statute cited. See note 12.

L. 1870, ch. 789.—Amends L. 1869, ch. 907, § 4, "general railroad bonding act," and this latter statute was repealed by L. 1892, ch. 685, § 28. Statute cited amended so as to read as follows by L. 1871, ch. 283, § 1, which erroneously states: that § 4 is amended, when in fact § 1 is intended, as there are only two sections in the statute.

L. 1871, ch. 64.—Amends L. 1869, ch. 907, "general railroad bonding act," by extending its provisions, and latter statute is repealed by L. 1892, ch. 685, § 28. L. 1869, ch. 907, and acts amendatory and supplementary were abrogated by Const., art. 8, § 11, as added in 1874.

L. 1871, ch. 146.—Amends L. 1869, ch. 907, "general railroad bonding act," by extending its provisions, and latter statute is repealed by L. 1892, ch. 685, § 28. L. 1869, ch. 907, and acts amendatory abrogated by Const., art. 8, § 11, as added in 1874.

L. 1871, ch. 260.—Amends L. 1869, ch. 907, "general railroad bonding act," by limiting its provisions, and latter statute was repealed by L. 1892, ch. 685, § 28. L. 1869, ch. 907, and acts amendatory and supplementary abrogated by Constitution, art. 8, § 11, as added in 1874.

L. 1871, ch. 388.—Amends L. 1869, ch. 907, "general railroad bonding act," by extending its provisions. The latter statute is repealed by L. 1892, ch. 685, § 28. L. 1869, ch. 907, and acts amendatory and supplementary abrogated by Const., art. 8, § 11, as added in 1874.

L. 1872, ch. 54.—Extends the provisions of L. 1869, ch. 907, "general railroad bonding act," and of the acts amendatory thereof, viz.: L. 1870, ch. 507, and L. 1871, ch. 925, to certain towns. L. 1869, ch. 907, and L. 1871, ch. 925, were repealed by L. 1892, ch. 685, § 28, and L. 1870, ch. 507, was repealed by L. 1892, ch. 686, § 238; statute cited is inoperative and obsolete. L. 1869, ch. 907, and acts amendatory and supplementary abrogated by Const., art. 8, § 11, as added in 1874.

L. 1872, ch. 62.—Extends provisions of L. 1869, ch. 907, "general railroad bonding act." See note to L. 1872, ch. 54.

L. 1872, ch. 307.—Extends provisions of L. 1869, ch. 907, "general railroad bonding act." See note to L. 1872, ch. 54.

L. 1872, ch. 516.—Statute cited amends L. 1869, ch. 907, "general railroad bond-

L. 1909, ch. 29.

Consolidators' notes.

ing act," by extending its provisions, but is repealed by L. 1892, ch. 685, § 28. Obsolete. L. 1869, ch. 907, and acts amendatory and supplementary abrogated by Const., art. 8, § 11, as added in 1874.

L. 1872, ch. 689.—Extends provisions of L. 1869, ch. 907, "general railroad bonding act." See note to L. 1872, ch. 54.

L. 1873, ch. 452.—Section 1 superseded and amended by L. 1875, ch. 206, § 1. Balance of act re-enacts L. 1870, ch. 760, §§ 2, 3, now consolidated in General Municipal Law, as §§ 161, 162. See note 12.

L. 1890, ch. 336.—Sections 1-5 consolidated in General Municipal Law, §§ 220-224. Section 6 disposed of in County Law.

L. 1890, ch. 554.—Consolidated in General Municipal Law, §§ 82, 83.

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1882, ch. 68.—Consolidated in General Municipal Law, § 225.

L. 1886, ch. 572.—Limits the time within which an action may be commenced for personal injuries against a city of 50,000 inhabitants or over and prescribes how a notice of intention to commence such action shall be filed. Is an exception to Code Civil Procedure, § 383, subd. 5.

So far as this statute applies to cities of the second class it is superseded by L. 1906, ch. 473, § 224 [Uniform Charter Cities of the Second Class], and so far as it applies to the city of Buffalo by L. 1901, ch. 105, §§ 15, 16 [Revised Charter].

This leaves the statute applicable only to the city of New York, and special in its effect. Held in *Quinn v. City of New York* that this statute and Greater New York Charter, § 261, "are concurrent and consistent," and that said statute "was not repealed by implication by the passage of the charter provision."

L. 1867, ch. 525.—Relates to refunding moneys paid by persons drafted into the army during the late Civil War. Was a temporary provision only. Temporary and obsolete.

L. 1889, ch. 402.—Consolidated in General Municipal Law, §§ 226-230.

L. 1890, ch. 160.—Sections 1-6 amended to read as follows by L. 1892, ch. 25, §§ 1-4, and L. 1896, ch. 53, §§ 2, 3. Section 7 consolidated in General Municipal Law, § 146. Section 8 states when act shall take effect.

L. 1892, ch. 25.—Sections 1, 4 amended to read as follows by L. 1896, ch. 53, §§ 1, 4. Sections 2, 3 consolidated in General Municipal Law, §§ 143, 144. Section 5 states when act shall take effect.

L. 1892, ch. 301.—Consolidated in General Municipal Law, § 51.

L. 1892, ch. 456.—Statute affected relates to public driveway and parkway in certain cities. L. 1894, ch. 758, relates to same subject and repeals all acts and parts of acts inconsistent.

L. 1892, ch. 518.—Consolidated in General Municipal Law, § 160.

L. 1892, ch. 685.—This statute, which is the "old" General Municipal Law, is recommended for repeal, because its live provisions have been incorporated in the General Municipal Law.

L. 1893, ch. 349.—Section 1 consolidated in General Municipal Law, § 3. There is no § 2. Section 3 repeals all inconsistent acts. Section 4 states when act shall take effect.

L. 1893, ch. 466.—Section 1, part amending L. 1892, ch. 685, §§ 7, 12, amended to read as follows by L. 1897, ch. 54, § 1, and L. 1903, ch. 515, § 1. Balance of section consolidated in General Municipal Law, § 18. Section 2 is a repealing section. Section 3 states when act shall take effect.

L. 1893, ch. 490.—Consolidated in General Municipal Law, § 17.

L. 1894, ch. 667.—Consolidated in General Municipal Law, § 120.

L. 1895, ch. 350.—Consolidated in General Municipal Law, § 10.

L. 1895, ch. 351.—Consolidated in General Municipal Law, § 121.

L. 1895, ch. 417.—Consolidated in General Municipal Law, §§ 206, 207.

L. 1895, ch. 792.—Consolidated in General Municipal Law, §§ 53-56.

L. 1896, ch. 53.—Consolidated in General Municipal Law, §§ 140, 141, 142, 145 respectively.

L. 1896, ch. 576.—Consolidated in General Municipal Law, § 79.

L. 1896, ch. 873.—Consolidated in General Municipal Law, § 122.

L. 1896, ch. 910.—Consolidated in General Municipal Law, § 84.

L. 1897, ch. 444.—Sections 1 and 2, except so much of each section as relates to the state, consolidated in General Municipal Law, § 86. So much of each section as relates to the state is consolidated in State Finance Law, § 43. Words referring to a county omitted, as by § 2 "municipal corporation" includes a county. Section 3 repeals inconsistent acts. Section 4 states when act shall take effect.

L. 1898, ch. 141.—Consolidated in General Municipal Law, § 85.

Cross-references.

- L. 1898, ch. 543.—Consolidated in General Municipal Law, § 163.
 L. 1899, ch. 342.—Section 1 amended "so as to read as follows," by L. 1907, ch. 375, § 1. Sections 2, 3 consolidated in General Municipal Law, §§ 211, 212. Section 4 states when act shall take effect.
 L. 1899, ch. 634.—Consolidated in General Municipal Law, §§ 180-182.
 L. 1900, ch. 342.—Consolidated in General Municipal Law, §§ 123-125.
 L. 1900, ch. 449.—Consolidated in General Municipal Law, §§ 202-204.
 L. 1901, ch. 333.—Consolidated in General Municipal Law, § 8.
 L. 1901, ch. 389.—Consolidated in General Municipal Law, § 81.
 L. 1901, ch. 659.—Consolidated in General Municipal Law, § 50.
 L. 1902, ch. 155.—Consolidated in General Municipal Law, § 87.
 L. 1903, ch. 515.—Consolidated in General Municipal Law, § 13.
 L. 1904, ch. 752.—Consolidated in General Municipal Law, § 75.
 L. 1905, ch. 705.—Sections 1, 6 amended "so as to read as follows." Sections 2-5, 7, 8 consolidated in General Municipal Law, §§ 31-33, 35, 37, 38. Section 9 is an appropriation. Section 10 states when act shall take effect.
 L. 1905, ch. 738.—Consolidated in General Municipal Law, § 76.
 L. 1906, ch. 49.—Consolidated in General Municipal Law, § 206.
 L. 1907, ch. 215.—Consolidated in General Municipal Law, §§ 30, 34, 36.
 L. 1907, ch. 237.—Consolidated in General Municipal Law, §§ 231-233.
 L. 1907, ch. 375.—Consolidated in General Municipal Law, § 210.

GENEVA EXPERIMENT STATION.

See Agricultural Law, §§ 306, 307.

GEOLOGIST.

See Education Law, § 54.

GINSENG.

Sale of; General Business Law, § 393. Breaking into garden is burglary; Penal Law, § 400.

GLANDERS.

See Agricultural Law, §§ 90-114.

GOLDWARE.

Marketing articles made of; Penal Law, § 431.

GOSPEL AND SCHOOL LOTS.

See Education Law, §§ 523-528, 361, 362.

GOVERNOR.

General provisions relating to; Executive Law, §§ 2-9.

GRADE CROSSINGS.

See Railroad Law, § 89ff.

GRAIN.

Number of pounds to the bushel; General Business Law, § 8. Illegal elevator charges; Penal Law, § 432.

GRAND ARMY OF THE REPUBLIC.

Incorporation of posts; Benevolent Orders Law.

GRAND JURY.

Formation, powers and duties; Code Crim. Pro. §§ 223-267. Stenographers and

Cross-references.

clerks; Code Crim. Pro. §§ 952-p, 952-w. Illegal disclosures by jurors or officers; Penal Law, §§ 1781-1784.

GRAND LARCENY.

See Penal Law, §§ 1294-1297.

GRAVESTONES.

Liens on; Lien Law, §§ 120-124. Malicious injury to; Penal Law, § 1427.

GREENE COUNTY.

Boundary; see County Boundaries.

GROCERY STORES.

Hours of labor, Public Health L., § 236-a.

GUARANTY CORPORATIONS.

Incorporation and powers; Insurance Law, §§ 170-184.

GUARDIAN AND WARD.

General provisions as to appointment, powers and duties of guardians; Domestic Relations Law, §§ 80-88. Appointment, removal, resignation, supervision and control of general, ancillary and testamentary guardian; Code Civ. Pro. §§ 2642-2664.

GUARD-POSTS.

For railroad bridges; Penal Law, § 1988.

GUIDE POSTS.

Erection of; Highway Law, § 68.

GUNPOWDER.

Unlawful keeping or transportation; Penal Law, §§ 1894, 1895.

GUY PARK HOUSE.

See Historic Places.

HABEAS CORPUS.

See Code Civ. Pro. §§ 1991-2066. Reconfining persons discharged upon a writ; Penal Law, § 1788. Concealing person entitled to writ of deliverance; Penal Law, § 1789.

HABITUAL CRIMINALS.

When person may be so adjudged; Penal Law, §§ 1020-1022. Code Crim. Pro. §§ 510-514.

HABITUAL DRUNKARDS.

See Liquor Tax Law, § 29.

HALF WINE.

Penalty for selling infant; Penal Law, § 437. To be marked or labelled, Public Health Law, §§ 48, 49.

HAMILTON GRANGE.

See Historical Places.

§§ 1,2.

Laying pipes in streets.

L. 1879, ch. 317.

HANDWRITING.

Comparison of disputed; Code Civ. Pro., § 961-d.

HARBOR MASTERS.

See New York Harbor.

HARRIMAN GIFT.

See Palisades Commission.

HAY.

Provisions regulating sale of; General Business Law, §§ 253-255.

HAZING.

Definition and punishment; Penal Law, § 1030.

HEATING CORPORATIONS.

L. 1879, ch. 317.—“An act to authorize the laying of pipes in the streets, avenues, and public places in the various cities, towns, and villages of this state, for heating and other purposes.”

§ 1. Municipal authorities to carry out act.—The municipal authorities of the cities, towns, and villages of the State of New York are hereby authorized and empowered to carry out the provisions of this act.

§ 2. Powers of heating corporations.—Any corporation or association formed or organized under the act entitled “An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes,” passed February seventeenth, eighteen hundred and forty-eight, or under any of the amendments to said act, or under the “Act to provide for the organization and regulation of certain business corporations,” passed June twenty-first, eighteen hundred and seventy-five, shall have full power to manufacture, furnish, and sell such quantities of hot water, hot air, or steam as may required in the city, town, or village where the same shall be located; and such corporation shall have power to lay pipes or conductors for conducting hot water, hot air, or steam through the streets, avenues, lanes, alleys, squares, and highways in such city, village, or town, with the consent of the municipal authorities of said city, town, or village, and under such reasonable regulations and conditions as they may prescribe; and whenever any such permission shall be granted, it shall only be upon the condition that reasonable compensation shall be paid therefor, and upon a further condition that a satisfactory bond shall be given to secure the city, town, or village against all damages in the use of said pipes. The amount of the compensation, and the manner of its payment, and the amount of the bond shall be first fixed and determined by said municipal authorities, before any pipes, as provided for by this act, shall be laid in any city, town, or village of this state, and that all such permissions heretofore given by any of said municipal authorities, where the above terms have been complied with, are hereby confirmed.

Cross-references.

The acts referred to are L. 1848, ch. 40, and L. 1875, ch. 611. See L. 1880, ch. 263 and L. 1885, ch. 549.

HEIRS.

Probate of heirship; Code Civ. Pro. §§ 2765-2767. Production of pretended heir; Penal Law, § 922. See Decedent Estate Law.

HERKIMER COUNTY.

Town elections in; Town Law, §§ 570-574. Jurors in; see Jurors.

HERKIMER HOMESTEAD.

See Historic Places.

HIGHLANDS OF THE HUDSON RESERVATION.

L. 1909, ch. 463, repealed by L. 1910, ch. 360.

Note.—The repeal of this act is in view of the acceptance of the Harriman gift, and the increase in the power and jurisdiction of the Palisades Park Commission. See that title.

HIGHWAY LAW.

L. 1909, ch. 30.—“An act relating to highways, constituting chapter twenty-five of the consolidated laws.”

(In effect February 17, 1909.)

CHAPTER XXV OF THE CONSOLIDATED LAWS.**HIGHWAY LAW.**

- Article 1. Short title and definitions (§§ 1-3).
 2. Department of highways (§§ 10-25).
 3. District or county superintendents (§§ 30-33).
 4. Town superintendents; general powers and duties (§§ 40-82).
 5. Highway moneys; state aid (§§ 90-111).
 6. State and county highways (§§ 120-160).
 6-a. Improvement with federal aid (§§ 161-168).
 7. Maintenance of state and county highways (§§ 170-180).
 8. Laying out, altering and discontinuing highways; private roads (§§ 190-240).
 9. Bridges (§§ 250-269).
 9-a. Bridges in certain counties (§§ 269-a-269-j).
 10. Ferries (§§ 270-274).
 11. Motor vehicles (§§ 280-293).
 12. Miscellaneous provisions (§§ 320-344).
 13. Saving clauses; laws repealed; when to take effect (§§ 350-358).

ARTICLE I.**SHORT TITLE AND DEFINITIONS.**

- Section 1. Short title.
 2. Definitions.
 3. Classification of highways.

§ 1. Short title.—This chapter shall be known as the “Highway Law.”

Source.—Former Highway Law (L. 1890, ch. 568) § 1.

Historical statement.—This chapter of the consolidation is identical with the new Highway Law of 1908 (L. 1908, ch. 330); the sections thereof are identical with the sections of the law of 1908. In showing the source of the several sections reference is made to the laws existing prior to the enactment of the Law of 1908.

The first general law on the subject of highways and bridges was passed in 1797 (ch. 43) which regulated highways in all the counties of the state except those of New York, Suffolk, Queens and Kings. The laws upon this subject were again revised and re-enacted by L. 1801, ch. 186, and were subsequently included

in the Revised Laws of 1813, ch. 33, and in the Revised Statutes of 1828, tit. 1, ch. 16, pt. 1.

Prior to 1873 all work upon the highways of the state outside of cities and villages was performed by the owners of property lying in the respective districts or wards, the number of days' labor to be performed by each being assessed against him in proportion to the value of his property. This system became known as the labor system. In 1873, by ch. 395, the several towns were given the option of changing to a money system, by which an annual tax was levied instead of an assessment for labor, and the money so raised was to be expended in procuring work to be done by contract or days' labor. The provisions of this act were carried over into the Highway Law of 1890. (Rept. of Board of Statutory Consolidation, p. 2570.)

Following the Revised Statutes of 1828 the next successful effort to consolidate and re-enact the laws upon the subject of highways was made by the Statutory Revision Commission in 1890. As a result of the labors of this Commission the Highway Law of 1890 (ch. 568) was enacted. This act consolidated and revised previous legislation upon the subject; but it was more than a consolidation in that new provisions were ingrafted on the antecedent law for the purpose of improving the highway system. *People ex rel. Root v. The Board of Supervisors* (1895), 146 N. Y. 107, 112.

The Highway Law of 1908 was submitted to the legislature in that year by the Joint Legislative Committee on Highways. This revision was much more than a consolidation or codification of existing general laws relating to highways and bridges. As stated in the preface to the Highway Code of the State of New York "But it does more than revise and codify existing laws; it originates new methods of state and county administration of highway affairs; it logically and effectively unites centralization with local control and responsibility, on the one hand, by creating a state commission with full power to aid, supervise and direct the local officer in administering highway affairs in his locality, and on the other, by preserving to the local officer all his power and responsibility in respect to local conditions and the expenditure of town and county funds; it outlines a comprehensive system of trunk highways and provides for their construction at the sole expense of the state; it abolishes the time-worn and ineffective labor system of taxation for the maintenance of town highways and substitutes therefor a money tax to be levied by the board of supervisors upon estimates duly submitted by the town superintendent of highways and revised by the town board, subject to reasonable limitations as to amounts which may be raised without a vote of a town meeting; it provides for the proper audit of town expenditures for highways and bridges and the systematic and uniform accounting for receipts and expenditures by highway officers, under the supervision of and in the form prescribed by the state commission of highways; it has more fully protected the interests of county and town in the construction of county highways and has provided more effectual safeguards in the award of contracts for the construction of state and county highways." As above indicated the Highway Law of 1908 was re-enacted as ch. 45 of the Consolidated Laws without change in arrangement or substance except that the Motor Vehicle Law is made a part thereof and is now found in art. 11.

§ 2. Definitions.—1. The term "department," when used in this chapter, shall mean the department of highways, as constituted herein.

2. The terms "commission," "highway commission," and "state highway commission," when so used, shall each mean the state commission of highways. The term "state superintendent of highways," when so used,

shall mean the commissioner of highways, and reference to powers and duties of the state superintendent of highways to be exercised subject to the commission shall mean the exercise of such powers and duties by the commissioner of highways without the concurrence of any other commission or officer.

3. The term "district superintendent" or "county superintendent," when so used, shall mean the district superintendent of highways or county superintendent of highways, respectively.

4. The term "town superintendent," when so used, shall mean the town superintendent of highways.

5. A highway within the provisions of this chapter shall be deemed to include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls and all bridges having a span of five feet or less. (*Amended by L. 1911, ch. 646, L. 1912, ch. 83, and L. 1913, ch. 80.*)

Source.—New, except that subd. 5 was derived from former Highway Law (1890, ch. 568) § 53 as amended by L. 1907, ch. 716, which provided in effect that a bridge with a span of more than five feet is not included as a part of the highway.

What is a highway.—At common law a highway is defined as a way over which the public at large have a right of passage whether it be a carriageway, a horseway or footway, or a navigable river. 3 Kent's Commentaries, 432. Any way which is common to all people without distinction is a highway. *People ex rel. Williams v. Kingman* (1862), 24 N. Y. 559.

A public highway, as distinguished from a private road is one which is open to the travel of the public. It is the right to travel upon it by all the world and not the exercise of the right which makes it a public highway. *Matter of Mayer, etc., of New York* (1892), 135 N. Y. 253, 31 N. E. 1043.

The term "highways," within the meaning of the statute, does not include a "canal." *Queens Terminal Co. v. Schmuck* (1911), 147 App. Div. 502, 512, 132 N. Y. Supp. 159.

Rivers and canals.—A navigable river is a public highway. *Robinson v. Chamberlain* (1866), 34 N. Y. 389. Canals may constitute public highways. *Robinson v. Chamberlain* (1866), 34 N. Y. 389.

Streets as highways.—There is no doubt that the term "highway" as generally used includes the streets of a city or village. *Adams v. S. & W. R. R. Co.* (1851), 11 Barb. 414, 449, revd. (1852) 10 N. Y. 328; *Benedict v. Goit* (1848), 3 Barb. 459; *Brace v. N. Y. Central R. R. Co.* (1863), 27 N. Y. 269, 271.

Under § 99 of R. S., pt. 1, ch. 16, tit. 1 (§ 234 of the present law), providing that all highways that have ceased to be traveled or used as highways for six years shall cease to be a highway for any purpose, it was held that the term "highway" applies to a village street. *Excelsior Brick Co. v. Village of Haverstraw* (1894), 142 N. Y. 146, 36 N. E. 819; *Horey v. Village of Haverstraw* (1891), 124 N. Y. 273, 26 N. E. 532.

The term "highway" in its ordinary and popular sense, refers to the country roads under the management and control of the local authorities of the several towns or counties of the state. It does not include streets or avenues in cities though it cannot be denied that such streets or avenues are highways in the broad sense. *In re Woolsey* (1884), 95 N. Y. 135; *In re Burns* (1898), 155 N. Y. 23, 49 N. E. 246.

A private approach having a span of less than five feet is to be deemed a part of the highway. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

Sidewalks as part of highway.—A sidewalk is as much a part of the highway as the traveled wagon road is. *People v. Meyer* (1899), 26 Misc. 117, 56 N. Y. Supp. 1097, 1099.

Turnpikes and plankroads.—The following cases are to the effect that public highways include toll roads: *Dodge County Commr's v. Chandler* (1877), 96 U. S. 205, 208, 24 L. Ed. 625; *Fox v. Union Turnpike Co.* (1901), 59 App. Div. 363, 69 N. Y. Supp. 551, 553; *Rogers v. Bradshaw* (1823), 20 Johns. 735, 742. Toll roads and bridges are subject to the provisions of the Transportation Corporations Law, §§ 120-151.

Bridges as part of highways.—Ordinarily it may be said that a highway includes all bridges necessary for the proper use of such highway by the traveling public. It has been held that as a general proposition bridges are treated as portions of the highways which cross them, and are to be maintained by the same authorities to whom the duty of repairing the highway is committed. *Washer v. Bullitt County* (1883), 110 U. S. 558, 568, 28 L. Ed. 249, 4 Sup. Ct. 249; *Dodge County Commr's v. Chandler* (1877), 96 U. S. 205, 208, 24 L. Ed. 625.

Cul-de-sac.—A way which is open at one end only is a cul-de-sac. Although every public thoroughfare is a highway, it is not essential that every highway should be a thoroughfare, as it is now well settled that a cul-de-sac may be a highway. *Elliot on Roads & Streets*, § 2. In the case of *Holdane v. Cold Spring Trustees* (1856), 23 Barb. 103, *affd.* (1860), 21 N. Y. 474, two of the three judges held that a cul-de-sac could not be a highway. They based their decisions upon what they supposed to be the common law. It has been laid down by Lord Kenyon in *Rugby Charity v. Merryweather* (1809), 11 East (Eng.) 376, that a mere cul-de-sac might be a highway; that otherwise such places would be traps to catch trespassers. And in *Bateman v. Bluck* (1852), 14 Eng. Law & Eq. 69, the question was fully considered, and the court held that it was no objection to a highway that it was a mere cul-de-sac, and not a thoroughfare.

In the case of *People ex rel. Williams v. Kingman* (1862), 24 N. Y. 559, the court of appeals disapproved the decision in *Holdane v. Cold Spring Trustees* (1856), 23 Barb. 103, *affd.* (1860), 21 N. Y. 474, and held that upon principle as well as authority it is no objection to the highway that it is a cul-de-sac; that public ways with outlet at one end may, and even do, exist. See also *People ex rel. Van Rensselaer v. Van Alstyne* (1866), 3 Keyes, 35, 37; *Saunders v. Townsend* (1882), 26 Hun 308, 309.

Private roads.—Special provisions are made in this chapter for the laying out of private roads. See Highway Law, §§ 211-226. A way opened by the owners of private lands for the accommodation of the lands through and to which it leads, although laid out as a public road, must be deemed a private way, even if the public are permitted to travel over it, unless it be shown to have been dedicated to, and accepted and adopted by the public as a public highway. *Palmer v. Palmer* (1896), 150 N. Y. 139, 44 N. E. 966. As to what constitutes a dedication of a private road as a public highway, see Highway Law, § 191, and the cases cited thereunder.

Bridges and culverts.—Bridges are a part of the highway and may be constructed by the state in the improvement of a highway. Rept. of Atty. Genl. (1904) 316.

Size and dimension of culverts necessary in road construction; even exceeding five feet in width, may be determined by the State Highway Commissioner. Rept. of Atty. Genl. (1909) 611.

Right to travel outside of highway.—If a highway be impassable or foundeuous, or even dangerous to be traveled over, or inconvenient from being out of repair, or from other causes, the public have a right to a new way for the time being and for this purpose may go on the adjoining land. If the adjoining land be inclosed, the traveler may remove so much of the fence as will enable him to pass around

§ 3.	Short title and definitions.	L. 1909, ch. 30.
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the obstruction, but he must do no unnecessary injury. *Williams v. Safford* (1849), 7 Barb. 309; *Newkirk v. Sabler* (1850), 9 Barb. 652; *Holmes v. Seely* (1838), 19 Wend. 507.

§ 3. **Classification of highways.**—Highways are hereby divided into four classes.

1. State highways are those constructed or improved under this chapter at the sole expense of the state, including those highways specified and described in section one hundred and twenty of the highway law and acts amendatory thereof.

2. County highways are those heretofore or hereafter constructed or improved at the joint expense of state, county and town, or state and county, as provided by law, except those highways specified and described in section one hundred and twenty of this chapter.

3. County roads are those designated as such under a general or special law and constructed, improved, maintained and repaired by the county as such, in counties in which the county road system has been or may be adopted.

4. Town highways are those constructed, improved or maintained by the town with the aid of the state, under the provisions of this chapter, including all highways in towns, outside of incorporated villages constituting separate road districts, which do not belong to either of the three preceding classes. (*Subd. 4, amended by L. 1916, ch. 578. Section amended by L. 1910, ch. 567 and L. 1912, ch. 83.*)

Source.—New. The county highways are the same as those formerly constructed under the so-called Higby-Armstrong Act (L. 1898, ch. 115) and the acts amendatory thereof, at the joint expense of state, county and town.

Classification.—Highways are classified under this section as state, county and town according to the method of construction, improvement and maintenance. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

A county road, established as such pursuant to L. 1893, ch. 333, did not become a town road by reason of the repeal of that law in 1909, so as to make the town the proper party to apply under section 92 of the Railroad Law (L. 1910, ch. 481) for a county road. *County of Nassau v. Luessen* (1910), 69 Misc. 184, 125 N. Y. Supp. 206.

Town highways.—Roads which have been constructed pursuant to section 178 of the Highway Law cannot be brought under the classification of either state or county highways as defined by subdivisions 1 and 2 of section 3. All roads constructed under said section 178 must come under the classification of town highways. Rept. of Atty. Genl. (1909) 635.

Section cited.—*County of Albany v. Hooker* (1912), 204 N. Y. 1, 97 N. E. 403.

ARTICLE II.

DEPARTMENT OF HIGHWAYS.

Section 10. Department of highways established.

11. State commission of highways; commissioner of highways.
12. Oath of office; undertaking.
13. Principal office; official seal; stationery.
14. Deputy commissioners, secretary and chief auditor of the department.
15. General powers and duties of the commissioner of highways.
16. Division engineers.
17. Duties of division engineers.
18. Salaries and expenses.
19. Appointment of officers, clerks and employees.
20. Blank forms and town accounts.
21. Examination of accounts and records.
22. Condemnation of bridges.
23. Estimate of cost of maintenance of state and county highways.
24. Rules and regulations for state and county highways.
25. Patented material or articles.

§ 10. Department of highways established.—There is hereby established a department, to be known as a department of highways, which shall be constituted as provided in this chapter, and shall have the powers and perform the duties hereinafter prescribed.

Source.—New.

§ 11. State commission of highways; commissioner of highways.—The state commission of highways is continued. Such commission shall consist of a single commissioner, to be known as the commissioner of highways, who shall be the head of the department of highways. Such commissioner shall be appointed by the governor by and with the advice and consent of the senate for a term of five years. He shall devote all of his time to the duties of his office. The governor may remove such commissioner for inefficiency, neglect of duty or misconduct in office. A copy of the charges against him shall be served upon such superintendent and he shall have an opportunity of being publicly heard in person or by counsel in his own defense upon not less than a ten days' notice. If such commissioner shall be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner and his findings thereon, together with a complete record of the proceedings. The commissioner of highways shall receive an annual salary to be fixed by the governor of not exceeding ten thousand dollars. Wherever by the terms of this chapter or other statute, action by the commission is required to be taken by resolution or in any manner by the concurrence of the members of * a majority, such action shall, when the commission consists of a single commissioner, be taken by a formal order of such commis-

* So in original.

sioner entered in the records of the department of highways. (*Amended by L. 1911, ch. 646, and L. 1913, ch. 80.*)

Source.—New.

References.—Appointment by the governor by and with the advice and consent of the Senate, Public Officers Law, § 7; removal of officers appointed by the governor by and with the advice and consent of Senate, Id., § 32; vacancies, how filled, Id. §§ 38 and 39; appointment and duties of deputies, Id., § 9; powers and duties of district superintendent, Highway Law, § 33.

Continuance of commission. L. 1913, ch. 80. § 18, is as follows:

§ 18. The state commission of highways shall continue as now constituted until the appointment and qualification of the commissioner of highways, pursuant to the highway law as hereby amended, and thereupon the term of office of the state superintendent of highways shall expire, and the superintendent of public works and state engineer shall cease to be members of such commission and all their powers and duties in respect to highways shall terminate; and thereupon the state commission of highways as constituted in pursuance of the highway law as amended by this act shall be deemed and held to constitute a continuation of the state commission of highways as now constituted and not as a new commission for the purpose of succession to all the rights, powers, duties and obligations of the state commission of highways as now constituted, except as modified by this act, with the same force and effect as if such modifications were made without any change in the membership of the present commission; and the present commission as now constituted, and the commission to be constituted in pursuance of the highway law as amended by this act, shall be deemed and held to be one continuing commission notwithstanding the changes in the membership thereof. The division engineers in office when this act takes effect shall continue in office as six of the division engineers, in pursuance of the highway law as hereby amended, in charge of the divisions to which they may be respectively assigned by the commissioner of highways. This act shall make no changes in any of the civil service positions under the highway law, and the present deputies, division engineers, resident engineers, division superintendents, clerks, officers and employees of the state commission of highways, shall continue in their respective offices and employments until the appointment and qualification of their successors in pursuance of the highway law as amended by this act, and in pursuance of the civil service law.

Political qualifications.—The Civil Service Law provides that not more than two of the civil service commissioners shall be adherents of the same political party. The court of appeals in the case of *Rogers v. Common Council of the City of Buffalo* (1890), 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579, held that such legislation, by providing that not more than a certain proportion of the members of the commission should be taken from one party, does not amount to an arbitrary exclusion from office or to a general regulation requiring qualifications not mentioned in the state constitution.

Supervisor may be appointed foreman of laborers in the Highway Department, the duties of the officers not being incompatible. Rept. of Atty. Genl. (1911), Vol. 2, p. 642.

The commissioner of highways is a public officer appointed under the authority of the state, within the meaning of section 3258 of the Code of Civil Procedure, so as to entitle the successful defendant to extra costs in an action for damages because of interference with and injury to certain water pipes belonging to plaintiffs and laid in a certain county highway while defendant was improving the same under the supervision of commissioner of highways. *Fernald v. Walker* (1914), 148 N. Y. Supp. 399.

L. 1909, ch. 30.

Department of highways.

§§ 12-14.

§ 12. **Oath of office; undertaking.**—The commissioner of highways shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office, and execute an undertaking in the sum of twenty-five thousand dollars, to be approved by and filed with the comptroller and renewed as often as the governor may require. Such undertaking shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such commissioner of highways in accordance with law, or in default thereof that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default. (*Amended by L. 1911, ch. 646, and L. 1913, ch. 80.*)

Source.—New.

References.—Constitutional oath of office, Const., art. 13, § 1; administration of oath, Public Officers Law, § 10; conditions, force and effect of official undertaking, Id., §§ 11 and 12.

§ 13. **Principal office; official seal; stationery.**—The principal office of the department shall be in the city of Albany in rooms provided by the trustees of public buildings. The department shall have an official seal, to be prepared by the secretary of state, as provided by law. The offices of the department shall be supplied with necessary postage, stationery and office furniture and appliances, to be paid for out of moneys appropriated therefor, and it shall have prepared for it by the state, such books and blanks as are required for carrying on the business of the department.

Source.—New.

References.—Seals to be prepared by secretary of state, Public Officers Law, § 60; method of impressing official seals on public papers, General Construction Law, § 43.

§ 14. **Deputy commissioners, secretary and chief auditor of the department.**—The commissioner of highways shall appoint a secretary and chief auditor of the department and three deputy commissioners. Each of the deputy commissioners shall have had practical experience in actual building, construction and maintenance of highways and be familiar with the operation and effect of state statutes relating to highways and bridges. One of such deputies shall be a practical civil engineer, to be known as the first deputy, and his duties shall relate to the plans, specifications and execution of all contracts pertaining to state and county highways; one of such deputies shall be known as the second deputy, and his duties shall relate to the maintenance of state and county highways; one of such deputies shall be known as the third deputy and his duties shall relate to the repair, improvement and maintenance of town highways and bridges, and county roads and roads and bridges on the Indian reservations. The first deputy shall receive an annual salary of six thousand dollars. The second and third deputies and the secretary shall each receive an annual salary of five thousand dollars. The chief auditor shall receive an annual salary of five thousand dollars. Each deputy, the secretary and the chief

auditor shall before entering upon the duties of his office each take and subscribe the constitutional oath of office. Each deputy, the secretary and the chief auditor shall each execute an undertaking in the sum of five thousand dollars, to be approved by and filed with the comptroller and renewed as often as the commissioner of highways may require. The commissioner of highways, by order filed in the office of the department, may at any time designate a deputy to sign on behalf of the commission such papers and documents as are specified in such order. The chief auditor shall determine the authorization for and the accuracy of every expenditure of state funds for highway purposes and his report thereon, after approval by the commissioner of highways, shall be transmitted to the comptroller for final audit. Each deputy, the secretary and the chief auditor shall have such other and further duties as the commissioner of highways may determine, and shall each be subject to his direction and control and may be removed by him. (*Added in place of § 14, by L. 1913, ch. 80.*)

References.—Deputies, powers and duties, Public Officers Law, § 9. As to oaths of office and undertakings generally, *Id.* §§ 10-15.

§ 15. General powers and duties of the commissioner of highways.—The commissioner of highways shall

1. Have general supervision of all highways and bridges which are constructed, improved or maintained in whole or in part by the aid of state moneys.

2. Prescribe rules and regulations not inconsistent with law, fixing the duties of division engineers, resident engineers, district, county and town superintendents in respect to all highways and bridges and determining the method of the construction, improvement or maintenance of such highways and bridges. Such rules and regulations shall, before taking effect, be printed and transmitted to the highway officers affected thereby.

3. Compel the compliance with laws, rules and regulations relating to such highways and bridges by highway officers and see that the same are carried into full force and effect.

4. Aid district, county and town superintendents in establishing grades, preparing suitable systems of drainage and advise with them as to the construction, improvement and maintenance of highways and bridges.

5. Cause plans, specifications and estimates to be prepared for the repair and improvement of highways and the construction and repair of bridges, when requested so to do by a district, county or town superintendent.

6. Investigate and determine upon the various methods of road construction adapted to different sections of the state, and as to the best methods of construction and maintenance of highways and bridges.

7. Make an annual report to the legislature on or before February fifteenth, stating the condition of the highways and bridges, the progress of

the improvement and maintenance of state, county and town highways, the amount of moneys received and expended during the year upon highways and bridges and in the administration of his office, and also containing such matters as in his judgment should be brought to the attention of the legislature, together with recommendations as to such measures in relation to highways as in his judgment the public interests require.

8. Compile statistics relating to the public highways throughout the state, and collect such information in regard thereto as he shall deem expedient.

9. Cause public meetings to be held at least once each year, in each district or county, for the purpose of furnishing such general information and instruction as may be necessary, regarding the construction, improvement or maintenance of the highways and bridges and the application of the highway law, and the rules and regulations of the department, and also for the purpose of hearing complaints. He shall notify the district or county superintendent of his intention to hold such meeting or meetings, specifying the date and the place thereof.

10. Aid at all times in promoting highway improvement throughout the state, and perform such other duties and have such other powers in respect to highways and bridges as may be imposed or conferred on him by law.

11. Approve and determine the final plans, specifications and estimates for state and county highways upon the receipt of the report and recommendations of the county or district superintendent, as provided herein, and transmit the same in the case of a county highway to the board of supervisors. After the approval of such plans, specifications and estimates by the board of supervisors and the return thereof to the commissioner of highways, in the case of a county highway and after his final determination in respect thereto in the case of a state highway, the commissioner of highways shall cause a contract to be let for the construction or improvement of such state or county highway after due advertisement.

12. Prepare tables showing the total number of miles of highways in the state, by town and county, and file a copy of the same in the office of the comptroller.

13. Divide the state into not more than nine divisions and assign a division engineer to the charge of each, subject to his direction, supervision and control. In making such division no county shall be divided.

14. Make and file with the comptroller a schedule of salaries of all officers, clerks, employees, engineers and superintendents, appointed by him, whose salaries are not fixed by law.

15. Inquire into the official conduct of all subordinates of the department.

16. Direct and cause to be made such repairs of state and county highways as he deems necessary, within the estimates and appropriations made therefor. (*Amended by L. 1913, ch. 80.*)

Source.—New.

References.—Rules and regulations for the use of state and county highways by the traveling public, Highway Law, § 22; responsibility of commissioner for performance of contracts, Id., § 132; county and district superintendents to notify town superintendents and supervisor of time and place of public meetings, Id., § 33, subd. 7; town superintendent to attend such meetings, Id., § 47, subd. 10.

Authority of state highway commission extends to all highway improvements maintained in whole or in part by the aid of state moneys. The commission also has supervisory control of moneys in the hands of the supervisor for such purpose; its duty being to safeguard such funds furnished by the state. Rept. of Atty. Genl. (1909) 612.

Whatever powers the state engineer and surveyor may have had prior to the passage of this act touching the closing of highways in the construction of the Erie canal improvement ceased and became vested in the highway commission. Rept. of Atty. Genl. (1909) 415.

The state highway commission has the authority to construct a highway the improvement of which had been provided for pursuant to L. 1898, ch. 115, before the incorporation of a city including such highway. Rept. of Atty. Genl. (1909) 650.

The highway commission may reconstruct, and treat as unimproved, highways constructed under L. 1908, ch. 118, upon the petition of a board of supervisors. Rept. of Atty. Genl., June 22, 1909.

Where a condemnation proceeding in behalf of the city of New York to take a county road under the supervision of the highway commission necessitates changes therein for the purpose of constructing a reservoir, the state highway commission has authority to locate said road and control its construction. Rept. of Atty. Genl. (1909) 614.

Culverts, determining size of.—The state highway commission may determine the size and dimension of culverts necessary in road construction, even exceeding five feet in width. Rept. of Atty. Genl. (1909) 611.

Closing of highways where necessary for work of Barge Canal.—General jurisdiction over highways being vested in the highway commission, when necessity arises for closing a highway within the bonds of a Barge Canal contract the contractors' application for authority so to do must pass through the state engineer to the highway commission and the authorization for such closing by the highway commission should be conveyed to the contractor by the state engineer with his approval. Rept. of Atty. Genl. (1909) 415.

Regulation of use of traction engines by State Highway Commission in hauling stone, etc., over public highways, see Rept. of Atty. Genl. (1910) 738.

The supervisory powers of the state commissioner of highways involve wide discretion as to the construction and maintenance of the highway system of the state, and the exercise of this discretion necessarily affects the manner in which the funds to be raised by the state, counties and towns relating to such construction and maintenance shall be collected and disbursed. *People ex rel. Carlisle v. Supervisors of Onondaga* (1916), 217 N. Y. 424, 111 N. E. 1057, affg. (1914), 164 App. Div. 922, 149 N. Y. Supp. 1103.

There is no provision of the Highway Law giving the State Commissioner any authority or control over the streets or avenues of a city. Rept. of Atty. Genl. (1909) 626.

There is no authority conferred upon the commission to act in the event of the failure of the electors of the town to vote the necessary appropriation for the repair of a bridge. Rept. of Atty. Genl. (1910) 716.

Plans and specifications.—No absolute duty rests upon the county superintendent to prepare and furnish plans, specifications and estimates for the repair and im-

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provement of strictly town highways, but the statute contemplates that he may in a proper case decline to do so and call upon the Highway Commissioner to provide the same. *People ex rel. Seaman v. Cocks* (1912), 149 App. Div. 883, 134 N. Y. Supp. 808.

§ 16. **Division engineers.**—The commissioner of highways shall appoint a division engineer for each of the divisions of the state. Each person so appointed as a division engineer shall be a practical civil engineer having had actual experience in the construction and maintenance of highways and bridges. The salary of such engineers shall be four thousand dollars per annum. An office may be maintained by such division engineers at a convenient place within each division as authorized by the commissioner of highways. The salary and expenses of such engineers shall be paid out of moneys appropriated therefor upon the requisition of the commissioner of highways. Each division engineer shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office and execute an official undertaking in the sum of ten thousand dollars to be approved by and filed with the comptroller and renewed as often as the commissioner of highways may require. The commissioner of highways, subject to the provisions of the civil service law, may remove such division engineers. (*Amended by L. 1911, ch. 646, and L. 1913, ch. 80.*)

Source.—New.

§ 17. **Duties of division engineers.**—Each division engineer shall devote his entire time to the performance of his duties. He shall, under the direction and control of the commissioner of highways:

1. Make or cause to be made all surveys, maps, plans, specifications and estimates necessary or required for the improvement, construction and maintenance of state and county highways within the division for which he is appointed.

2. Examine, revise and approve all plans, specifications and estimates and proposals for the improvement, construction, and maintenance of highways and bridges within his division, which may be submitted by the commissioner of highways, pursuant to the provisions of this chapter, or the rules and regulations of such commissioner.

3. Examine and inspect, or cause to be examined and inspected, the work performed on any highways, and report to the commissioner of highways as to whether the work has been done in accordance with the plans and specifications and contracts made therefor.

4. Approve and certify to the monthly estimates or allowances for work being performed under any contract let for the construction, improvement or maintenance of state and county highways.

5. Inspect, or cause to be inspected, all state and county highways, and report from time to time in respect thereto, when required by the commissioner of highways.

6. Consult with district, county and town superintendents and other

highway officers in respect to the proper methods of constructing, improving and maintaining highways and bridges.

7. Perform such other duties as may be prescribed by the commissioner of highways.

8. Have charge of the construction, reconstruction, maintenance and repair of state and county highways in his division, under the supervision of the deputy having jurisdiction thereof.

9. When the corners of the boundaries of counties, cities, villages and subdivision lots of towns shall have been located, as provided in subdivision nine of section thirty-three of this chapter, it shall be the duty of the division engineer to accurately set a monument at such corner, except in cases where the improvement of such highway or road has been completed prior to the location of such corner as provided in such subdivision. Such monument shall be of some durable material and shall be so set that the top thereof shall be on a level with the surface of such improved highway or road. The cost and expense of such monuments and the setting of the same shall be a state charge. (*Subd. 9 added by L. 1916, ch. 217. Section amended by L. 1911, ch. 646, and L. 1913, ch. 80.*)

Source.—New.

Conspiracy of engineers employed by the state and the officers and employees of a state road contractor to defraud the state by not constructing the road according to specifications. Evidence examined and held insufficient to establish any motive on the part of the employees of the state to commit the crime charged. *People v. Suffolk Contracting Co.* (1916), 171 App. Div. 645, 157 N. Y. Supp. 523.

§ 18. **Salaries and expenses.**—All engineers, superintendents, clerks, officers and other employees of the department shall receive the compensation fixed by the commissioner of highways except as otherwise defined and established in this chapter. In the discharge of their official duties the commissioner of highways, deputies, secretary, engineers, and the clerks, officers and other employees of the department shall have reimbursed to them their necessary traveling expenses and disbursements. Such salaries and expenses shall be paid by the state treasurer upon the warrant of the comptroller, out of moneys appropriated therefor in the same manner as the salaries and expenses of other officers, clerks and employees are paid. (*Former § 14, as amended by L. 1911, ch. 646, renumbered and amended by L. 1913, ch. 80.*)

Source.—New.

References.—Payment of traveling and other expenses; statement to be itemized, *State Finance Law*, § 12.

§ 19. **Appointment of officers, clerks and employees.**—The commissioner of highways shall appoint such resident engineers, district superintendents, clerks, officers and employees as may be required to carry out the provisions of this chapter, subject to the civil service laws and the provisions of this chapter, within the amount appropriated therefor, unless the appointment of such clerks, officers or employees is otherwise provided for

herein. District superintendents, appointed as provided in this chapter, shall be appointed from lists prepared from examinations which shall test their qualifications for the actual construction and maintenance of highways and their executive capacity, rather than their scientific attainments. Clerks, other than those employed in the principal office of the commissioner of highways, inspectors and other employees in the department whose duties pertain to the maintenance of highways, shall likewise be selected from lists prepared from examinations testing their general knowledge of the highway law and of the practical construction of highways. Inspectors of construction, other than engineers and levelers, shall be selected from lists similarly prepared, except that they shall be residents of the county within which the highway constructed or improved is located. To the end that the employees of the department of highways engaged in the work of constructing, improving or maintaining highways under the provisions of this chapter may be practical highway builders, the commissioner of highways is authorized to indicate to the civil service commission the relative value which should be given to experience and scientific attainments. The commissioner of highways, subject to the provisions of the civil service law, may remove the resident engineers, district superintendents, clerks, officers and employees of the department. (*Added by L. 1913, ch. 80.*)

§ 20. **Blank forms and town accounts.**—The commissioner of highways shall prescribe and furnish blank forms of orders, reports and accounts and blank books, whenever in his judgment they are required for the convenience of his office and of highway officers. (*Former § 18 renumbered and amended by L. 1913, ch. 80.*)

Source.—Former Highway Law (L. 1890, ch. 568), § 28 as added by L. 1906, ch. 363, and amended by L. 1907, ch. 719. This section provided that the state engineer should prescribe the form of blanks to be used by highway commissioners and supervisors in keeping accounts of highway moneys.

Reference.—The commission is authorized to prescribe the method of keeping town accounts of highway moneys, Highway Law, § 108.

§ 21. **Examination of accounts and records.**—The commissioner of highways may, at such times as may be deemed expedient, cause an examination of all accounts and records kept as required by this chapter, and it shall be the duty of all county and town officers to produce all such records and accounts for examination and inspection, at any time on demand of a representative of the commissioner of highways. (*Former § 19 renumbered and amended by L. 1913, ch. 80.*)

Source.—New.

Reference.—Form of keeping accounts of moneys received and expended for highway and bridge purposes, Highway Law, § 108.

§ 22. **Condemnation of bridges.**—The commissioner of highways shall cause an inspection to be made of any bridge which is reported to be

unsafe for public use and travel by the district or county superintendent, the town superintendent, or five residents of the town. If such bridge is found to be unsafe for public use and travel the commissioner of highways shall condemn such bridge, and notify the district or county superintendent, the town superintendent and the supervisor of the town, of that fact. The district or county superintendent shall either prepare or approve plans, specifications and estimates for the construction or repair of such bridge without delay. The town shall provide for the construction or reconstruction of such bridge, as provided for by section ninety-three of this chapter. (*Former § 20 renumbered and amended by L. 1913, ch. 80.*)

Source.—New.

References.—Duty of town superintendent to repair or rebuild condemned bridge, Highway Law, § 93; submission of propositions at a town meeting for repair or construction of condemned bridge, Id., § 95; town may borrow money for construction or repair of condemned bridge, Id., § 97.

§ 23. Estimate of cost of maintenance of state and county highways.—The commissioner of highways shall annually cause to be inspected all improved state and county highways, either by the division engineer, or the district or county superintendent of the district or county in which such highways are situated and shall require a complete report of such inspection which shall show in detail the condition of the highway inspected, the necessary work to be performed in the repair and maintenance of such highways, and the estimated cost thereof. The commissioner of highways shall revise said estimates and annually report to the legislature his estimated cost of such repair and maintenance for the ensuing year, as so revised, in detail by counties. (*Former § 21, as amended by L. 1912, ch. 83, renumbered and amended by L. 1913, ch. 80.*)

Source.—New L. 1898, ch. 115, § 12, as amended by L. 1907, ch. 717, required the state engineer to report each year the estimated cost of repairing all highways maintained under that act.

Reference.—Appropriations for maintenance and repair of state and county highways, Highway Law, § 171.

§ 24. Rules and regulations for state and county highways.—The commissioner of highways is hereby empowered to make rules and regulations from time to time for the protection of any state or county highway or section thereof. He may prescribe the width of tires to be used on such highways and he may prohibit the use of chains or armored tires by motor vehicles upon such highways, and any disobedience thereof shall be punishable by a fine of not less than ten dollars and not exceeding one hundred dollars, to be prosecuted for by the town, county or district superintendent and paid to the county treasurer to the credit of the fund for the maintenance of such highways in the town where such fine is collected. (*Former § 22; renumbered and amended by L. 1913, ch. 80.*)

Source.—L. 1898, ch. 115, § 12, as amended by L. 1907, ch. 717, last sentence. The former law did not authorize the state engineer to make a rule prohibiting

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the use of chains or armoured tires by motor vehicles on the highways or to prescribe the width of tires.

Use of highways for racing purposes.—The State Engineer and Surveyor has no authority under this section to prohibit the use of highways for racing purposes or to recover for damages thereto, caused by races, such power having been given to the local authorities whose districts would be injured, and perhaps benefited by the commercial advantages from the race. *Morrell v. Skene* (1909), 64 Misc. 185, 119 N. Y. Supp. 28.

Regulating use of highways. Rept. of Atty. Genl. (1909) 654, (1910) 738.

§ 25. Patented material or articles.—In the construction, maintenance or repair of state or county highways, no patented material or article or any other material or article shall be specified, contracted for or purchased, except under such circumstances that there can be fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the commissioner of highways. (*Added by L. 1913, ch. 80.*)

Source.—New.

Suit to enjoin Highway Commissioner from letting contracts.—Under this section a producer of liquid asphalt, which answers all the tests prescribed in specifications for the construction of highways, except that they call for a solid asphalt, which is produced only by a single company and its subsidiaries, has a sufficient special interest to authorize a suit upon its part to enjoin the Highway Commissioner from letting contracts under such specifications. Such a suit cannot be maintained purely as a taxpayer's action. *Warner Quinlan Asphalt Co. v. Carlisle* (1913), 158 App. Div. 638, 144 N. Y. Supp. 70.

ARTICLE III.

DISTRICT OR COUNTY SUPERINTENDENTS.

Section 30. Appointment of county superintendent.

31. District superintendents; appointment and salaries.

32. Removal of county superintendent.

33. General powers and duties of district or county superintendents.

§ 30. Appointment of county superintendent.—The board of supervisors of any county may appoint a county superintendent, determine the amount of the bond which he shall give, fix his salary, and provide for the payment of all the necessary expenses incurred while in the performance of his duties, which salary and expenses shall be a county charge, and may remove such county superintendent for malfeasance or misfeasance in office, upon written charges, after an opportunity to be heard, not less than five days after the service upon such superintendent of a copy of such charges. The term of office of each superintendent shall be four years unless sooner removed by the board of supervisors as above provided, or by the commission as hereinafter provided. (*Amended by L. 1910, ch. 567.*)

Source.—New. The former Highway Law (1890, ch. 568) § 55, as amended by L. 1904, ch. 609, provided for the appointment of a county engineer by a board of supervisors and prescribed his duties.

Salary and expenses of county superintendent.—Under this section of the High-

way Law, as amended in 1910, the board of supervisors, being authorized to fix the salary of the county superintendent of highways and to provide for the payment of his expenses, has implied power to increase the salary of such superintendent and to provide for additional expenses where there is an unusual increase in the duties to be performed by him. *Porter v. Fletcher* (1912), 153 App. Div. 470, 138 N. Y. Supp. 557, *affd.* (1914), 211 N. Y. 524, 105 N. E. 1096.

Qualifications of county superintendent.—County superintendent need not be a civil engineer or under the civil service save in certain counties. He cannot hold office of supervisor at same time. He must be a citizen of the United States, of full age, and a resident of the county in which he is appointed. *Rept. of Atty. Genl.* (1908) 553; (1909) 872.

Civil service regulations.—Office of county superintendent is a classified position in the competitive class under the Civil Service Law. *Matter of Phillips* (1910), 139 App. Div. 365, 124 N. Y. Supp. 60, *affd.* (1910), 200 N. Y. 521, 93 N. E. 1129.

A board of supervisors has the absolute and exclusive right to appoint the county superintendent of highways and to fix his salary and provide for the payment of his necessary expenses, although the said salary at the time of the appointment exceeds the salary stated in the notice published by the commission for the competitive examination of candidates. *MacDonald v. Ordway* (1916), 219 N. Y. 328, 114 N. E. 386.

A bill for services of counsel employed by the county superintendent in a proceeding to remove a town superintendent is not a proper charge against the state. But, if no county attorney has been appointed, it may be a proper charge against the county. *Rept. of Atty. Genl.* (1911) 429.

Duty to prepare plans for town highways.—No absolute duty rests upon the county superintendent of highways to prepare and furnish plans, specifications and estimates for the repair and improvement of strictly town highways, and he may in a proper case decline to do so and call upon the highway commissioner to provide the same. *People ex rel. Seaman v. Cocks* (1912), 149 App. Div. 883, 134 N. Y. Supp. 808.

Malfeasance is the doing of an act which is positively unlawful or wrongful, and in order to justify the removal of a county superintendent of highways must affect his performance as such officer. Thus, a misconception of his rights affords no ground for a conclusion of malfeasance. *It seems*, that he may not voluntarily perform such services and thereby create a charge against the town. *People ex rel. Seaman v. Cocks* (1912), 149 App. Div. 883, 134 N. Y. Supp. 808.

Removal of county superintendent; review of proceedings; reinstatement.—*Certiorari* may be brought to review the proceedings of a board of supervisors in removing a county superintendent of highways, pursuant to this section, for malfeasance in office by reason of the receipt by him of moneys from a town for the preparation of plans and specifications for the improvement of a highway. Evidence examined, and *held*, that, although the county superintendent may have misconceived his rights, he should be reinstated. *People ex rel. Seaman v. Cocks* (1912), 149 App. Div. 883, 134 N. Y. Supp. 808.

§ 31. **District superintendents; appointment and salaries.**—If the board of supervisors of any county shall fail to appoint a county superintendent, the commission shall appoint a county superintendent from the eligible list of the county, and fix his salary, which, together with his expenses, shall be a county charge, payable monthly, or, in its discretion, place such county in a district with such other counties as they deem best and appoint district superintendent therefor. A county may be divided, but no district shall contain more than five thousand miles of public highways. Such

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district superintendents may be removed by the commission at its pleasure. The commission shall fix the salaries of such superintendents. Such salaries, together with expenses, shall be paid monthly in the first instance by the state treasurer upon the warrant of the comptroller and the amount thereof shall be annually apportioned by the commission among the counties contained in the district, in proportion to the number of miles of public highways of such county and in such district. The comptroller shall certify the amount so apportioned to the board of supervisors of each of such counties, and such board shall annually levy and cause to be collected as a county charge the proportionate part of such salary, and the treasurer of each such county shall pay the sum so raised into the state treasury. (*Amended by L. 1910, ch. 224.*)

Source.—New.

§ 32. **Removal of county superintendent.**—The commission may remove a county superintendent for inefficiency, neglect of duty or misconduct in office, upon written charges after an opportunity of being publicly heard in his defense. A copy of such charges shall be personally served upon such superintendent and he shall be given not less than five days' notice of the time and place of the hearing. If upon such hearing it appears that the charges are sustained, the commission shall remove such superintendent and forthwith serve notice thereof by mail upon the superintendent and upon the chairman and clerk of the board of supervisors of the county for which he was appointed. Such notice shall state specifically the grounds for such removal. The record of the proceedings upon such hearing shall be filed in the office of the commission. The commission shall appoint a district superintendent for such county or cause it to be added to some other district, and it shall thereupon be made subject to the jurisdiction of the district superintendent thereof until the board of supervisors shall appoint a new county superintendent to fill the vacancy caused by such removal.

Source.—New.

Reference.—Power of commission to require a person to attend before it and give testimony on the hearing of charges against county superintendent, Code Civ. Pro. § 854.

§ 33. **General powers and duties of district or county superintendents.**—The district or county superintendent appointed as provided in this article shall, subject to the rules and regulations of the commission, and subject to the supervision of the state superintendent of highways:

1. Have the general charge of all highways and bridges within his district or county and see that the same are improved, repaired and maintained, as provided by law, and have the general supervision of the work of constructing, improving and repairing bridges and town highways in his district or county.

2. Visit and inspect the highways and bridges in each town of his

district or county, at least once in each year, and whenever directed by the commission, and advise and direct the town superintendent how best to repair, maintain and improve such highways and bridges.

2-a. If a county has any county roads as defined by subdivision three of section three, the county superintendent shall on or before December first in each year prepare and submit to the board of supervisors of such county a statement of the amount necessary to be raised by the board of supervisors for the construction, improvement and maintenance of such county roads for the ensuing year, showing the amount by towns and as a total and the location where any permanent repairs are required to be made. (*Subd. 2-a, added by L. 1910, ch. 567.*)

3. Examine the various formations and deposits of gravel and stone in his district or county, for the purpose of ascertaining the materials which are best available and suitable for the improvement of highways therein, and when requested by the commission submit samples of such formations and deposits and make a written report in respect thereto.

4. Establish, or cause to be established, such grades, and recommend such means of drainage, repairs and improvements, as seem to him necessary whenever requested by the town superintendent or town board.

5. Approve plans and specifications and estimates for the erection and repair of bridges and the construction and maintenance of town highways.

6. Report to the commission annually, on or before November fifteenth in each year, in relation to the highways and bridges in his district or county, containing such matter and in such form as may be prescribed by the commission, and file a duplicate thereof with the clerk of the board of supervisors. Additional reports shall be made from time to time when required by the commission in respect to such matters as may be specified by them.

7. Whenever a public meeting for a county or district shall have been called by the commission he shall cause due notice to be mailed to each town superintendent and supervisor of the towns under his jurisdiction and give such notice by advertisement as shall be directed by the commission.

8. Inspect or cause to be inspected, if so directed by the board of supervisors, each county highway during its construction or improvement, and certify to the board of supervisors the progress of the work, and report to the commission any irregularities of the contractor or any failure on his part to comply with the terms of the contract.

9. Accurately ascertain and locate the corners of the established boundaries of the counties, towns, cities and villages and, where townships were originally subdivided into lots to accurately ascertain and establish such lot corners if any such corners will be located within the bounds of the improved part of any state or county highway or county road.

If the district or county superintendent shall not be a civil engineer he may hire a competent civil engineer to locate such corners. In either case

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he may employ such other assistants as may be necessary, the cost and expense thereof to be a county charge.

Nothing in this subdivision contained, however, shall be construed to extend to the location of the corner or other boundaries of city, or village lots, or farm lands, except as they may be, incidentally, the corners of the boundaries of counties, towns, cities, villages or original subdivisions of towns, except, also, that where the corners or boundaries of city or village lots, or farm lands, have been located and a monument placed before the improvement of such highway, the owner of such city or village lots or farm lands may point out to such engineer the location of such monument, and upon such owner furnishing a suitable monument, it shall be the duty of such engineer to erect such monument in the manner hereinbefore provided. (*Subd. 9, added by L. 1916, ch. 217.*)

10. Perform such other duties as may be prescribed by law, or the rules and regulations of the commission. (*Former subd. 9, as renumbered by L. 1916, ch. 217. Section amended by L. 1911, ch. 646; subd. 2-a, added by L. 1910, ch. 567; subd. 9, added by L. 1916, ch. 217. Former subd. 9, renumbered subd. 10, by L. 1916, ch. 217.*)

Source.—New in form. Many of the powers and duties here conferred upon district or county superintendents were exercised and performed by the county engineer under the former Highway Law (L. 1890, ch. 568) § 55, as amended by L. 1904, ch. 609.

References.—Powers and duties to be exercised or performed subject to rules of the commission, Highway Law, § 15, subd. 2; public meetings called by the commission, Id. § 15, subd. 9; duties in relation to acceptance of county highway, Id. § 134; duties in relation to maintenance of state and county highways, Id. § 170.

Duties as to town highways.—No absolute duty rests upon the county superintendent to prepare and furnish plans, specifications and estimates for the repair and improvement of strictly town highways, but the statute contemplates that he may in a proper case decline to do so and call upon the highway commission to provide the same. *People ex rel. Seaman v. Cocks* (1912), 149 App. Div. 883, 134 N. Y. Supp 808.

ARTICLE IV.

TOWN SUPERINTENDENTS; GENERAL POWERS AND DUTIES.

Section 40. Election of town superintendent of highways.

41. Submission of proposition for appointment or election of town superintendent.
42. Term of office of town superintendent.
43. Vacancies; office of highway commissioner abolished.
44. Deputy town superintendent.
45. Compensation of town superintendent and deputy.
- 45-a. Compensation of town superintendents in certain counties adjoining cities of the first class.
46. Removal of town superintendent.
47. General powers and duties of town superintendent.
48. Contracts for the construction of town highways.

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49. Machinery, tools and implements.
50. Town superintendent may hire machinery.
51. Purchase of gravel and stone.
52. Obstructions and their removal.
53. Removal of obstructions.
- 53-a. Temporary obstruction of highways.
54. Removal of noxious weeds and brush within the highways, and of obstructions caused by snow.
55. Assessment of cost against owners and occupants.
56. Wire fences to prevent snow blockades.
57. Entry upon lands by town superintendent.
58. Damages to owners of lands.
59. Damages for change of grade.
- 59-a. Interest on damages for change of grade.
60. Drainage, sewer and water pipes, cattle passes or other crossings in highways.
61. Trees and sidewalks.
62. Expenditures for sidewalks.
63. Allowance for shade trees.
64. Custody of shade trees.
65. Compensation for watering troughs.
66. Credit on private road.
67. Neglect or refusal to prosecute.
68. Erection of guide boards.
69. Measurement of highways and report.
70. Application for service of prisoners.
71. Construction and repair of approaches to private lands.
72. Unsafe toll bridges.
73. Actions for injuries to highways.
74. Liability of town for defective highways.
75. Action by town against superintendent.
76. Audit of damages without action.
77. Closing highways for repair or construction.
78. Adoption of labor system for removing snow.
79. Assessment of labor for removal of snow.
80. Lists of persons assessed for removal of snow.
81. District foreman; return and levy of unworked tax.
82. Appeals by non-resident; certain assessments to be separate; tenant may deduct assessment.

§ 40. Election of town superintendent of highways.—At the biennial town meeting held next after the taking effect of this chapter, there shall be elected in each town a town superintendent of highways. A successor to the town superintendent, so elected, shall be elected at each biennial town meeting held thereafter in such town, unless the town shall have adopted as provided in section forty-one a resolution that thereafter the town superintendent shall be appointed by the town board.

Source.—New.

References.—Election of town officers generally, Town Law, § 80; every elector of town eligible to office of town superintendent, Id. § 81; town superintendent must be resident of town, Public Officers Law, § 3; town superintendent required to take constitutional oath of office, Town Law, § 83; form of constitutional oath

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of office, Const., art. 13, § 1; town clerk to notify town board of failure of town superintendent to take and file official oath, Public Officers Law, § 13; neglect or failure to file oath vacates office, Town Law, § 130, Public Officers Law, § 30, subd. 7; undertaking of town superintendent, Town Law, § 111; general provisions relating to undertaking, Public Officers Law, §§ 11-13.

Effect of failure to file oath.—The failure of a town superintendent to take and file his oath, as required in § 83 of the Town Law, would not affect the powers and rights of such superintendent in his official capacity. The failure to file the oath, does not of itself work a forfeiture. Such forfeiture must come from some act, judicial or otherwise, which effectually ousts the superintendent and severs his relation to the office and until then he is practically an officer *de jure*, having a defeasible title to the office. *Horton v. Parsons* (1885), 37 Hun 42. See also *People ex rel. Woods v. Crissey* (1883), 91 N. Y. 616, 635; *In re Kendall* (1881), 85 N. Y. 302, 305; *Foot v. Stiles* (1874), 57 N. Y. 399.

The rule is that the defect, if any, in regard either to the executing and filing of an official bond or an official oath, only makes the officer's title defeasible and offers a cause for forfeiture, but does not create a vacancy. A vacancy in such a case can only be effected by a direct proceeding for that purpose. *People ex rel. Brooks v. Watts* (1893), 73 Hun 404, 26 N. Y. Supp. 280.

Right of electors in villages to vote.—It was held under § 53 of the former Highway Law that notwithstanding the exemption contained therein all incorporated villages exempt from taxation imposed for the maintenance and repair of the highways lying outside of the villages, with residents of villages, could vote upon a proposition for the issue of bonds for the construction and repair of highways and bridges. *Matter of Shapter v. Carroll* (1897), 18 App. Div. 390, 46 N. Y. Supp. 202. Electors in villages incorporated under the General Village Law may vote for highway commissioners and are eligible to such offices. *Rept. of Attorney General* (1898) 104.

Election of town superintendent. *Rept. of Atty. Genl.* (1909) 872, 908; (1908) 555.

§ 41. **Submission of proposition for appointment or election of town superintendent.**—Upon the written request of twenty-five taxpayers of any town, made and filed as provided in the town law, the electors thereof may, at a special or biennial town meeting, vote by ballot upon a proposition providing for the appointment of a town superintendent in such town. Such proposition shall be submitted in the manner provided by law for the submission of questions or propositions at a town meeting. If such proposition be adopted, the town board of the town shall, upon the expiration of the term of office of the elected town superintendent, appoint a town superintendent therefor, who shall take and hold office for the term hereinafter prescribed. Upon like request the electors of any town in which the office of superintendent of highways is appointed may, in like manner, determine that the superintendent of highways for such town shall thereafter be elected, as provided in section forty of the highway law. (*Amended by L. 1916, ch. 47.*)

Source.—New.

References.—Submission of proposition at town meeting, Town Law, § 48; special town meeting to vote upon proposition, Town Law, § 47.

Constitutionality.—Chapter 48 of the Laws of 1916, validating the action of the voters of the town of Brookhaven rescinding a prior resolution making the office of

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superintendent of highways appointive, and again making it an elective office, is constitutional and valid, not being an attempt to substitute an election by the Legislature for one by the qualified town electors. *People ex rel. Dare v. Howell* (1916), 174 App. Div. 118, 160 N. Y. Supp. 959.

Effect of vote to make appointive.—This section does not mean that the office of town superintendent becomes permanently appointive when such proposition has been approved by the electors, and hence at a subsequent election they may again make the position elective. *People ex rel. Dare v. Howell* (1916), 174 App. Div. 118, 160 N. Y. Supp. 959.

Section cited.—*Local Authorities v. New York, N. H. & H. R. R. R. Co.* (1911), 144 App. Div. 791, 129 N. Y. Supp. 643.

§ 42. **Term of office of town superintendent.**—The term of office of a town superintendent elected or appointed, as provided in this article, shall be two years. If such town superintendent be elected at a town meeting held at the time of a general election, his term shall begin on the Thursday succeeding his election, or as soon thereafter as he shall have been officially notified of his election and shall have duly qualified. If such town superintendent shall have been elected at a town meeting held at any other time, his term of office shall begin on the first Monday succeeding his election. If such town superintendent shall have been appointed pursuant to a proposition adopted, as provided in the preceding section, his term shall begin on the first day of November, and the town board shall meet prior to that day, for the appointment of such town superintendent. (*Amended by L. 1917, ch. 562, in effect May 18, 1917.*)

L. 1917, ch. 562, § 2.—The term of office of the town superintendent of highways heretofore elected at a town meeting held at a time other than that of a general election shall not be affected by this act, and his successor, elected at the first biennial town meeting held after this act takes effect, shall not take office until the existing term expires. The term of his successor, as prescribed by section forty-two of the highway law, shall be shortened by the interval between the Monday following his election and the ensuing first day of November.

Source.—New. It was provided in former Town Law, § 13, as amended by L. 1901, ch. 391, that the term of office of a highway commissioner should be two years; beginning, in a town where the town meeting was held on general election day, on January first after the election, and in other towns immediately upon their election; present Town Law, § 82, conforms to the above section.

References.—Term of office of town officers generally, Town Law, § 82; holding over after expiration of term, Public Officers Law, § 5; delivery of books and papers by outgoing town superintendent to his successor, Town Law, § 91.

Evidence of election.—It is intended by the statute that a public declaration by the town clerk as to the result of the canvass of the votes cast for a town superintendent of highways, shall be a sufficient certificate and evidence of his election. *Matter of Baker* (1855), 11 How. Pr. 418; *Matter of Case v. Campbell* (1833), 16 Abb N. C. 269.

Holding over after expiration of term is authorized by Public Officers Law, § 5. Except for the authority conferred by this section a town superintendent of highways would not be permitted to hold his office after the expiration of his term. *People ex rel. Morton v. Tieman* (1859), 30 Barb. 193. The term "qualified" as used in this section of the Public Officers Law means to take an oath of office and

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to file an official undertaking as required by law. *People ex rel. Williamson v. McKinney* (1873), 52 N. Y. 374, 380.

§ 43. **Vacancies; office of highway commissioner abolished.**—Vacancies in the office of town superintendent shall be filled for the balance of the unexpired term. The office of highway commissioner in each town is hereby abolished, to take effect on and after November first, nineteen hundred and nine. Where the office of highway commissioner shall become vacant by expiration of term or otherwise, after the taking effect of this chapter, and prior to the said first day of November, nineteen hundred and nine, such vacancies shall be filled for a term to expire on such date. Highway commissioners in office when this chapter or any section hereof takes effect shall exercise the powers and perform the duties hereby conferred and imposed upon town superintendents until the said first day of November, nineteen hundred and nine, and until their successors shall have duly qualified, whereupon such powers and duties shall cease and determine.

Source.—New.

References.—Creation of vacancies generally, Public Officers Law, § 30; resignation of town superintendent, Town Law, § 84.

Vacancy caused by non-residence.—The office of town superintendent of highways will become vacant upon the officer ceasing to be a resident of the town for which he was elected or appointed. *People ex rel. Engs v. Board of Education* (1845), 1 Den. 647; *People v. Hull* (1892), 47 N. Y. St. Rep. 91, 94, 19 N. Y. Supp. 536.

A special town meeting cannot be called for the filling of a vacancy in the office of a town superintendent of highways. *People ex rel. Hyde v. Potter* (1903), 40 Misc. 485, 32 N. Y. Supp. 649, *affd.* (1903), 88 App. Div. 239, 85 N. Y. Supp. 460.

§ 44. **Deputy town superintendent.**—The town board of a town may, in its discretion, upon the written recommendation of the town superintendent, appoint a deputy town superintendent, to be nominated by such town superintendent, to assist him in the performance of his duties. Such deputy superintendent shall act as such during the pleasure of the town superintendent.

Source.—New.

Appointment of a deputy town superintendent by the superintendent is unauthorized and the acts of such an appointee cannot be imputed to the superintendent, nor is the town liable therefor. *Lynch v. Town of Rhinebeck* (1913), 210 N. Y. 101, 103 N. E. 888.

§ 45. **Compensation of town superintendent and deputy.**—The town board shall fix the compensation of such superintendent and his deputy, if one be appointed, which shall not be less than two nor more than five dollars per day. Such town superintendent and his deputy, if any, shall be paid the actual and necessary expenses incurred by them in the performance of their duties. Such compensation may be paid by the supervisor monthly, in advance of audit, from moneys levied and collected for such purpose, on accounts duly verified in the same manner as town accounts are required by law to be verified. Such accounts for compensation, together

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with accounts for expenses incurred by such town superintendent and his deputy, if any, verified as above provided, shall be subject to audit by the town board at its meeting held annually for the audit of accounts of town officers, and the balance due, as finally audited by the town board, shall be paid by the supervisor to such town superintendent, or deputy, if any, from funds available therefor.

Source.—New. The salary of a highway commissioner under the former Town Law, § 178 was fixed at not less than two nor more than three dollars per day.

References.—Audit of accounts for compensation, Highway Law, § 106; Town Law, § 361. Compensation of town superintendent for services in respect to the maintenance of state and county highways, Highway Law, § 175.

Purchase of automobile.—The purchase and maintenance of an automobile for the use of a town superintendent of highways is a separate town charge, where it develops to be for the financial interests of the town. Opinion of State Comptroller (1916), 9 State Dept. Rep. 530.

§ 45-a. Compensation of town superintendents in certain counties adjoining cities of the first class.—The town board of any town in a county having a population of two hundred thousand or less, according to the last federal or state census or enumeration, adjoining a city of the first class having a population of one million and upwards, may by resolution provide that the town superintendent of highways shall receive an annual salary of not to exceed twenty-five hundred dollars in lieu of all other compensation. In a town in which such superintendent shall receive a salary as herein provided, the compensation provided for in section one hundred and seventy-five of this chapter for the services of such superintendent shall be paid to the supervisor of the town for the benefit of the town. (*Added by L. 1917, ch. 662, in effect May 26, 1917.*)

Source.—New.

§ 46. Removal of town superintendent.—A town superintendent may be removed by the town board upon written charges preferred by the commission, or by the district or county superintendent, for malfeasance or misfeasance in office. Such charges shall be presented in duplicate to the town clerk, one of which shall be filed in his office, and the other shall be served by him personally upon the town superintendent, together with a notice directing him to appear before the town board at a time and place stated therein. Such service shall be made at least five days prior to the time specified in such notice. The town board shall convene for the purpose of considering such charges within ten days after the filing thereof with the town clerk. The town board shall hear evidence in support and in defense of such charges and after such hearing shall enter an order in the office of the town clerk either sustaining or dismissing such charges. The entry of an order sustaining the charges shall operate as a removal and the town board shall appoint another person to fill the vacancy caused thereby. The person so appointed shall hold office for the unexpired term or until the entry of a final order of a court of competent jurisdiction

determining that the original town superintendent was wrongfully and illegally removed and directing his reinstatement. If the charges are dismissed, the town board shall notify the commission and the district or county superintendent of such fact. The town board shall also notify the commission and the district or county superintendent of the name of the person appointed to fill the vacancy caused by the removal of such town superintendent. An appeal may be taken by the commission or district or county superintendent, or by the town superintendent, from the order of the town board, to the county court by the filing of a notice of such appeal in the office of the town clerk within thirty days after the entry of such order. A copy of such notice of appeal shall be served personally or by mail upon the adverse party. Upon such appeal the county court shall consider the charges presented to the town board, and may hear evidence in support and in defense thereof. After such hearing the court shall make an order either affirming or reversing the order of the town board. A copy of such order shall be entered in the office of the town clerk. If the order reverse an order dismissing the charges, it shall direct the town board to remove the town superintendent and appoint a person to fill the vacancy caused thereby, within the time specified therein; if it reverse an order sustaining such charges, it shall direct the reinstatement of the town superintendent removed, to take effect upon the filing of the copy in said town clerk's office.

Source.—New.

References.—Town superintendent may be removed from office by the appellate division of the supreme court, Public Officers Law, § 36.; Power to compel attendance of witnesses before town board, Code Civ. Pro. §§ 854-859.

Hearing of charges; dismissal.—Where, upon the hearing of charges of malfeasance and misfeasance in office preferred by the state commissioner of highways against a town superintendent of highways, he admits that he did not file a list of the names of the persons employed by him, as required by statute, and the evidence shows that he and the town board entered into a written agreement which provided for the improvement of certain highways and the expenditure of certain moneys, and he admits that he did not improve the highway specified in and required by said agreement and did not make the expenditures therein called for, but testifies that he spent the money on town highways other than those specified and authorized by said agreement, he knowingly violated section 105 of the Highway Law, was guilty of malfeasance in office as charged and subject to removal, and an order of the town board dismissing the charges must be reversed. *Carlisle v. Burke* (1913), 82 Misc. 282, 144 N. Y. Supp. 163.

An appeal from a decision of the Town Board may be taken by the commission within 30 days after service of notice upon him of the entry of an order dismissing charges against a town superintendent. Rept. of Atty. Genl. (1911) 429.

§ 47. General powers and duties of town superintendent.—The town superintendent shall, subject to the rules and regulations of the commission, made and adopted as provided in this chapter:

1. Have the care and superintendence of the highways and bridges and board walks or renewals thereof on highways less than two rods in width,

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in the town, except as otherwise specially provided in relation to incorporated villages, cities and other localities. (*Subd. 1, amended by L. 1915, ch. 322.*)

2. Cause such highways and bridges and the board walks or renewals thereof on highways less than two rods in width to be kept in repair, and free from obstructions caused by snow and give the necessary directions therefor, and inspect the highways and bridges within the town, during the months of April and October of each year, or at such other time as the district or county superintendent may prescribe; and may cause to be constructed and repaired any public roads, walks, places and avenues on any sand beach separated by more than two miles of water from the main body of his town, although such roads, walks, places and avenues are narrower than the width of highways required by statute. Within the meaning of this section, or of any provision of this chapter referring to a renewal of a board walk on a highway less than two rods in width, the term "renewal" shall include a walk built of other material to replace such board walk. (*Subd. 2, amended by L. 1914, ch. 84, and L. 1915, ch. 322.*)

3. Divide the town into as many sections as may be necessary for the proper maintenance and repair of the highways therein, and the opening of highways obstructed by snow.

4. Employ such persons with teams and implements, as may be necessary for the proper maintenance and repair of highways and bridges, and the removal of obstructions caused by snow, subject to the approval of the town board, as hereinafter provided, and provide for the organization and supervision of the persons so employed. He shall file a list of the names of the persons so employed, with the compensation paid to each, and the capacity in which they were employed in the office of the town clerk.

5. Construct and keep in repair sluices and culverts and cause the waterways, bridges and culverts to be kept open.

6. Cause loose stones lying in the beaten track of every highway within his town to be removed at least three times each year between the first day of April and the first day of December. Stones so removed shall be conveyed to some place from which they shall not work back, or be brought back into the track by road machines or other implements used in repairing such highways.

7. Cause noxious weeds growing within the bounds of the highway to be cut and removed, at least twice in each year, once between the first and thirtieth day of July, and once between the first and thirtieth day of September. He shall also cause all briars and brush within the bounds of the highway to be cut and removed once between the first and thirtieth day of September in each year, as provided by section fifty-four of this chapter, unless otherwise directed by the commission. (*Subd. 7, amended by L. 1910, ch. 567.*)

8. Cause such highways as shall have been laid out, but not sufficiently described, and such as shall have been used for twenty years, but not

recorded, to be ascertained, described and entered on record in the town clerk's office.

9. Inspect all highways which are to be constructed or improved as state or county highways, when directed by the district or county superintendent, for the purpose of securing preliminary information to be used in preparing the plans and specifications for such highways, and mark or in some substantial manner designate the portions of such highways which may need special care and attention. He shall report to the district or county superintendent the condition of such highways and submit therewith such recommendations in respect thereto as may seem expedient. The district or county superintendent may require additional reports in respect to such highways whenever it seems to him to be necessary.

10. Attend public meetings called by the commission, held within the county, after receiving notice thereof from the district or county superintendent, and his expenses necessarily incurred thereby shall be a town charge.

11. Cause the monuments erected, or to be erected, as the boundaries of highways, to be kept up and renewed so that the extent of such highway boundaries may be publicly known, and erect and establish such new monuments as may be required by the district or county superintendent.

12. Collect all penalties prescribed by this chapter.

13. Report annually on such date as may be prescribed by the commission, prior to November fifteenth, to the district or county superintendent, in relation to the highways and bridges in his town, containing the matter and in the form to be prescribed by the commission.

14. Perform such other duties and have such other powers as may be imposed or conferred by law, or the rules and regulations of the commission, including the powers and duties heretofore exercised or performed by highway commissioners.

Source.—Former Highway Law (L. 1890, ch. 568) § 4, 20, subds. 5, 6, and § 53-a.

References.—Bridges in villages under control of superintendent of highways, Village Law, § 143. Repair of bridges over streams constituting town boundaries, Highway Law, §§ 254-262. Removal of obstructions in highways, Id. § 54. Contracts for repairs, Id. § 48. Liability for failure to repair, Id. §§ 74, 75. Ditches, culverts and waterways in state and county highways to be kept open by town superintendent, Id. § 53. Duties in respect to removal of weeds, and brush, Id. § 54. Board of supervisors may direct town superintendent to establish location of highways by suitable miles, County Law, § 71. Disposition of penalties collected by town superintendent, Highway Law, § 104. Duties in respect to railroad crossings intersecting highways, Railroad Law, § 22. Town superintendents act with town assessors as fence viewers, Town Law, § 121.

Powers and duties generally.—The town superintendent is vested with general control over the public highways and he has a duty to perform toward the public in connection with their proper maintenance. *Matter of the Application of Roch. Elec. R. Co.* (1890), 123 N. Y. 351, 25 N. E. 381. In the administration of the highway system, he is an independent public officer, exercising power and charged with public duties, specially prescribed by law, and as such acts individually and independently of any direction on the part of the town; on the other hand he is with-

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out power to represent or affect the rights of the town in any other manner than as prescribed by statute. *Flynn v. Hurd* (1869), 118 N. Y. 19, 22 N. E. 1109; *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *Mather v. Crawford* (1862), 36 Barb. 564. He is not an agent of the town in its corporate capacity, and the town is not chargeable for his nonfeasance or misfeasance, nor for his official acts or delinquencies, except where made so by special provision of law. *People ex rel. Van Keuren v. Town Auditors* (1878), 74 N. Y. 310. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *Morey v. Town of Newfane* (1850), 8 Barb. 645; *Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657; *Whitney v. Town of Ticonderoga* (1891), 127 N. Y. 40, 27 N. E. 403. But see *Bartlett v. Crozier* (1820), 17 Johns. 439.

The town superintendent is charged with the care and superintendence of the highways as well as with directing their reparation; and the former may not be discharged by the performance of the latter; and in discharging both such duties he must exercise reasonable diligence and vigilance which may not be disposed of by the delegation of the duty to a road overseer or any other party. *Farman v. The Town of Ellington* (1887), 46 Hun 41, *affd.* (1891), 124 N. Y. 662, 27 N. E. 413; *Gould v. Glass* (1885), 19 Barb. 179.

It is to be assumed that in the exercise of his official functions the town superintendent has acted in good faith, and therefore, according to the best of his judgment, unless the contrary appears. This is the rule applicable to officers clothed with discretionary or judicial powers. *People ex rel. Slater v. Smith* (1894), 83 Hun 432, 31 N. Y. Supp. 749; *People v. Crounse* (1889), 51 Hun 494, 4 N. Y. Supp. 266; *Harriman v. Howe* (1894), 78 Hun 280, 28 N. Y. Supp. 858, *affd.* (1898), 155 N. Y. 683, 50 N. E. 1117.

Duties respecting ditches, approaches or driveways onto private property. *Rept. of Atty. Genl.* (1902) 277.

Highway commissioners not allowed to employ their own team to work on highways under their control. *Rept. of Atty. Genl.* (1903) 309.

Highways to be maintained.—The highways and bridges in the town referred to in this section are the ones which the town is required to maintain and not the highways which are under the exclusive supervision and control of the state commission. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

Laying out highways, etc.—Town superintendents of highways act in laying out highways under a special and statutory authority, and it must appear upon the face of their proceedings, or by proof *akunde*, that they acquired jurisdiction in the particular case, and a record, purporting to be a record of the highway laid out by them, which fails to show affirmatively that such jurisdiction was acquired, cannot be helped out by intendment or presumption. *Müller v. Brown* (1874), 56 N. Y. 383; *People ex rel. Babcock v. Commissioners of Plainfield* (1852), 7 How. Pr. 27.

In the case of *Snowden v. Town of Somerset* (1900), 52 App. Div. 84, 64 N. Y. Supp. 1088, it was held that a town never had any right to lay out, alter, discontinue, improve or repair a highway; but that those are duties of the commissioners. [town superintendent], and the town has no authority over him in their performance, and he is not its agent in so doing. See *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356; *People ex rel. Bowles v. Burrell* (1895), 14 Misc. 217, 35 N. Y. Supp. 608.

Liability for injury.—The construction of an embankment upon private land with the result of causing surface water thereafter, and because thereof, to flow upon a public highway to its injury and to the prejudice of the rights of the public using the same, where such work has been done by direction of the commissioner of highways of the town, does not justify any charge or inference of malice against the party doing it. Where a party is indicted for such obstruc-

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tion of the highway, he is entitled to give evidence showing that the act done by him was done by direction of the commissioner of highways. *People v. Crounse* (1889), 51 Hun 489, 4 N. Y. Supp. 266.

Power to contract.—A town superintendent is not an agent of the town with authority to contract for it in real or supposed emergencies, and cannot make a contract binding upon the town unless specifically authorized by statute. *People ex rel. Morey v. Town Board of Oyster Bay* (1903), 175 N. Y. 394, 67 N. E. 620, revg. (1903), 80 App. Div. 280, 80 N. Y. Supp. 309. As to legality of orders made by town superintendents, see *Van Bergen v. Bradley* (1867), 36 N. Y. 316; *Engleman v. Longhorst* (1890), 120 N. Y. 332, 24 N. E. 476.

Highway superintendents have no power or authority to bind the town by their contracts and are individually responsible alone to those with whom they contract if any responsibility is thereby created; they can only impose liability upon towns for the construction of roads when they have direct statutory authority therefor. *Matter of Niland v. Bowron* (1908), 193 N. Y. 180, 85 N. E. 1012, affg. (1906), 113 App. Div. 661, 99 N. Y. Supp. 914.

Under the former Highway Law, a resolution, adopted at a town meeting, providing that the work of repairing and maintaining highways and bridges should be let upon contract to the lowest bidder, was held to be unauthorized and void. *Rept. of Atty. Genl.* (1900) 137.

Duty of the town superintendent to keep highways and bridges in repair.—The town superintendent is powerless to burden the town he represents for the repair of highways and bridges beyond statutory limitations. *Flynn v. Hurd* (1889), 118 N. Y. 19, 22 N. E. 1109; *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397. No other officers are by enactment charged with such duty. *Berlin Iron Bridge Co. v. Wagner* (1890), 57 Hun 346, 10 N. Y. Supp. 840. Neither the Town Law nor the Highway Law has changed the old rule that he cannot create any liability upon the part of his town to pay for materials ordered by him for the ordinary repair of town highways. *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 366; *Van Alstyne v. Freday* (1869), 41 N. Y. 174; *People ex rel. Bowles v. Burrell* (1895), 14 Misc. 217, 35 N. Y. Supp. 608. If the reparation made by the town superintendent is the product of his judgment he does not exceed the consent granted him by the town board; and mandamus will lie on its refusal to audit a claim so incurred by him. *People ex rel. Slater v. Smith* (1894), 83 Hun 432, 31 N. Y. Supp. 749. As to duty to repair and the origin thereof, see *Bartlett v. Crozier* (1820), 17 Johnson 439; *Morey v. Town of Newfane* (1850), 8 Barb. 645; *Dorn v. Town of Oyster Bay* (1895), 84 Hun 510, 32 N. Y. Supp. 341, affd. (1899), 158 N. Y. 731, 53 N. E. 1124.

A town superintendent is not responsible for the repair of highways and bridges situated within an Indian reservation. *Bishop v. Barton* (1874), 2 Hun 436, affd. (1876), 64 N. Y. 637.

Inspection of highways; failure to notify town board of unsafe driveway; negligence.—A town is chargeable with the negligence of the town superintendent in failing to call the attention of the town board to an unsafe driveway of which he had knowledge, leading from a highway to abutting premises as this section imposes upon the superintendent a duty of inspection. But, *it seems*, no charge of negligence can arise against the superintendent if the town board fails to act after having been informed of the defect. *Ferguson v. Town of Lewisboro* (1912), 149 App. Div. 232, 133 N. Y. Supp. 699.

The town superintendent is not the agent of the town, but an independent public officer with defined and limited powers. The office of pathmaster is not recognized or provided for in the Highway Law, neither does the statute authorize the appointment of such an officer by the town superintendent or permit him to delegate the duties imposed upon him by law. The acts of a person claiming to

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be his deputy cannot be imputed to him, nor is the town liable therefor. *Lynch v. Town of Rhinebeck* (1913), 210 N. Y. 101, 103 N. E. 888.

Removal of town superintendent of highways for failure to comply with subdivision 4 of this section. *Carlisle v. Burke* (1913), 82 Misc. 282, 144 N. Y. Supp. 163.

Common-law duty to repair bridges.—The repair of bridges at common law, that is, those without cities or incorporated towns, belonged to the county; and the remedy was not by suit against the surveyors, whose duty it was to repair bridges, or against the justices, but by indictment against the county. But the common-law rule has never been adopted in this state. *Bartlett v. Crozier* (1820), 17 Johns. 439; *Hill v. Supervisors of Livingston* (1854), 12 N. Y. 52.

Extent of repairs.—A highway cannot be said to be open and worked unless it is passable for its entire length. It need not be worked in every part, but it must be worked sufficiently to enable the public to pass and repass with teams and vehicles such as are ordinarily used. The requirement to open and work a highway implies that it must be made passable as a highway for public travel. It need not be a first-class road; it need not be finished, but it must be sufficient and kept in a suitable condition to enable the public to pass over it. *Beckwith v. Whalen* (1877), 70 N. Y. 430. In performing the duty of repairing highways the town superintendent has discretionary power, and if he does not exceed his statutory authority, it will be assumed, unless the contrary appears, that he acted in good faith and according to the best of his judgment. *People ex rel. Slater v. Smith* (1894), 83 Hun 432, 31 N. Y. Supp. 749. He is also permitted to use his own judgment in determining whether any repairs are necessary; there is no absolute and imperative duty imposed upon him to repair in a given case. *Peck v. Batavia* (1860), 32 Barb. 634.

Where town superintendents have not sufficient funds in their hands to provide the needed repairs it is within their discretion to apply the fund on hand in making such repairs as are most urgently needed. They are not nor is the town liable for an error in judgment in so doing, if they act reasonably and in good faith. *Monk v. Town of New Utrecht* (1887), 104 N. Y. 552, 11 N. E. 268; *Patchen v. Town of Walton* (1897), 17 App. Div. 158, 45 N. Y. Supp. 145.

Use of material taken from highway.—In making necessary repairs to highways the town superintendent may take soil from any portion of the highway including the unused roadside, regardless of any grading or other improvements made by abutting owners, in the absence of proof that the town superintendent has not acted wantonly or maliciously. *Anderson v. Van Tassell* (1873), 53 N. Y. 631. Where it is necessary to cut down the bed of the highway, the fee of which is not in the public, in order to bring it to a desired grade, the town superintendent may use the earth and stone thus taken out to repair any part of a highway upon which they may see fit to put them; but unless it is necessary to remove the earth and stone for that purpose, they may not use them for the purpose of repairing any part of the highway, except that part which is opposite the lands of the owner who owns the fee of the highway at the point where the materials were removed. *Robert v. Sadler* (1887), 104 N. Y. 229, 10 N. E. 428; *Ladd v. French* (1889), 3 Silv. 1, 6 N. Y. Supp. 56.

Stones and other material taken from the highway and not required for the use of the highway belong to the abutting owner if his title covers the highway. *Deverell v. Bauer* (1899), 41 App. Div. 53, 58 N. Y. Supp. 413.

Duties in respect to plank-roads.—A road appropriated by a plank-road corporation for the purpose of a toll-road does not cease to be a highway; the general right of the public to use it for the purpose of travel remains unimpaired. Local authorities are not ousted of their jurisdiction, in the particulars in which their exercise would not conflict with the purposes or with the rights of the plank-

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road company, and which the public interests require should be exercised; and especially are they not relieved from their duties in respect to encroachments upon highways, which are at the same time used as plank-roads. *Walker v. Caywood* (1865), 31 N. Y. 51; *Estes v. Kelsey* (1832), 8 Wend. 555.

Division of town under former law.—As to duty to divide town into districts, see *Lane v. Town of Hancock* (1894), 142 N. Y. 510, 37 N. E. 473. The highway commissioner is empowered to discontinue a district and divide it among other districts from which it was originally taken. *People ex rel. Seward v. Sly* (1843), 4 Hill 593. The commissioner must exercise this power; but in so doing he acts upon his own judgment and discretion. *Buffalo Plank Road Co. v. Commissioners, etc.* (1854), 10 How. Pr. 237.

The object of dividing a town into highway districts is to divide the work to be done in repairing the highways to the end that the highways in each district may speedily receive the benefits of the money available for repair and maintenance. *Chamberlain v. Taylor* (1885), 36 Hun 24, 37.

Cutting brush along highway.—A town superintendent has no authority to create a liability upon the part of his town to a person hired to cut brush along a town highway, and even if such liability were created, it would not become actionable until the claim had been acted upon by the town auditors. *Wright v. Town of Wilmurt* (1904), 44 Misc. 456, 90 N. Y. Supp. 90.

When survey authorized.—The law constantly presumes that public officers have performed their official duty, and, where no such record has been made in relation to a road, the presumption is that the facts required to be recorded never existed. *Harriman v. Howe* (1894), 78 Hun 280, 28 N. Y. Supp. 858, *affd.* (1898), 155 N. Y. 683, 50 N. E. 1117; *City of Cohoes v. D. & H. C. Co.* (1892), 134 N. Y. 397, 31 N. E. 887. Where a highway has been dedicated to the public for the prescribed period of twenty years the town superintendent may cause a survey to be made thereof and remove fences and other encroachments within the limits of such highway. *James v. Sammis* (1892), 132 N. Y. 239, 30 N. E. 502.

Form of survey.—A writing signed by the commissioners, although not containing a formal order laying out the highway, which purports to be a survey of the road, describes the center line, and states where the road is to commence and terminate and which was filed with the town clerk, is a substantial compliance with the statute; no particular form is necessary and the acts of such officers should receive liberal construction. *Tucker v. Rankin* (1853), 15 Barb. 471.

Effect of survey.—The order cannot have the effect to increase or change the width or location of the highway from what it was before; it could be effectual only as a description of the width as manifested by the permitted use for twenty years. *Ivory v. Town of Deerpark* (1889), 116 N. Y. 476, 22 N. E. 1080; *People ex rel. Highway Com'm'rs. v. Judges of Cortland Co.* (1840), 24 Wend. 491; *Cole v. Van Keuren* (1875), 4 Hun 262, *affd.* (1876), 64 N. Y. 646. An order of the superintendent is not conclusive upon a person claiming that the highway is a private road; the statute does not authorize the superintendent to create or enlarge, but only to perpetuate, the evidence of a public right. *Cole v. Van Keuren* (1875), 4 Hun 262, *affd.* (1876), 64 N. Y. 646.

A certificate or order of the town superintendent merely ascertaining and describing a road as a highway is insufficient as a defense in an action against him for trespass, where it does not purport to be based upon a record nor upon an adjudication that there had been a user of twenty years without record. *Kelsey v. Burgess* (1890), 35 N. Y. St. Rep. 368, 12 N. Y. Supp. 169.

Survey of old highway.—Where no record can be found as to the width, boundaries, etc., of an old established highway, the town superintendent may cause a survey to be made and have the boundaries described and entered of record in the town clerk's office, after which he may remove fences and other obstructions

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and open a highway to the width of at least two rods. Rept. of Atty. Genl. (1910) 706.

Private roads.—Roads dedicated to public use by private persons, but not adopted by the local public authorities, or declared highways by statute, are not highways within the meaning of the highway acts. *Oswego v. Oswego Canal Co.* (1852), 6 N. Y. 257.

User alone is insufficient to constitute a public highway. It must be associated with some act showing such use to be claimed as a right hostile to and independent of the will of the owner, such as reparation, or assuming the control of the road in some ostensible manner. The presumption of a grant of the right of way springs from the lapse of twenty years in connection with the adverse use by the public. *Harriman v. Howe* (1894), 78 Hun 280, 28 N. Y. Supp. 858, *affd.* (1898), 155 N. Y. 683, 50 N. E. 1117.

The failure of the town to cause a public highway, long in use, to be opened to its full width, for thirty years, does not extinguish the rights of the public in the parts not opened. *Walker v. Caywood* (1865), 31 N. Y. 51.

When the people have the right to travel the road and have done so for the prescribed time, it is a public highway notwithstanding the neglect of the superintendent to accept it by having it recorded. *Devenpeck v. Lambert* (1865), 44 Barb. 596.

The statute makes the road a highway, if it has been in use for twenty years, independent of any judgment of the superintendent. *Snyder v. Plass* (1864), 28 N. Y. 465. For history of statutes relative to statutory highways by user, see *James v. Sammis* (1892), 132 N. Y. 239, 30 N. E. 502. See cases cited under § 209, *post*.

Penalties recovered by commissioners of highways belong to the town and must be accounted for by such commissioners. *Albro v. Rood* (1881), 24 Hun 72. See *People ex rel. Loomis v. Town Auditors* (1878), 75 N. Y. 316.

Actions for penalties.—Any action for the benefit of a town to recover penalty or forfeiture given to a town officer, or the town represented by him, must be brought in the name of the town. Town Law, § 10. As to actions generally by or against town superintendents of highways, see Code Civil Procedure, §§ 1925-1928. Prior to the enactment of § 10 of the present Town Law (former Town Law, § 182), it was held that actions brought by a highway commissioner for the recovery of penalties might be brought by him in his own name with the addition of his official title. *Gould v. Glass* (1855), 19 Barb. 179; *Commissioners of Cortlandville v. Peck* (1843), 5 Hill 215.

Liability of town under contracts.—Section 10 of the Town Law (former § 182) has not changed the old rule that a commissioner [now town superintendent] of highways cannot create any liability upon the part of his town to pay for materials ordered by him for the ordinary repair of town highways. Highway commissioners are charged with the duty of keeping town highways in repair as independent officers and not as agents of the town, and when they contract for such ordinary repairs no liability is created against the town, and the commissioners themselves as such officers, and not the town, should be sued for the debt. *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356.

Liability for purchase-price of road machine under former law.—Under the former law it was held that a town is not liable for the price of a road machine purchased by its commissioner of highways, with the assent of the town board, since it was expressly required, under § 6 of the former law, that the machine be paid for with money appropriated for highway purposes, thus excluding any power on his part to impose a debt upon the town. *Acme Road Machine Co. v. Town of Bridge-water* (1906), 185 N. Y. 1, 77 N. E. 879.

Control of machines; liability.—As a road scraper belongs to the town and is

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employed in working the highways, it is under the control of the town superintendent; and the town is liable for injuries sustained by reason of his negligently leaving it in the road at night. *Whitney v. Town of Ticonderoga* (1891), 127 N. Y. 40, 27 N. E. 403.

Purchase of supplies.—The town superintendent has implied power to purchase supplies necessary for the purposes covered by an agreement pursuant to section 105 of the Highway Law. *Rept. of Atty. Genl.* (1911) 325.

Repair of bridges, lack of funds.—Lack of funds applicable in the hands of the commissioner (superintendent) is no defense to an action for negligence in not replacing a barrier upon a bridge, where by section 10 of the former Highway Law, he was authorized to make necessary expenditures to be afterward audited by the town board. Where the commissioner (now superintendent) of highways works a road at public expense for eight or nine years, it is a sufficient acceptance of the road as a highway to charge the town with damages for negligence in not properly guarding a bridge. *Rising v. Town of Moreau* (1911), 68 Misc. 284, 125 N. Y. Supp. 249.

The superintendent of highways in repairing a bridge may draw the water from a pond for so long a time as may be necessary to complete such repairs. *Rept. of Atty. Genl.* (1907) 372.

Removal of snow on improved highways.—It is the duty of town superintendents of highways to remove obstructions caused by snow in improved county and state highways in their respective towns. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 566.

Section cited.—*Local Authorities v. New York, N. H. & H. R. R. Co.* (1911), 144 App. Div. 791, 129 N. Y. Supp. 643; *Farnsworth v. Boro Oil & Gas Co.* (1915), 216 N. Y. 40, 109 N. E. 860.

§ 48. **Contracts for the construction of town highways.**—The town board of any town may provide that the construction of new highways and bridges, or the permanent improvement or reconstruction of existing highways and bridges or repairing, rebuilding or replacing walks on highways less than two rods in width pursuant to the provisions of section forty-seven, sixty-two and ninety-seven of this chapter, the cost of which will exceed five hundred dollars, shall be done under contracts. All such contracts shall be awarded by the town superintendent, in accordance with estimates, plans and specifications to be furnished by the district or county superintendent, or by the commission, as provided in this chapter, to the lowest responsible bidders, after advertisement once a week, for three consecutive weeks, in a newspaper published in the town where the work is to be performed, or if no newspaper is published therein, in a newspaper published at some other place in the county, having the largest circulation in said town. All bids for such work shall be opened in public and shall be filed in the office of the town clerk. No such contract shall be awarded, unless it be approved by the district or county superintendent, as to its form and efficiency. The person to whom such contract is awarded shall execute a bond to the town, in a sum equal to one-half of the amount of the contract, with two or more sureties to be approved by the town board, conditioned for the faithful compliance with the terms of the contract, and the plans and specifications and for payment of all damages which may accrue to the town, because of a violation thereof. When such work is

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completed pursuant to the terms of such contract, and the plans and specifications therefor, and accepted by the district or county superintendent and town board, as being in accordance therewith, the cost of the work under the contract shall be paid out of moneys available therefor, in the same manner as other highway expenses. Payments made under such contract shall be upon certificates issued to the contractor by the district or county superintendent, to the effect that the work has been done under and in accordance with the terms of such contract, and the plans and specifications. All work done under any such contract shall be under the supervision of the district or county superintendent, or some person designated by him. The town superintendent shall file all contracts, awarded under this section or as provided in this chapter, for the construction, improvement or repair of town highways and bridges, or for repairing, rebuilding or replacing a walk, with the town clerk of the town within ten days after their execution. (*Added by L. 1914, ch. 413, and amended by L. 1915, ch. 322, and L. 1916, ch. 578. Former § 48, as amended by L. 1913, ch. 621, repealed by L. 1914, ch. 413.*)

Source.—Former Highway Law (L. 1890, ch. 568) § 183, modified so as to conform to the proposed system. The last sentence was derived from L. 1895, ch. 717, §§ 2 and 3.

References.—Approval of plans and specifications by district or county superintendent, Highway Law, § 3, subd. 5. Payment for repair and improvement of town highways, Id. § 105. Contracts of town superintendent to be in name of town, Town Law, § 10.

§ 49. **Machinery, tools and implements.**—The town superintendent may, with the approval of the town board, purchase for the use of the town, stone crushers, steam rollers, traction engines, road machines for grading and scraping, tools and other implements, subject to the limitations prescribed in section ninety-four, which shall be paid for from moneys levied and collected or from the proceeds of bonds issued and sold for such purposes as provided in this chapter. No contract for the purchase of stone crushers, steam rollers or traction engines shall be valid, unless the district or county superintendent shall have approved thereof and indorsed his approval upon such contract. All road machines, stone crushers, steam rollers, tools and other implements owned either by the town or the highway districts therein, when this chapter takes effect, shall be used by the town superintendent in such manner and at such places in such towns as he shall deem best. They shall be under the control of the superintendent and be cared for by him at the expense of the town. The town superintendent shall annually make a written inventory of all such machinery, tools and implements, indicating each article and stating the value thereof, and the estimated cost of all necessary repairs thereto, and deliver the same to the supervisor of the town on or before October thirty-first in each year. He shall at the same time file with the town clerk his written recommendations as to what machinery, tools and implements should be purchased for

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the use of the town, and the probable cost thereof. The town superintendent shall provide a suitable place for housing and storing all machinery, tools and implements owned by the town and cause the same to be stored therein, when not in use. He may also with the approval of the town board, sell any such machinery, tools and implements, which are no longer needed by the town, or which are worn out or obsolete, or may exchange the same for new machinery, tools and implements. If sold, the proceeds shall, under the direction of the town board be applicable to the purchase of the machinery, tools and implements mentioned in subdivision three of section ninety-four of this chapter. Where there is an incorporated village constituting a separate road district, wholly or partly in a town which has purchased a stone crusher, steam roller or traction engine, the town board of such town may permit the use thereof by such village upon such terms as may be agreed upon. (*Amended by L. 1917, ch. 349, in effect May 3, 1917.*)

Source.—Substituted for former Highway Law (L. 1890, ch. 568) § 6. The last sentence was derived from former Highway Law (L. 1890, ch. 568) § 8. Under the former system road machines were purchased by road districts in labor system towns on petition of taxpayers, and by towns on a vote of the town board. Stone crushers and steam-rollers were purchased by commissioners of highways after a vote of the town meeting.

References.—Estimate of amount required for purchase of road machines, tools and implements, Highway Law, § 91, subd. 3; no part of money received from state is available for purchase of road machines, Id. § 101; payment of cost of road machines, tools, and implements, Id. § 106; inventory of machinery, tools and implements, Id. § 107.

Power to contract for road machine under former law.—A town is not liable for the price of a road machine purchased by its commissioner of highways, with the assent of the town board, under the provisions of section 6 of the former Highway Law (L. 1890, ch. 568, amd. L. 1896, ch. 987), since that section expressly requires the machine to be paid for with money appropriated for highway purposes, thus excluding any power upon his part to impose a debt upon the town. *Acme Road Machinery Co. v. Town of Bridgewater* (1906), 185 N. Y. 1, 77 N. E. 879.

Contract for steam roller.—Payment by the manufacturers of a steam roller of the *per diem* fees of the members of the town board for attending a meeting to authorize a contract for hiring or purchasing a steam roller and also the expenses of town officials in going to examine the roller and verify the agent's representations in respect to it is not a fraud upon the town which will vitiate the subsequent contract for the hiring or purchase of the steam roller. *Gardner v. Town of Cameron* (1911), 74 Misc. 286, 131 N. Y. Supp. 984, *affd.* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634, *affd.* (1915), 215 N. Y. 682, 109 N. E. 1074.

A lease of a steam roller by the manufacturers to a town, at a rental to be paid out of the highway improvement fund of ten dollars per day for sixty-four days each year for five years, coupled with an agreement upon the part of the manufacturers to sell the roller to the town for one dollar at the end of that period is a violation of this section, prohibiting the purchase of a steam roller for more than five hundred dollars without a vote of a town meeting, and also of section 50 which limits the hiring of a steam roller for rent payable out of the highway improvement fund to the days such roller is actually used on the highways. *Gardner v. Town of Cameron* (1911), 74 Misc. 286, 131 N. Y. Supp. 894, *affd.* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634, *affd.* (1915), 215 N. Y. 682, 109 N. E. 1074.

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Contract for conditional sale of steam roller; power of town authorities to lease steam roller; liability of town for benefits received.—The Highway Law does not authorize a town board to purchase a steam roller for use upon highways by a contract of conditional sale, and such contract is void and unenforceable. Although the contract aforesaid is void a taxpayer, in order to compel a restoration of town funds paid thereon to the seller by the town officials, must allege not only that the town funds have been wasted but prove upon trial that they have in fact been wasted; that is to say, that the payment resulted in no benefit to the town. Hence, as the town authorities were authorized by statute to lease a steam roller, there can be no recovery as for waste where the amount paid to the company furnishing the roller was reasonable in amount and the town received the benefit of the roller, which was used in the necessary performance of its function in caring for its highways. Under the circumstances the town is liable as upon a *quantum meruit*. *Shoemaker v. Buffalo Steam Roller Co.* (1915), 165 App. Div. 836, 151 N. Y. Supp. 207.

Purchase of steam roller under contract of conditional sale is unauthorized. *Gardner v. Town of Cameron* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634, *affd.* (1915), 215 N. Y. 602, 109 N. E. 1074.

Steam rollers must be purchased from funds furnished by the town in cash or funds immediately available for that purpose. *Gardner v. Town of Cameron* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634, *affd.* (1915), 215 N. Y. 682, 109 N. E. 1074.

Sale of highway machinery.—The power to sell machinery, implements or other personal property belonging to a town is vested in the electors of the town to be exercised by them at a town meeting. Neither the town board nor the town superintendent of highways has such power. *Opinion of State Comptroller* (1916), 9 State Dept. Rep. 472.

The erection of a building for the storing of road machinery belonging to a town may only be authorized under the provisions of the Town Law relating to town buildings. The provisions of the Highway Law do not contemplate such an undertaking. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 448.

§ 50. Town superintendent may hire machinery.—The town superintendent may, with the approval of the district or county superintendent, lease or hire stone crushers, steam rollers and traction engines at a rate to be approved by the town board, which shall not exceed ten dollars for a stone crusher and steam roller, and eight dollars for a traction engine, for each day such stone crusher, steam roller or traction engine is actually used upon the highways. The expense thereof shall be paid by the supervisor, upon the written order of the town superintendent, out of moneys received by him, as provided in this chapter, for the repair and improvement of highways.

Source.—New.

Leasing road machine.—A town superintendent cannot enter into a contract for the leasing of a road machine, binding upon his town, unless the town board approve of the rate to be paid therefor, notwithstanding the fact that the county superintendent has approved of the contract. *Rept. of Atty. Genl.* (1911) 408.

Where an injunction which originally prohibited the use of a steam roller sold to a town under a void contract of conditional sale was so modified as to permit the authorities of a town to hire the roller for use upon highways until further order of the court and the town board fixed the rental at ten dollars per day as permitted by the statute, the lessors of the roller are not guilty of contempt of

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court in receiving payment at that rental for the number of days the roller was actually used upon the highways. This is true although the contract of conditional sale of the roller made with the town authorities has been declared by the courts to be invalid. *Gardner v. Buffalo Steam Roller Co.* (1913), 155 App. Div. 762, 140 N. Y. Supp. 1049.

Contract for conditional sale with provision for rental.—The authorities of a town on its behalf entered into a written agreement purporting to lease a steam roller at the rate of ten dollars a day and agreed to use the same not less than sixty-four days in the year. It was further provided that the continuance of the lease each year was optional with the town superintendent, but that if the lease was not to be so continued the lessee must notify the lessor in writing by a certain date, and that upon a failure to do so the lease should continue for another year upon the same terms. It was further provided that in default of notice to the contrary the lessee agreed to rent and use the roller for the aforesaid number of days at the aforesaid rates, payments to be made until the roller was fully paid for, the lessor agreeing that upon full payment, and for a consideration of one dollar, the roller should belong to the lessee free of all incumbrances, the machine, however, to remain the property of the lessor until paid for, with a right in it to retake the machine. It was held, that said instrument though called a lease was not such in fact, but on the contrary was a contract of conditional sale, unauthorized by this section. A lease can only be made at a rental fixed by the town board. Where the contract is not approved the lessor cannot recover for use of roller. *Gardner v. Town of Cameron* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634, *affd.* (1915), 215 N. Y. 682, 109 N. E. 1074.

In order that a town may lease a steam roller for use upon the highways the rate of rental must be fixed by the town board, not exceeding ten dollars per day as provided by this section. Where the lessor of a steam roller allowed the machine to be used with full knowledge that the town board disapproved of the lease and refused to fix any rate of rental, it cannot recover for the use of the machine. *People ex rel. Buffalo Steam Roller Co. v. Laidlaw* (1913), 155 App. Div. 759, 140 N. Y. Supp. 641.

§ 51. **Purchase of gravel and stone.**—The town superintendent may, with the approval of the town board, purchase of the owner of any gravel bed or pit, or stone quarry within the town, gravel or stone for the purpose of grading, repairing or otherwise improving the highways of the town, at a price per cubic yard to be approved by the town board. If such town superintendent cannot agree with any such owner for the purchase of such gravel or stone, he may, with the approval of the town board, acquire by condemnation the right to take and use such gravel or stone, and to remove the same from such bed, pit or quarry, for the purpose of grading, repairing or otherwise improving such highways, together with the right of way to and from such bed, pit or quarry, for the purpose of such removal. No such gravel or stone shall be so taken by condemnation within five hundred feet of any house or barn, or from any lawn, orchard or vineyard. The purchase price of such stone or gravel and the damages awarded in such condemnation proceedings, together with the costs and expenses thereof, shall be a town charge and paid from moneys levied and collected therefor, as provided by law. If the town shall abandon for the period of three years any right acquired under this section to take and use the gravel or stone from any such bed, pit or quarry, or if the superintendent shall

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cease to use the same for the purpose for which it was acquired, the right thereto shall cease, and the ownership thereof shall revert to and become vested in the owner of such bed, pit or quarry, or his heirs or assigns.

Source.—L. 1891, ch. 309, § 1 and 2, modified by eliminating references to highway districts and providing for the acquisition of the right to use and take stone from stone quarries.

The words "town superintendents of highways" and "town superintendents" are used interchangeably to designate the same official. *Maxson v. Gale* (1911), 142 App. Div. 335, 126 N. Y. Supp. 967.

Form of petition, see *Maxson v. Gale* (1911), 142 App. Div. 335, 126 N. Y. Supp. 967.

§ 52. Obstructions and their removal.—Obstructions, within the meaning of this section, shall include trees which have been cut or have fallen either on adjacent lands or within the bounds of the highway, in such a manner as to interfere with public travel therein; limbs of trees which have fallen within the highway, or branches of trees overhanging the highway so as to interfere with public travel therein; lumber, wood or logs piled within the bounds of the public highway; machines, vehicles and implements abandoned or habitually placed within the bounds of the highway; fences, buildings or other structures erected within the bounds of the highway; earth, stone or other material placed in any ditch or waterway along the highway; telegraph, telephone, trolley and other poles, and the wires connected therewith, erected within the bounds of the highway in such a manner as to interfere with the use of the highway for public travel.

It shall be the duty of each owner or occupant of lands situate along the highway, to remove all obstructions within the bounds of the highway, which have been placed there, either by themselves or by their consent. It shall be the duty of all telephone, telegraph, electric railway and other electrical companies, to remove and reset telephone, telegraph, trolley and other poles and the wires connected therewith, when the same constitute obstructions to the use of the highway by the traveling public. If temporary obstructions such as trees, lumber, wood, logs, machinery, vehicles and similar obstructions are not removed within five days after the service of a notice, personally or by mail, upon such owner or occupant, requesting the same to be done, the town superintendent shall remove such obstruction. And if permanent obstructions, including, among others, telegraph, telephone, trolley and other poles and wires connected therewith, are not moved and reset within thirty days, the town superintendent shall move and reset such poles and wires. The expense thereby incurred shall be paid in the first instance out of moneys levied and collected and available therefor, and the amount thereof shall be charged against such owner, occupant or company, and levied and collected, as provided in section fifty-five. (*Amended by L. 1914, ch. 196.*)

Source.—New. This section was intended as a substitute for former Highway Law (L. 1890, ch. 568) §§ 104, 105, wherein it was provided that obstructions should be removed by the owner or occupant of lands adjoining highways, and in

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case of a failure a penalty was prescribed, or the commissioner could remove and recover the expense from the owner or occupant.

References.—Assessment of cost of removal of obstructions, Highway Law, § 55; owner or occupant of lands to remove tree which had fallen into the highway, *Id.* § 296; obstructions in highway a public nuisance and person causing it guilty of a misdemeanor, Penal Law, §§ 1530, 1532.

General rule as to obstructions.—The general rule is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above or below the surface, is guilty of maintaining a nuisance, for which he is liable in damages to a person directly injured, and to indictment on behalf of the people. *People v. Horton* (1876), 64 N. Y. 610.

Opening or recording highway, when necessary.—The failure of the superintendent to cause a public highway, in use for over thirty years, to be opened to its full width, does not extinguish the rights of the public in the parts not opened. *Walker v. Caywood* (1865), 31 N. Y. 51; *Milhau v. Sharp* (1863), 27 N. Y. 611. So as to non-user of a portion. *Mangam v. Village of Sing Sing* (1898), 26 App. Div. 464, 50 N. Y. Supp. 647, *affd.* (1900), 164 N. Y. 560, 58 N. E. 1089. But see *Peckham v. Henderson* (1858), 27 Barb. 207. It is not necessary that the highway obstructed be recorded before a penalty can be recovered. *Town of West Union v. Richey* (1901), 64 App. Div. 156, 71 N. Y. Supp. 871; *Town of Corning v. Head* (1895), 86 Hun 12, 33 N. Y. Supp. 360; *Devenpeck v. Lambert* (1865), 44 Barb. 596; *Baylis v. Rooe*, 1 Silv. 356 (1889); *Fowler v. Mott*, 19 Barb. 204 (1855). But see *Doughty v. Brill* (1862), 36 Barb. 488, *affd.* (1862), 3 Keyes 612, 1 Abb. Ct. of App. Dec. 524; *Christy v. Newton* (1871), 60 Barb. 332; *People ex rel. Butler v. Hunting* (1886), 39 Hun 452; *Alpaugh v. Bennett* (1891), 59 Hun 45, 12 N. Y. Supp. 398. But a public highway cannot be obstructed until it is opened by the superintendent. *Little v. Denn* (1866), 34 N. Y. 452; *Trustees of Jordan v. Otis* (1862), 37 Barb. 50; *Doughty v. Brill* (1862), 36 Barb. 488, *affd.* (1867), 3 Keyes 612; *Kelly v. Horton* (1823), 2 Cow. 424. Under ch. 245 of the Laws of 1878 it was held sufficient if the highway is one that has been established by user, even though it has never been laid out or entered of record. *Town of West Union v. Richey* (1901), 64 App. Div. 156, 71 N. Y. Supp. 871.

Mandamus will lie to compel the town superintendent to remove bath houses which lie in a public highway and cut off access at high-water mark. *People ex rel. Butler v. Hawxhurst* (1907), 123 App. Div. 65, 107 N. Y. Supp. 746.

What constitute obstructions.—Anything which unreasonably obstructs a highway so as to prevent the use thereof for the purposes for which it is maintained is an illegal obstruction and must be removed as provided in this section, or may be abated as a nuisance. Slight inconveniences and occasional interruptions of the use of a highway, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have full use thereof. *People v. Horton* (1876), 64 N. Y. 610.

Every encroachment upon a highway is not a nuisance, as for instance a fence which annoys no one. *Griffith v. McCullum* (1866), 46 Barb. 561. Trees, lawfully planted in a highway, do not become obstructions or encroachments upon a change in the statute, and the court is powerless to have them removed; if public convenience require their removal, condemnation proceedings must be instituted and compensation awarded their owner. *Town of Wheatfield v. Shasley* (1898), 23 Misc. 100, 51 N. Y. Supp. 835; *Edsall v. Howell* (1895), 86 Hun 424, 33 N. Y. Supp. 892.

An encroachment or obstruction placed upon a highway, or the taking of possession by an individual, or fencing it up, will not affect or diminish the public right in it or prevent its being opened and worked. But the public may abandon

its claims to a public highway, and non-user for twenty years is some evidence of such intent. *Woodruff v. Paddock* (1890), 56 Hun 288, 9 N. Y. Supp. 381, *affd.* (1892), 130 N. Y. 618, 29 N. E. 1021; *Burbank v. Fay* (1875), 65 N. Y. 57. A fence is an obstruction if within highway. *Town of Corning v. Head* (1895), 86 Hun 12, 33 N. Y. Supp. 360.

Obstruction as public nuisance.—The obstruction of a public highway is an act which in law amounts to a public nuisance, and one who sustains a private and peculiar injury from such an act may maintain an action to abate it and recover the special damages sustained by him. *Wakeman v. Wilbur* (1895), 147 N. Y. 657, 42 N. E. 341; *Adams v. Popham* (1879), 76 N. Y. 410; *Chipman v. Palmer* (1879), 77 N. Y. 51; *Dygert v. Schenck* (1840), 23 Wend. 446; *People v. Kerr* (1863), 27 N. Y. 188, 193. Any unauthorized continuous obstruction of a public highway is a public nuisance; but that which is authorized by competent legal authority cannot constitute a nuisance. *Davis v. Mayor, etc., of New York* (1856), 14 N. Y. 506.

The owner of the fee of a highway, if he erect a dock to navigable water thereon, creates a nuisance if the dock prevents public travel and it may be removed; if it does not obstruct travel it becomes a part of the street. *City of Buffalo v. D., L. & W. R. R.* (1907), 190 N. Y. 84, 82 N. E. 513, 16 L. R. A. (N. S.) 506, *revg.* (1906), 114 App. Div. 915, 99 N. Y. Supp. 1049.

An obstruction of a highway by which the public is deprived of its use constitutes a nuisance. But there must be such a permanent and continued occupation of the highway for a purpose foreign to and inconsistent with its use by the public as to amount to a permanent obstruction. *People v. Horton* (1876), 64 N. Y. 610; *Tinker v. N. Y., Ontario & Western R. Co.* (1898), 157 N. Y. 312, 51 N. E. 1031; *People v. Cunningham* (1845), 1 Den. 524; *Attorney-General v. Cohoes Co.* (1836), 6 Paige 133. A person maintaining a nuisance in a highway is liable for any damages to a person who by reason thereof has sustained a special injury. But the injury to be actionable must be special in its nature and not a damage which is sustained by the rest of the community as well. *Lansing v. Smith* (1828), 8 Cow. 146, *affd.* (1829), 4 Wend. 9; *Butler v. Kent* (1821), 19 Johns. 223; *Pierce v. Dart* (1827), 7 Cow. 609; *Mills v. Hall* (1832), 9 Wend. 315; *Griffith v. McCullum* (1866), 46 Barb. 561, 565; *Harrower v. Ritson* (1861), 37 Barb. 301. Such a nuisance may, doubtless, be abated by any private person injured thereby. *Strickland v. Woolworth* (1874), 3 T. & C. 286; *Thompson v. Allen* (1872), 7 Lans. 459; *McFadden v. Kingsbury* (1834), 11 Wend. 667.

Continued obstruction of highway.—The occupation of a portion of a highway is a mere obstruction and nuisance, and not even if such occupation be continued for over twenty years is it justified; and no acquiescence on the part of the highway commissioners can deprive the public of the use of the whole roadway. *Driggs v. Phillips* (1886), 103 N. Y. 77, 8 N. E. 514; *Wiseman v. Lucksinger* (1881), 84 N. Y. 31, 44; *St. Vincent Orphan Asylum v. City of Troy* (1879), 76 N. Y. 108; *Mills v. Hall* (1832), 9 Wend. 315. So held of abutments placed in highway and maintained there over twenty years by a railroad. *Town of Windsor v. D. & H. C. Co.* (1895), 92 Hun 127, 36 N. Y. Supp. 863, *affd.* (1898), 155 N. Y. 645, 49 N. E. 1105.

There is no such thing as a prescriptive right to maintain a public nuisance. *Mills v. Hall* (1832), 9 Wend. 315. The doctrine of adverse possession does not apply to highways. *Woodruff v. Paddock* (1890), 56 Hun 288, 9 N. Y. Supp. 381, *affd.* (1892), 130 N. Y. 618, 29 N. E. 1021.

Public authorities may authorize obstructions.—The legislature, by virtue of its general control over public streets and highways, has the power to authorize structures in the streets and highways, which, under the common law, would be obstructions or encroachments, and may delegate the power to the governing body of a municipality. *Hoey v. Gilroy* (1891), 129 N. Y. 132, 29 N. E. 85. For instance, town, village or city authorities may, if empowered by statute, authorize and

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regulate the use of awnings, stands for business purposes, and the like, in the public streets. But apart from these exceptions "public highways belong, from side to side, and end to end" to the public. Any permanent or unnecessary obstacle to travel in a street or highway is a nuisance, although space may be left for the passage of the public. Authorities may properly grant a right to a railroad to maintain gates at a highway crossing, and if properly constructed and opened and closed, and necessary to the public safety, cannot be restrained. *Friedlander v. D. & H. C. Co.* (1890), 34 N. Y. St. Rep. 650, 13 N. Y. Supp. 323.

Owner of land may not obstruct.—An owner of land, over which a highway is laid out, has no right to obstruct the same, although the damages sustained by reason of the opening of the highway have been neither assessed nor paid; it is not a constitutional requisite that the assessment and payment precede the taking, provided the statute has made provision therefor. *Chapman v. Gates* (1873), 54 N. Y. 132, affg. (1873), 46 Barb. 313; *Case v. Thompson* (1831), 6 Wend. 634.

Liability of owners for injuries caused by obstruction.—The landowner who has stored muck by the roadside is not liable for injuries received by one driving along the highway whose horse becoming frightened by an automobile suddenly reared to one side, and, running into such muck overturned the vehicle. *Sweet v. Perkins* (1906), 115 App. Div. 784, 101 N. Y. Supp. 163.

Obstructions for business purposes.—Reasonable temporary obstruction for purposes of business is permissible. *Welsh v. Wilson* (1886), 101 N. Y. 254, 4 N. E. 633; *St. John v. Mayor* (1857), 13 Super. (6 Duer) 315. To excuse the placing of an obstruction in a highway it must be shown that it is reasonably necessary for the conduct of one's business, and at the same time does not unreasonably interfere with the right of the public to use the highway. *Tinker v. N. Y., Ontario & Western R. Co.* (1898), 157 N. Y. 312, 51 N. E. 1031, 5 Am. Neg. Rep. 208; *Flynn v. Taylor* (1891), 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556; *Callanan v. Gilman* (1887), 107 N. Y. 360, 14 N. E. 264.

In these cases a temporary obstruction or occupation of a part of a street or highway, by persons engaged in building, or in receiving or delivering goods from stores or warehouses were allowed. But one who has occasion to leave a load in a highway must remove it with promptness. If he let it remain there an unreasonable time it may be removed as a nuisance. It is not sufficient, however, that the obstructions are necessary with reference to the business of the person who erects or maintains them; they must be reasonable with respect to the rights of the public. *Callanan v. Gilman* (1887), 107 N. Y. 360, 14 N. E. 264.

Telephone poles in highways.—Subject to reasonable regulations by the town superintendent, telephone poles may be erected in the highway, and they are not a nuisance *per se*. *Scofield v. Town of Poughkeepsie* (1907), 122 App. Div. 868, 107 N. Y. Supp. 767. See also Rept. of Atty. Genl. (1904) 366.

Erection of poles in highway.—The right which telephone and telegraph companies derive by virtue of section 102 of the Transportation Corporations Law to construct and maintain poles and wires in rural highways is not absolute or unqualified but subject to the rule that the lines must be so located as not unnecessarily to obstruct the public travel. Where the plans for the improvement of any such highway require the re-location of poles and wires, it is incumbent upon the companies at their own expense to re-locate the same. It seems, however, that it is incumbent upon the state or county, as the case may be, to afford the company a new right of way within the limits of the improved highway. Rept. of Atty. Genl. (1913) 176.

Abatement of nuisance.—Statute does not abrogate common law remedy of abatement of nuisance, or abolish the proceedings by indictment. *Wetmore v. Tracy* (1835), 14 Wend. 250. Trial by jury is a matter of right in an action to abate a nuisance and recover damages thereby. *Hudson v. Cary* (1871), 44 N. Y. 553.

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Denial of an encroachment must be in writing. *Lane v. Cary* (1885), 19 Barb. 537.

Notice to remove.—Under the common law an actual notice must be shown, and it will not be presumed; the burden of proving that it has been given is upon the commissioner. *Case v. Thompson* (1831), 6 Wend. 634.

A notice or order requiring the removal of such an encroachment must contain a precise and certain description of the particulars of the encroachment to such an extent, at least, as will enable the party upon whom it is served to go upon the ground and fix the place and extent thereof with certainty and without embarrassment. *Town of Sardinia v. Butler* (1896), 149 N. Y. 505, 44 N. E. 179; *Cook v. Covill* (1879), 18 Hun 288; *Mott v. Commissioners of Highways of Rush* (1842), 2 Hill, 472; *Fitch v. Commissioners of Highways of Kirkland* (1839), 22 Wend. 132; *Spicer v. Slade* (1812), 9 Johns. 359.

Action for removal.—Former Highway Law, § 105, authorized an action by the commissioner for the removal of an obstruction in the name of the town. It was held that such action might be instituted after a reasonable notice. *Town of Smithtown v. Ely* (1902), 75 App. Div. 309, 78 N. Y. Supp. 178, *affd.* (1904), 178 N. Y. 624, 70 N. E. 1110. See also under former law as to order of removal, *Olen-dorf v. Sullivan* (1891), 36 N. Y. St. Rep. 74, 13 N. Y. Supp. 6; *James v. Sammis* (1892), 132 N. Y. 239, 30 N. E. 502, *affg.* (1892), 31 N. Y. St. Rep. 192, 10 N. Y. Supp. 143. It was questioned under the former law whether sufficiency of a notice or order of a commissioner to remove an encroachment can be attacked in action of trespass against the commissioner. *Hathaway v. Jenks* (1893), 67 Hun 289, 22 N. Y. Supp. 421; *James v. Sammis* (1892), 132 N. Y. 239, 30 N. E. 502, *affg.* (1892), 31 N. Y. St. Rep. 192, 10 N. Y. Supp. 143.

Under the former law a highway commissioner might either summarily abate the nuisance or bring an action therefor. *Flood v. Van Wormer* (1895), 147 N. Y. 284, 41 N. E. 569. Commissioners of adjoining towns could not unite in the action; it belongs exclusively to the commissioner of the town where the encroachment lies. *Bradley v. Blair* (1854), 17 Barb. 480.

Summary removal by superintendent.—It was held under the former law that commissioners of highways had the power to summarily remove from a highway any obstruction placed therein which unnecessarily interferes with the public use of highways, without beginning an action. They could do this without first resorting to any legal proceeding. *Cook v. Harris* (1875), 61 N. Y. 448; *Hathaway v. Jenks* (1893), 67 Hun 289, 22 N. Y. Supp. 421; *Van Wyck v. Lent* (1884), 33 Hun 301. But it was also held that the commissioner had no remedy in equity to compel the removal of an obstruction in the highway. *Rozell v. Andrews* (1886), 103 N. Y. 150, 8 N. E. 513.

Where the town superintendent sees fit to remove the encroachment summarily the party would be remediless, except by an action for trespass; such a remedy would be inadequate to afford relief, so injunction will interpose and the plaintiff will not be compelled to wait and seek his remedy after the injury has been actually inflicted. *Flood v. Van Wormer* (1893), 70 Hun 415, 24 N. Y. Supp. 460, *affd.* (1895), 147 N. Y. 284, 41 N. E. 569; *Corning v. Lowerre* (1822), 6 Johns. Ch. 439. If, in the discharge of his official duty, the superintendent removes without unnecessary damage an encroachment, after notice, though informal, to the owner, he should not be deemed a trespasser, and no action for trespass will lie against him therefor. *Hathaway v. Jenks* (1893), 67 Hun 289, 22 N. Y. Supp. 421.

Removal of fences.—Rept. of Atty. Genl. (1908) 546.

§ 53. Removal of obstructions.—The town superintendent shall cause the removal of obstructions caused by snow on state and county highways within the town. He shall also, during such time as patrolmen are not employed thereon, cause snow and ice to be removed from the culverts and

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waterways of such highways when necessary, and the cost thereof shall be paid from the miscellaneous or other town funds. (*Added by L. 1914, ch. 197; former § 53 repealed, by L. 1912, ch. 83.*)

Source.—New.

Application.—This is the only section of article 4 which imposes a specific duty on town boards in relation to state and county highways. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

§ 53-a. Temporary obstruction of highways.—The necessary obstruction of a highway by the removal of buildings or other temporary obstruction shall only be allowed if a highway other than a state or county highway under a permit granted by the county superintendent upon the written request of the town superintendent, and if a state or county highway under a permit granted by the commissioner of highways. (*Added by L. 1910, ch. 567, and amended by L. 1913, ch. 80.*)

Source.—New.

Use of streets for moving building.—One who has obtained a permit pursuant to this section to move a building twenty-nine feet high along a highway, cannot be prevented from so doing by a telephone company refusing to raise or remove its wires. *New York Telephone Co. v. Dittman* (1916), 96 Misc. 60, 159 N. Y. Supp. 625.

§ 54. Removal of noxious weeds and brush within the highways, and of obstructions caused by snow.—It shall be the duty of the owner or occupant of lands situated along the highway to cut and remove the noxious weeds growing within the bounds of the highway, fronting such lands, at least twice in each year, once in the month of June, and once in the month of August. It shall be the duty of such owner or occupant to cut and remove all briars and brush, growing within the bounds of the highway, fronting such lands, once in the month of August in each year. It shall also be the duty of such owner or occupant to remove brush, shrubbery and other obstructions within the bounds of the highway, causing the drifting of snow upon said highway, before the first day of November in each year. If such owner or occupant fails to cut or remove such weeds or brush, or to remove such brush, shrubbery or other obstructions, causing the drifting of snow, as provided herein, the town superintendent of the town in which said lands are situated shall cause the same to be done, and the expense thereby incurred shall be paid in the first instance out of moneys levied and collected and available therefor, and the amount thereof shall be charged against such owner or occupant, and levied and collected, as provided in section fifty-five. The town board of any town may, by resolution, determine that the work required by this section to be done by the owner or occupant of lands situated along the highway shall be done by the town superintendent. If such resolution be adopted such work shall be done by the town superintendent at the times prescribed by this section, the cost thereof shall not be charged or assessed against the owner or occupant but shall be a town charge, and

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there shall be annually raised in such town in addition to other moneys raised for highway purposes, a sum sufficient to pay such expense. (*Amended by L. 1911, ch. 151.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 63-a, as amended by L. 1897, ch. 648. The part of this section relating to the assessment of the cost of removal against owners of lands is contained in § 55.

References.—Payment of cost of removal of noxious weeds and brush and obstructions caused by snow, Highway Law, § 106; town meeting may vote to allow awards for destruction of noxious weeds, Town Law, § 43, subd. 5; board of supervisors may make laws and regulations for the destruction of wild and noxious weeds, County Law, § 12, subd. 7.

Duty of abutting owners to cut weeds and brush and remove obstructions from highway is laid upon the occupants of lands as well as the owners and the question of ownership of the fee of any part of the highway does not necessarily enter into the consideration. Rept. of Atty. Genl. (1910) 734.

A person whose lands abut on the highway, whether the line of his land is at the edge or in the center of the highway, is required by statute to cut, destroy and remove brush and weeds from the highway surrounding such lands and where different persons own the land each should cut the brush, etc., to the center of the line of the highway regardless of whether the center line of the highway is the boundary line of the lands. Rept. of Atty. Genl. (1908) 537.

The owner of land adjacent to a highway is liable for the expense of removal of brush therefrom notwithstanding he may not be the owner of the fee of the highway in front of his premises. Rept. of Atty. Genl. (1912), Vol. 2, p. 438.

Cutting of brush and weeds.—Rept. of Atty. Genl. (1904) 358.

§ 55. Assessment of cost against owners and occupants.—The town superintendent shall assess the cost of,

1. Removing obstructions and moving and resetting poles and wires, pursuant to section fifty-two.

2. Cutting and removing noxious weeds, briars and brush and removing brush, shrubbery and other obstructions within the highways, causing the drifting of snow, pursuant to section fifty-four, against the owner, occupant or company neglecting to perform the duty imposed by the sections above referred to. Such town superintendent shall serve personally or by mail upon such owner, occupant or company, a written notice, stating that at a time and place specified therein, he will assess such cost against the owner, occupant or company neglecting to perform such duty. Such notice shall be served at least eight days previous to the time specified therein. If directed against a company, it may be served upon it at its principal place of business, or upon an agent of the company within the town. At the time and place so specified, he shall hear the parties interested, and shall thereupon complete the assessment, stating therein, the name of each owner, occupant or company, and the amount assessed against him or it, and shall return such assessment to the town clerk who shall present the same to the town board of his town, at its meeting held on the Thursday preceding the annual meeting of the board of supervisors. Such town board shall certify such assessment to the board of supervisors who shall cause the amount stated therein to be levied against such owner, occupant or com-

pany and any uncollected tax shall be a lien upon the land affected. The amount so levied shall be collected in the same manner as other taxes levied by such board, and shall be paid to the supervisor of the town, to be applied in reimbursing the fund from which such cost was defrayed.

Source.—New in form. The provisions relating to the assessment of the cost of removing noxious weeds and brush and the obstructions caused by the drifting of snow, upon abutting property owners, were contained in former Highway Law (L. 1890, ch. 568) § 53-a.

§ 56. **Wire fences to prevent snow blockades.**—The town superintendent, with the consent of the town board, may purchase wire for fences to be erected for the prevention of snow blockades, and the said town superintendent is hereby authorized to contract with the owners of the lands lying along the highways of their respective towns, at such points as are liable to snow blockade, for the removal of the fences now standing along the boundaries of such highways and the replacing of such fences with wire fences. He may contract to deliver to such land owners fence wire to be used in the construction of such fences, without charge to said land owners, at the place of purchase, but he shall not agree to pay any part of the cost of the removal or construction called for by said contracts, or to make any payment to said land owners, as a compensation for the construction of fences or for posts. The amount to be expended for the purchase of such wire shall not exceed the sum of three hundred dollars in any one year, and such amount shall be included in the estimate for expenditures for removal of obstructions caused by snow, and other miscellaneous purposes, and paid from the money levied and collected therefor. The fences to be built, under the provisions of this section, shall be of not less than four strands of wire nor more than nine strands, in the discretion of the town superintendent, approved by the town board, and the construction of said fences and their distance apart, shall be such as said town superintendent shall prescribe. Whenever such fence or fences shall become so out of repair as to be dangerous to animals passing along the highway, it shall be the duty of the owner or owners of said fence or fences to immediately repair or replace the same. Whenever the town superintendent shall contract for the removal of any fence, under the provisions of this section, he shall file in the office of the town clerk a description of that portion of the highway to which said contract shall apply, and thereafter it shall not be lawful for any person to replace the fence so contracted to be removed, with any fence liable to cause the drifting of snow. In no case shall the town superintendent approve of or permit the use of barb wire for such fences.

Source.—L. 1890, ch. 291, §§ 1-5, as amended by L. 1905, ch. 311. The former law required a submission of the question as to the purchase of wire to a town meeting.

References.—Amount required for purchase of wire fence to be included in estimate of town superintendent, Highway Law, § 90, subd. 4; payment of cost of wire fence, *Id.* § 106.

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Injuries to colt from barb-wire fence.—*Mattice v. Mattice* (1913), 81 Misc. 484, 143 N. Y. Supp. 487.

§ 57. Entry upon lands by town superintendent.—The town superintendent may, when directed by the district or county superintendent, and when authorized by the town board, enter

1. Upon any lands adjacent to any of the highways in the town, for the purpose of opening an existing ditch or drain, or for digging a new ditch or drain for the free passage of water for the drainage of such highways.

2. Upon the lands of any person adjoining rivers, streams or creeks, to drive spiles, throw up embankments and perform such other labor as may be necessary to keep such rivers, streams or creeks within their proper channels, and to prevent their encroachment upon highways or abutments of bridges.

3. Upon the lands adjoining a highway which, during the spring freshets or at a time of highwater are subject to overflow from such rivers, streams or creeks, to remove or change the position of a fence or other obstruction preventing the free flow of water under or through a highway, bridge or culvert, whenever the same may be necessary for the protection of such highway or bridge.

4. Upon any lands adjacent to highways to remove any fence or other obstruction which causes snow to drift in and upon such highways, and erect snow fences or other devices upon such lands to prevent the drifting of snow in or upon such highways.

Source.—The part of the above section relating to entry upon lands to open or dig ditches was derived from former Highway Law (L. 1890, ch. 568) § 27, as added by L. 1906, ch. 101. The provisions relating to the entry upon lands to prevent overflow and to remove fences and other obstructions causing the drifting of snow were taken from former Highway Law, § 4, subd. 8.

References.—Entry upon lands adjacent to state or county highway for the purpose of opening or constructing drain or ditch, Highway Law, § 135; damages for such entry, *Id.* § 136.

§ 58. Damages to owners of lands.—Where lands are entered upon under the provisions of the preceding section, the town superintendent shall agree with the owner of such lands, subject to the approval of the town board, as to the amount of damages, if any, sustained by such owner in consequence of such entry in performance of the work authorized by such section, and the amount of such damages shall be a town charge. If the town superintendent is unable to agree with such owner upon the amount of damages thus sustained the amount thereof shall be ascertained, determined and paid in the manner that damages are so ascertained, determined and paid, where new highways are laid out and opened and the town superintendent and land owners are unable to agree upon the amount thereof.

Source.—Former Highway L. (L. 1890, ch. 568) § 27, in part, as added by L. 1906, ch. 101, and § 4, subd. 8, in part, as amended by L. 1904, ch. 478.

Reference.—Determination of amount of damages where town superintendent is unable to agree with owners of lands, Highway Law, §§ 192-204.

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§ 59. **Damages for change of grade.**—In any town in which a town highway shall be repaired, graded and macadamized from curb to curb by the authorities of the town the owner or owners of the land adjacent to the said highway shall be entitled to recover from the town the damages resulting from any change of grade. A person claiming damages from such change of grade must present to the town board of such town a verified claim therefor within sixty days after such change of grade is effected. The board may agree with such owner upon the amount of damages to be allowed him. If no agreement be made within thirty days after the presentation of the claim, the person presenting it may apply to the supreme court for the appointment of three commissioners to determine the compensation to which he is entitled. Notice of the application must be served upon the supervisor of the town at least ten days before the hearing thereof. All proceedings subsequent to the appointment of commissioners shall be taken in accordance with the provisions of the condemnation law, so far as applicable. Such town board, or such commissioners, shall, in determining the compensation, consider the fair value of the work done, or necessary to be done, in order to place the claimant's lands, or buildings, or both, in the same relation to the changed grade as they stood to the former grade, and make awards accordingly, except that said board or said commissioners may make an allowance for benefits derived by the claimant from such improvement. The amount agreed upon for such damages, or the award therefor together with the costs, if any, allowed to the claimant, shall be a charge against such town and the supervisor shall pay the same, if there be sufficient funds in his hands available, and if not, the town board shall borrow money for the payment thereof, as provided in section ninety-seven, or issue certificates of indebtedness therefor, as provided in section ninety-six. Bonds of the town to raise the money necessary to make such payment, and such bonds or such certificates of indebtedness shall bear a rate of interest not exceeding five per centum per annum payable semi-annually. Such bonds shall be in the same form, and shall be issued and sold in the same manner as other town bonds.

Source.—Former Highway L. (L. 1890, ch. 568) § 11-a, as added by L. 1903, ch. 610, and amended by L. 1906, ch. 530.

Constitutionality.—The constitutionality of the original act was established in the case of *Matter of Borup* (1905), 182 N. Y. 222, 74 N. E. 838, affg. (1905), 102 App. Div. 262, 92 N. Y. Supp. 624. It was there held an award of damages not permissible except by virtue of the act was in no sense a gift or gratuity of the money of the town; that the legislature had power to provide for the payment of damages in the original act; that the act authorized no new or improper rule of damages; that the recovery is limited to the actual amount of damages, measured by the principles prevailing in condemnation proceedings.

Application.—This section has no application to highways constructed by the state under the so-called Good Roads Law (L. 1898, ch. 115), the expense of which is borne jointly by the town, county and state. *Matter of Baynes* (1910), 140 App. Div. 735, 126 N. Y. Supp. 132. The Act of 1898 is now contained in article 6 of this chapter.

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The statute does not apply to the change of grade of a highway to carry it under a railroad in accordance with Railroad Law, §§ 62-69. *Smith v. Boston & Albany R. R. Co.* (1904), 99 App. Div. 94, 91 N. Y. Supp. 412, *affd.* (1905), 181 N. Y. 132, 73 N. E. 679.

At common law a town is not liable to an abutting owner for a change of grade of a highway, and is only made liable by virtue of some provision of statute. *Matter of Baynes* (1910), 140 App. Div. 735, 738, 125 N. Y. Supp. 861.

"It is the settled law in this state that the owner of property abutting upon a highway which is graded or changed by the public authorities has no right of action against the town or municipality unless such right is given by some express statute. At common law there is no such liability." *Smith v. Boston & Albany R. R. Co.* (1905), 181 N. Y. 132, 136, 73 N. E. 679.

Retroactive effect of former law.—Section 11-a of the former Highway Law, as added by L. 1903, ch. 610, was held to include highways that had been theretofore or were thereafter graded. Such section was amended by L. 1904, ch. 443, so as to embrace only those highways which were regraded in the future. *Matter of Andersen* (1904), 178 N. Y. 416, 70 N. E. 921, *revd.* (1904), 91 App. Div. 563, 87 N. Y. Supp. 24.

Under the former law it was held that it must be established that such improvement was done "in accordance with the provisions of § 69 of ch. 686 of the Laws of 1892," the County Law. *Matter of Borup* (1903), 89 App. Div. 183, 85 N. Y. Supp. 828.

Claim for damages.—At common law an abutter had no claim for damages against a municipality for a change in the grade of a highway; and this rule was applicable even though access to his property might be cut off. In towns the only remedy given is that contained in this section. *Smith v. Boston & Albany R. R. Co.* (1904), 90 App. Div. 94, 91 N. Y. Supp. 412, *affd.* (1905), 181 N. Y. 132, 73 N. E. 679. The right to compensation is created by statute, and the statutory remedy is exclusive, and the measure of damage is determined by the terms thereof and cannot be assessed on the theory of a trespass. *Matter of Hoy v. Village of Salamanca* (1907), 57 Misc. 31, 107 N. Y. Supp. 208.

Although this section authorizes a recovery of damages by an adjoining owner where a highway is "graded and macadamized from curb to curb by the authorities of the town," a recovery may be had, even though the road graded and macadamized was not in fact curbed. Court should determine sufficiency of petition even if no objection is made by town. *Matter of Ives* (1913), 155 App. Div. 670, 140 N. Y. Supp. 694, *affd.* (1913), 209 N. Y. 575, 103 N. E. 1125.

Damages arising from change of grade in construction of highway preventing approach to farm lands.—*Rept. of Atty. Genl.* (1908) 544.

Consequential damages upon change of grade of state highway; jurisdiction to set aside award.—The report of commissioners to ascertain compensation to be made for the taking of real estate for state highway purposes, so far as an award therein for consequential damages depending upon a change of the grade of a state highway, should be set aside, because the change of grade is not of a town highway; but the court at Special Term cannot make such determination, as under section 3371 of the Code of Civil Procedure the court is without power to strike out part of an award and confirm the report as modified, but the report will be set aside and a rehearing directed before the same commissioners with instructions to make no award or appraisal of damage by reason of the change of the grade of the highway in front of defendant's premises. *People v. Dawson* (1914), 87 Misc. 588, 150 N. Y. Supp. 679.

Protection of work from surface waters; damage to private property.—In constructing highways, the State Department of Highways may protect the work from surface waters without giving private owners ground for complaint even

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though such water is caused to flow on their lands in a larger quantity than before. It may not, however, collect a material body of water and conduct it by an artificial channel and discharge it in a body upon private property. Rept. of Atty. Genl. (1913), Vol. 2, p. 530.

§ 59-a. Interest on damages for change of grade.—Whenever awards shall be lawfully made, pursuant to any statute of this state, for damages sustained by real estate or any improvements thereon by reason of any change of grade of any street, avenue or road in front thereof, the award for the principal amount of damages sustained shall bear interest at the rate of six per centum per annum from the time of the change of grade to the time of the payment of the award. (*Added by L. 1910, ch. 701.*)

Constitutionality of section upheld. *People ex rel. C. T. Co. v. Prendergast* (1911), 202 N. Y. 188, 95 N. E. 715.

Application.—This section applies to all parts of the state, provided some statute authorizes an award of damages therefor. It extends to all damages whenever sustained whether in the future or the past. *People ex rel. C. T. Co. v. Prendergast* (1911), 202 N. Y. 188, 95 N. E. 715.

Prior to the enactment of this section claimants for damages resulting from a change of grade were not entitled to recover interest, because the statute did not so provide. *People ex rel. Central Trust Co. v. Stillings* (1910), 136 App. Div. 438, 121 N. Y. Supp. 13, *affd.* (1910), 198 N. Y. 504, 92 N. E. 1096; *Matter of Cauldwell* (1913), 156 App. Div. 661, 141 N. Y. Supp. 734, *affd.* (1913), 209 N. Y. 538, 102 N. E. 1100.

Application to city streets.—The provision of this section that whenever awards are made for damages sustained by a change of grade "the award for the principal amount of damages sustained shall bear interest at the rate of six per cent. per annum from the time of the change of grade to the time of the payment of the award," is of general application, and the receipt of the principal of an award for damages for the change of grade in front of petitioner's premises in the city of New York, and the giving of a receipt in full payment, therefor, even though no demand for interest was made when the principal was received. *Matter of Murphy v. Prendergast* (1917), 99 Misc. 326.

Interest as portion of damages.—The statute in effect makes the interest allowed a portion of the damages sustained by property owners in proceedings to change the grade of streets. *Matter of Murphy v. Prendergast* (1917), 99 Misc. 326.

§ 60. Drainage, sewer and water pipes, cattle passes or other crossings in highways.—The town superintendent may, with the consent of the town board, upon the written application of any resident or taxpayer of his town or a corporation, grant permission for an overhead or underground crossing or to lay and maintain drainage, sewer and water pipes under ground within the portion therein described of a town highway. If the highway is a state or county highway such permission shall be granted with the consent of the county or district superintendent instead of the town board. Permission shall not be granted for the laying and maintaining of such pipes under the traveled part of the highway, except across the same, for the purposes of sewerage, and draining swamps or other lands, and supplying premises with water. Such permission shall be granted upon the condition that such pipes and hydrants or crossing shall be so laid, set or

constructed as not to interrupt or interfere with public travel upon the highway, and upon the further condition that the applicant will replace the earth removed and leave the highway in all respects in as good condition as before the laying of said pipes, or construction of such crossings, and that such applicant will keep such pipes and hydrants or crossing in repair and save the town harmless from all damages which may accrue by reason of their location in the highway, and that upon notice by the town superintendent the applicant will make the repairs required for the protection or preservation of the highway. The permit of the town superintendent, with the consent of the town board or county or district superintendent, and the acceptance of the applicant, shall be executed in duplicate, one of which shall be filed in the office of the town clerk and the other in the office of the district or county superintendent. In case the applicant shall fail to make any of the repairs required to be made under the permit, they may be made by the town superintendent at the expense of the applicant, and such expenses shall be a lien, prior to any other lien, upon the land benefited by the use of the highway for such pipes, hydrants or structures. The town superintendent may revoke such permit upon the applicant's failure to comply with any of the conditions contained therein. (*Amended by L. 1916, ch. 462.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 14, modified so as to provide for the consent of district or county superintendent in case of state or county highway.

References.—Right of water companies to lay and maintain pipes and hydrants in streets and highways, Transportation Corporation Law, §§ 80-82; construction of water lines in highways, *Id.* § 45; right of gas and electric light corporations to lay pipes and conduits in highways, *Id.* § 61.

Permission to maintain crossings for water and drainage pipes.—The town superintendent with the consent of the town board may give permission for overhead and underground crossings for maintenance of drainage, sewer and water pipes, etc. Rept. of Atty. Genl. (1909) 633.

Cattle passes existing under a license from a town need not be rebuilt by the state. If unsuited to improved highway, owner must make provision for reconstruction under this section. Rept. of Atty. Genl. (1910) 725.

Effect of permission.—The town officers represent the public and their permission to construct and maintain a private water pipe in the public highway is sufficient so far as the public ownership of an easement over the street is concerned. But such permission is not effective against an abutting owner whose title extends to the middle of the highway. *Cary v. Dewey* (1908), 127 App. Div. 478, 111 N. Y. Supp. 261.

Change of grade necessitating lowering of water pipes in city.—Rept. of Atty. Genl. (1909) 673.

Supervision of town superintendent.—Under the former law a contract between a waterworks' company and a town provided for the furnishing of water to the town and its inhabitants and contained a provision that the company's pipes should be laid under the supervision of the commissioners of highways, their services to be paid for by the company. It was held that the contract was not invalid because of the clause requiring payment of compensation of the commissioners by the company, although subject to close scrutiny. *Nicoll v. Sands* (1892), 131 N. Y. 19, 29 N. E. 818.

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Section cited.—*Farnsworth v. Boro Oil & Gas Co.* (1915), 216 N. Y. 40, 109 N. E. 860.

§ 61. **Trees and sidewalks.**—The town superintendent may, by an order in writing, approved by a majority of the members of the town board, authorize the owners of property adjoining the highways, at their own expense, to locate and plant trees and locate and construct sidewalks along the highways, in conformity with the topography thereof, which order with a map or diagram, showing the location of the sidewalk and tree planting, certified by the town superintendent, shall be filed in the office of the town clerk, within ten days after the making of the order.

Source.—Former Highway L. (L. 1890, ch. 568) § 43; provision requiring approval of town board is new.

References.—Allowances for setting out shade trees, Highway Law, § 63; custody of shade trees, Id. § 64; shade trees belong to owners of abutting lands, Id. § 293; penalty for injury to fruit or shade trees, Id. § 295; penalty for felling trees into highway, Id. § 295. Wilful injury to fruit, shade or ornamental trees, a misdemeanor, Penal Law, § 1425, subd. 2; wilful driving on sidewalks punishable by fine of fifty dollars or imprisonment in county jail, Penal Law, 1907.

Right to plant and maintain shade trees.—In addition to the ordinary easements of light, air and access, an abutting property owner may, on a country highway, plant shade trees, cultivate the sides of the road and do anything to improve or beautify it or his own property so long as his acts do not impair the public right of passage. *Palmer v. Larchmont Electric Co.* (1896), 6 App. Div. 12, 39 N. Y. Supp. 522, revd. on other grounds (1899), 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; *Jackson ex dem Yates v. Hathaway* (1818), 15 Johns. 447; *Edsall v. Howell* (1865), 84 Hun 424, 33 N. Y. Supp. 392; *Evans v. Board of Street Commissioners* (1895), 84 Hun 206, 32 N. Y. Supp. 547. Town authorities cannot arbitrarily cut down trees planted in a street or highway by an abutting owner; the latter is entitled to maintain them there, unless some proper street or highway use requires their removal, or they are condemned for public use and paid for. *Ellison v. Allen* (1894), 62 N. Y. St. Rep. 274, 30 N. Y. Supp. 441. An injunction will lie to prevent their unnecessary removal. *Evans v. Board of Street Commissioners* (1895), 84 Hun 206, 32 N. Y. Supp. 507. Even where the abutter does not own the fee of the highway, he may recover for injury to shade trees planted by him therein with the consent of the municipal authorities. *Lane v. Lamke* (1900), 53 App. Div. 395, 65 N. Y. Supp. 1090.

Trees planted in a highway, the fee of which belongs to adjacent owners, are the property of such owners, who may remove them at pleasure; and the legislature cannot impose a penalty upon him for removing them unless the public have acquired title by making him compensation for them. *Village of Lancaster v. Richardson* (1871), 4 Lans. 136. Trees lawfully set and maintained in the highway are neither encroachments nor obstructions, and the court has no power to compel their removal. *Town of Wheatfield v. Shasley* (1898), 23 Misc. 100, 51 N. Y. Supp. 835.

The setting of trees on the side of a highway, in accordance with the statute, is not such an occupation as can be made the foundation of a claim to title by adverse possession as against the true owner. *Bliss v. Johnson* (1883), 94 N. Y. 234.

Rights of electric corporations in respect to shade trees.—In stringing its wires a corporation has no right to cut branches of trees belonging to abutting owners, unless such course is demanded by an existing necessity which cannot be avoided by insulating the wires or by employing other practical means which may be more expensive and less convenient. *Van Siclen v. Jamaica Electric Light Co.* (1899),

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45 App. Div. 1, 61 N. Y. Supp. 210, *affd.* (1901), 168 N. Y. 650, 61 N. E. 1135. The right to the protection of shade trees vested in the owners of adjoining lands is subservient to the proper and legitimate use of the highway by the public. The question as to whether or not the use of public highways in the country by electric lighting companies is within the proper public use of such highways is, in all cases, to be determined by the necessity of the light for the proper use of such highways. *Palmer v. Larchmont Electric Co.* (1899), 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.

Sidewalks are a part of the highway, and the owner of adjoining land has no greater duty in regard to keeping them in repair than any other part of the highway. *Village of Fulton v. Tucker* (1875), 3 Hun 529; *Clapper v. Town of Waterford* (1892), 131 N. Y. 382, 30 N. E. 240.

Defective sidewalks.—The controlling principle in the case of injuries caused by defective sidewalks is stated in the case of *Saulsbury v. Village of Ithaca* (1883), 94 N. Y. 27, where it is said: "It is true that whether a municipal corporation shall build, or permit to be built, a sidewalk on any of its streets, is a matter of discretion not to be regulated by the courts; yet when a sidewalk is built with or without its permission it becomes responsible for its condition, and is bound, so long as it exists, to keep it in order." So in the case of *Birngruber v. Town of Eastchester* (1900), 54 App. Div. 80, 66 N. Y. Supp. 278, the court held where a town constructs a highway with a sidewalk for the use of the inhabitants of an unincorporated village, the duty to keep the sidewalk in proper order for travel applies to the same extent as to the center of the street.

§ 62. **Expenditures for sidewalks.**—The town superintendent of any town may, with the consent of the town board, maintain and repair existing sidewalks in such town, and the expense thereof shall be a town charge. Where such sidewalk shall consist of a board walk not more than ten feet in width located on a highway less than two rods in width the town superintendent of such town may maintain and repair such board walk or renewal thereof and with the consent of the town board may replace such board walk with a walk of concrete or other suitable construction and the expense thereof shall be a town charge. The town board of any such town may on the petition of not less than twenty-five taxpayers of the town, by resolution, direct the town superintendent to construct a sidewalk along a described portion of any highway of the town, in the manner and not exceeding an expense to be specified in the resolution, and the expense of constructing such sidewalk shall be a town charge, and shall be paid in the same manner as other town charges. (*Amended by L. 1915, ch. 322.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 45, as amended by L. 1904, ch. 588, as far as such section pertains to the expenditure of money in towns which had adopted the money system for the construction of sidewalks.

Application.—Provisions of this section are permissive. *Rept. of Atty. Genl.* (1909) 636.

§ 63. **Allowance for shade trees.**—There shall be allowed by the town superintendent, with the consent of the town board, to each such owner or occupant, who shall set out or transplant by the side of the highway adjoining his premises, any forest shade trees, fruit trees, or nut bearing trees suitable for shade trees, in conformity with the preceding section, the

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sum of one dollar for each three living trees so set out or transplanted, to be paid by the supervisors to such owner or occupant, upon the order of the town superintendent out of moneys levied and collected for miscellaneous purposes. Such allowance shall only be made for trees so set out or transplanted during the preceding year, and living and well protected from animals at the time of the allowance. Such trees shall be set out or transplanted not more than eight feet from the outside line of any highway three rods wide, and not more than one additional foot distant therefrom, for each additional rod in width of highway, and not less than seventy feet apart, on the same side of the highway, if elms, or fifty feet, if other trees. Trees transplanted by the side of the highway, in place of trees which have died, shall be allowed for in the same manner. ✓

Source.—Former Highway L. (L. 1890, ch. 568) § 44. The allowance was increased from one dollar for four trees to one dollar for three trees. The limitation of the amount of the allowance to one-fourth of the annual tax, was omitted.

§ 64. **Custody of shade trees.**—The town superintendent shall have the full control of all shade trees in the public highways of the town, but not within the limits of an incorporated village, and shall prosecute complaints for malicious injury to, or unlawful acts concerning, public shade trees. Upon the recommendation of the town superintendent, the town board may, by resolution, appropriate a sum, not exceeding two hundred dollars, to be known as the "Shade Tree Fund." Such fund shall be placed in the hands of the supervisor as custodian, and shall be expended by him upon the written order of the town superintendent, for the setting out and preservation of shade trees along the highways in such town.

Source.—Former Town L. (L. 1890, ch. 569) § 45, as added by L. 1905, ch. 502.

Trimming trees by telephone company.—The owner of adjacent land, who has planted trees along the highway to which he owns the fee subject to the use by the public, may permit a telephone and telegraph company to trim or cut such trees without assent of the town superintendent. Rept. of Atty. Genl. (1911) 434.

§ 65. **Compensation for watering troughs.**—The town superintendent may, with the consent of the town board, authorize the owner or occupant of lands to construct and maintain a watering trough beside the public highway, to be supplied with fresh water, the surface of which shall be three or more feet above the level of the ground and easily accessible for horses with vehicles, but when possible, all such watering troughs shall be constructed on the lower side of the highway. Such watering trough shall be maintained by such owner or occupant and kept supplied with fresh water. The town superintendent shall annually give a written order upon the supervisor for three dollars to be paid to such owner or occupant by the supervisor, for maintaining such watering trough, and keeping the same supplied with fresh water, out of moneys levied and collected for miscellaneous purposes.

Source.—Former Highway L. (L. 1890, ch. 568) § 48, modified by eliminating
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provisions applicable to labor system. The provision requiring the trough to be on the lower side of the highway is new.

Abatement of tax for watering troughs applies under money system. Rept. of Atty. Genl. (1903) 263.

§ 66. Credit on private road.—Any person living upon a private road may be credited on account of his highway taxes in any year an amount equal to the value of the work which the town superintendent may deem necessary to be done in such year upon such road. The town superintendent shall issue to him a statement containing the name of the person, the location of the road, the amount of work so deemed necessary to be done, and the value thereof. Such statement shall be presented to the town board at its annual meeting for the audit of town accounts, and if approved by such board, and such work shall have been done, an order shall be issued directing the supervisor to pay the sum specified in such statement to the person therein named, or his assignee, out of moneys in the hands of the supervisor available for highway purposes. The amount so paid in any year shall not exceed the amount payable by the person named in such statement on account of moneys levied in such town for the repair and improvement of highways as provided in this chapter. This section shall not apply to private roads or rights of way over lands of the owner thereof used by him for his own convenience.

Source.—Former Highway L. (L. 1890, ch. 568) § 37, as amended by L. 1906, ch. 149, so far as such section pertains to credit to be given on private roads in towns where the money system of taxation had been adopted.

References.—Laying out private roads, Highway Law, §§ 211-225; use of private road, *Id.* § 226.

§ 67. Neglect or refusal to prosecute.—If the town superintendent shall neglect or refuse to prosecute for any penalty, knowing the same to have been incurred, he shall be liable to a penalty of ten dollars for every such neglect or refusal, which shall be recovered by action in the name of the town, by the supervisor, or by any taxpayer of the town who shall indemnify the town for the costs and expense of the action, in such manner as the supervisor may approve.

Source.—Former Highway L. (L. 1890, ch. 568) § 23.

Reference.—Duty of town superintendent to collect penalties, Highway Law, § 47, subd. 12.

For actions to recover penalties under the former law, see *Bentley v. Phelps* (1858), 27 Barb. 524; *McFadden v. Kingsbury* (1834), 11 Wend. 667; *Bartlett v. Crozier* (1820), 17 Johns. 439; *Haywood v. Wheeler* (1814), 11 Johns. 432.

§ 68. Erection of guide boards.—The town superintendent may, with the consent of the town board, cause guide posts with proper inscriptions and devices to be erected at the intersections of such highways therein, as may be necessary, which shall be kept in repair by him at the expense of the town. Upon written application to him, of five resident taxpayers of any town or twenty resident taxpayers of the county in which such town is located, requesting the erection of one or more guide boards at the inter-

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section of highways in such town, it shall be his duty to cause to be erected at the intersections mentioned in such application, such guide boards indicating the direction, distances and names of the towns, villages or cities to or through which such intersecting highways run. Such application shall designate the highway intersections at which such guide boards are requested to be erected, and may contain suggestions as to the inscriptions and devices to be placed upon such boards. The cost of the erection and maintenance of such boards shall be a town charge. If the town superintendent refuses or neglects for a period of sixty days after receiving such application to comply with the request contained therein, he shall, for such neglect or refusal, forfeit to the town, the sum of twenty-five dollars, to be recovered by the supervisor in the name of the town, and the amount so recovered shall be set apart for the erection of such guide boards.

Source.—Former Highway L. (L. 1890, ch. 568) § 5, as amended by L. 1895, ch. 330.

References.—Maps, plans and specifications for state and county highways to provide for erection of guide posts, Highway Law, § 125, subd. 7; damages for injury or destruction of guide post, *Id.* § 290; erection of milestones and guide posts by turnpike and plank-road companies, Transportation Corporation Law, § 130; wilful or malicious injury to guide posts punishable by imprisonment, Penal Law, § 1423, subd. 6.

§ 69. **Measurement of highways and report.**—Within six months after the taking effect of this chapter, and as often as the commission shall direct, the town superintendent shall measure all highways of his town. Such measurements shall be made either by the use of a cyclometer or otherwise as the commission shall direct. He shall ascertain, and indicate in his report, the town highways which have been surfaced with gravel, those which have been surfaced with crushed stone and those which have been shaped and crowned. He shall report in triplicate, on forms to be prescribed and furnished by the commission, the total mileage of all highways within his town, specifying as above provided as to town highways, one of which shall be filed with the town clerk, one with the district or county superintendent, and one with the commission.

Source.—New.

Abandoned highways should not be included in the measurement made by the town superintendent although premises along such highway are occupied. Rept. of Atty. Genl. (1909) 617.

§ 70. **Application for service of prisoners.**—After satisfying himself that proper quarters can be secured, the town superintendent may, with the consent of the town board, request the supervisor of the town, under the provisions of section ninety-three of the county law, to procure the services of prisoners serving sentence in the county jail, for general work upon the public highways of the town.

Source.—New; inserted for the purpose of carrying into effect the provisions of § 93 of the County Law.

References.—Employment of prisoners of county jails on highways, County Law,

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§ 93; employment of state prison convicts upon public highways, Prison Law, §§ 179, 180.

§ 71. **Construction and repair of approaches to private lands.**—The owners or occupants of lands shall construct and keep in repair all approaches or driveways from the highway, under the direction of the district or county superintendent, and it shall be unlawful for such owner or occupant of lands to fill up any ditch or place any material of any kind or character in any ditch so as to in any manner obstruct or interfere with the purposes for which it was made. The town superintendent may, when directed by the town board, construct and keep in repair such approaches and the expense thereof shall be a town charge.

Source.—New.

Reference.—Ditches, culverts and waterways in state and county highways to be kept open by town superintendent, Highway Law, § 53.

Plans of underground crossings.—The Highway Commission has power to approve plans for underground crossing of railroad providing for sidewalks through proposed subway, but cannot approve plans for construction of approaches to highways on lands of adjacent owners. Rept. of Atty. Genl. (1911) 242.

Maintenance of approaches.—The town board, if it sees fit, may relieve abutting owners of their statutory duty of constructing and keeping in repair approaches or driveways from the highway and adopt the policy of itself constructing and keeping in repair such approaches. But the duty of maintenance does not rest on the town unless the town board decides to assume it, and only in that event is the town superintendent under any duty of inspection, which is but incident to the duty of maintenance and repair. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

§ 72. **Unsafe toll bridges.**—Whenever complaint in writing, on oath, shall be made to the town superintendent, of any town in which shall be in whole or in part any toll bridge belonging to any person or corporation, representing that such toll bridge has from any cause become and is unsafe for the public use, such town superintendent shall forthwith make a careful and thorough examination of such toll bridge, and if upon the examination thereof he shall be of the opinion that the same has from any cause become dangerous or unsafe for public use, he shall thereupon give immediate notice to the owners of such toll bridge, or to any agent of such owners, acting as such agent in respect to such bridge, that he has, on complaint made, carefully and thoroughly examined the bridge, and found it to be unsafe for public use. Such owners shall thereupon immediately commence repairing the same, and cause such repairs to be made within one week from the day of such notice given, or such reasonable time thereafter as may be necessary to thoroughly repair the bridge, so as to make it in all respects safe and convenient for public use. For neglect to take prompt and effective measures so to repair the bridge, its owners shall forfeit twenty-five dollars, and shall not demand or receive any toll for using the bridge until the same shall be fully repaired. The town superintendent shall cause such repairs to be made and the owners of the bridge shall be liable for the expense thereof, and for the services of the super-

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intendent, and upon the neglect or refusal to pay the same upon presentation of an account therefor, the town superintendent may recover the same by action, in the name of the town.

Source.—Former Highway Law, § 13.

References.—Powers and duties of toll bridge corporations in respect to toll bridges, Transportation Corporation Law, §§ 122-150.

§ 73. **Actions for injuries to highways.**—The town superintendent shall bring an action in the name of the town, against any person or corporation, to sustain the rights of the public, in and to any town highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered, or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway.

Source.—Former Highway L. (L. 1890, ch. 568) § 15.

Reference.—Action by town superintendent must be in name of town, Town Law, § 11.

Action in name of town.—As the law now stands, an action under this section can only be prosecuted in the name of the town. *Town of Palatine v. Canajoharie W. S. Co.* (1904), 90 App. Div. 548, 86 N. Y. Supp. 412, *affd.* (1906), 184 N. Y. 582, 77 N. E. 1197. Such an action is not barred by the fact that defendant recovered judgment in a similar action improperly brought by the commissioner in his own name instead of in the name of the town. *Town of Clay v. Hart* (1898), 25 Misc. 110, 55 N. Y. Supp. 43, *affd.* (1899), 41 App. Div. 625, 58 N. Y. Supp. 1150.

Where a nuisance is public and no private person has sustained special injury, the action must be maintained by the town superintendent in the name of the town. *Griffith v. McCullum* (1866), 46 Barb. 561.

When action will lie.—A town may maintain an action to restrain a traction company from tearing up and obstructing its highways without lawful authority, and compel it to restore to its former condition a portion of the highway so torn up. *Town of Eastchester v. N. Y. W. & C. Tract. Co.* (1900), 30 Misc. 571, 63 N. Y. Supp. 1032. An electric light company may be compelled to remove from streets, poles, wires and lamps abandoned by it. *Village of Hempstead v. Ball Electric Co.* (1896), 9 App. Div. 48, 41 N. Y. Supp. 124. An action will lie for destruction or obstruction of a bridge. *Town of Palatine v. Canajoharie W. S. Co.* (1904), 90 App. Div. 548, 86 N. Y. Supp. 412, *affd.* (1906), 184 N. Y. 582, 77 N. E. 1197; *Town of Fort Covington v. U. S. & C. R. R. Co.* (1896), 8 App. Div. 223, 40 N. Y. Supp. 313, *affd.* (1898), 156 N. Y. 702, 51 N. E. 1094. Action may be brought by trustees of village constituting a separate highway district. *Village of Hempstead v. Ball Electric Co.* (1896), 9 App. Div. 48, 41 N. Y. Supp. 124; *Village of Oxford v. Willoughby* (1905), 181 N. Y. 155, 73 N. E. 677. Where an abutting owner affects the lateral support of the highway by excavating upon his lands the equitable power of the court may be invoked. *Village of Haverstraw v. Eckerson* (1908), 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287, *affg.* (1908), 124 App. Div. 18, 108 N. Y. Supp. 506.

The town has no authority to bring an action for the violation of a wide tire law enacted by a board of supervisors where said act neither authorizes suit nor provides for the disposition of penalties when recovered. *Town of Stamford v. Calhoun* (1910), 69 Misc. 558, 125 N. Y. Supp. 910.

Drainage commissioners may be compelled, under this section, to bridge a channel for drainage of swamp land, cut by them across a highway, although the

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statute under which they act gives them no power in terms to construct such a bridge. *Town of Conewango v. Shaw* (1898), 31 App. Div. 354, 52 N. Y. Supp. 327. Where a mill owner digs a raceway through a highway and builds a bridge over it, he is primarily liable to repair the bridge, and where it becomes unsafe, it is a nuisance which the town may, upon the refusal of the owner, abate by itself repairing the bridge, and this expense may be recovered by the town from the owner of the mill, although it appears upon the trial that he had no actual notice that there was any obligation resting on him to keep the bridge in repair. *Town of Clay v. Hart* (1898), 25 Misc. 110, 55 N. Y. Supp. 43, *affd.* (1899), 41 App. Div. 625, 58 N. Y. Supp. 1150.

Pleadings.—Sufficiency of the complaint; see *Town of Palatine v. N. Y. C. & H. R. R. Co.* (1897), 22 App. Div. 181, 47 N. Y. Supp. 1024; *Town of Eastchester v. N. Y., W. & C. Tract. Co.* (1900), 30 Misc. 571, 63 N. Y. Supp. 1032. Irrelevancy, see *Town of Dunkirk v. L. S. & M. S. R. Co.* (1894), 75 Hun 366, 27 N. Y. Supp. 105.

Restoration of highway by railroad.—If a railroad company fails to comply with its statutory duty in respect to restoration of highway, an action may be brought under this section of the Highway Law; but the remedy thereby afforded is not exclusive and does not supersede common law remedies and the railroad company may be proceeded against by mandamus, or by indictment for maintaining a nuisance. *People v. N. Y. Central & H. R. R. Co.* (1878), 74 N. Y. 302; *People ex rel. Green v. D. & C. R. R. Co.* (1874), 58 N. Y. 152; *Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657. The superintendent of highways has no power to dictate how the restoration shall be made, although it may maintain an action for a proper performance of the duty or for damages by the town. *Post v. West Shore R. R. Co.* (1890), 123 N. Y. 580, 26 N. E. 7.

The duty imposed upon a railroad corporation, which has constructed a crossing over a highway to restore the highway to its former state or to such a state as will not unnecessarily impair its usefulness, is a continuous one and an action brought by the town to compel the performance of such duty cannot be barred by the statute of limitations. *Town of Windsor v. D. & H. C. Co.* (1895), 92 Hun 127, 36 N. Y. Supp. 863, *affd.* (1898), 155 N. Y. 645, 49 N. E. 1105.

For other cases relating to the duty of a railroad company to restore a highway to its former condition, see *Schild v. Central Park, etc., R. R. Co.* (1892), 133 N. Y. 447, 31 N. E. 327; *Allen v. Buffalo, R. & P. R. Co.* (1897), 151 N. Y. 434, 45 N. E. 845; *Conklin v. N. Y., Ont. & W. R. R. Co.* (1886), 102 N. Y. 107, 6 N. E. 663; *Uline v. N. Y. C. & H. R. R. Co.* (1886), 101 N. Y. 98, 4 N. E. 536; *Masterson v. N. Y. C. & H. R. R. Co.* (1881), 84 N. Y. 247; *McMahon v. S. A. R. R. Co.* (1878), 75 N. Y. 231; *Wiley v. Smith* (1898), 25 App. Div. 351, 49 N. Y. Supp. 934; *Hatch v. Syracuse, B. & N. Y. R. R. Co.* (1888), 24 N. Y. St. Rep. 36, 4 N. Y. Supp. 509.

Proceeding under the Railroad Law is independent of remedy under the Highway and Town Laws. *People ex rel. Bacon v. North Central Ry. Co.* (1900), 164 N. Y. 289, 58 N. E. 138.

A street railroad company is required by § 11 of the Railroad Law to restore the highways to the condition in which they were before the railroad was constructed; and it is made the duty of the town superintendent, by this section, to compel such company to make such restoration and in case of a failure he may bring an action in the name of the town against the company. *Rept. of Atty. Genl.* (1902) 230.

Application to villages.—Since § 141 of the Village Law constituted a village a "separate highway district," the trustees of a village may maintain an action under this section to prevent an encroachment upon a village street. *Village of Oxford v. Willoughby* (1905), 181 N. Y. 155, 73 N. E. 677. A village being a separate highway district, the authority of the town superintendent is transferred to and

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vested in the village authorities and the latter may resort to a court of equity for the preservation of the village streets and highways. *Village of Haverstraw v. Eckerson* (1908), 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287, *affg.* (1908), 124 App. Div. 18, 108 N. Y. Supp. 506.

Repair of driveway giving access to highway; action against abutting owner for expense thereof.—This section does not require the town superintendent to make repairs to a wooden driveway giving access from the highway to the lands of an abutting owner and to sue the owner for the expense thereof, where he was not directed to make the repairs by the town board. Nor can the superintendent proceed against the abutting owner to compel him to repair such driveway unless there has been a prior direction for such repairs by the district or county superintendent. *Ferguson v. Town of Lewisboro* (1912), 149 App. Div. 232, 133 N. Y. Supp. 699.

Section cited.—*People ex rel. Cochen v. Dettmer* (1898), 26 App. Div. 327, 49 N. Y. Supp. 877; *Farnsworth v. Boro Oil & Gas Co.* (1915), 216 N. Y. 40, 109 N. E. 860

§ 74. Liability of town for defective highways.—Every town shall be liable for all damages to persons or property sustained by reason of any defect in its highways or bridges, existing because of the neglect of any town superintendent of such town. No action shall be maintained against any town to recover such damages, unless a verified statement of the cause of action, including the time and place at which such injury is alleged to have been received, shall have been filed with the town clerk of the town within six months after the cause of action accrued. And no such action shall be commenced until fifteen days after the service of such statement. (*Amended by L. 1913, ch. 389.*)

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Source.—Former Highway L. (L. 1890, ch. 568) § 16; originally derived from L. 1881, ch. 700, § 1.

Section is not unconstitutional upon the ground that the highways are for the public and not for local use, and that highway commissioners are not the representatives or agents of the town in any sense, and, therefore, there is no legislative power to charge the property of its citizens with the consequences of the misconduct and negligence of those officers. *Bidwell v. Town of Murray* (1886), 40 Hun 190, 196.

At common law prior to the act of 1881, the town was in no way responsible for injuries resulting from defects in the highways; and even after the courts held that the commissioners were subject to such liability, the town was still held exempted, for the commissioner of highways was not an agent of the town in its corporate capacity, and the latter was not chargeable for his nonfeasance or misfeasance or for his official acts or delinquencies. *People ex rel. Van Keuren v. Town Auditors* (1878), 74 N. Y. 310; *Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657; *Morey v. Town of Newfane* (1850), 8 Barb. 645; *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *People ex rel. Bowles v. Burrell* (1895), 14 Misc. 217, 35 N. Y. Supp. 608; *Matter of Certain Freeholders* (1887), 46 Hun 620; *Dorn v. Town of Oyster Bay* (1895), 84 Hun 510, 32 N. Y. Supp. 341, *affd.* (1899), 158 N. Y. 731, 53 N. E. 1124; *McGuinness v. Town of Westchester* (1892), 66 Hun 356, 21 N. Y. Supp. 290; *Frasier v. Town of Tompkins* (1883), 30 Hun 168; *Monk v. Town of New Utrecht* (1887), 104 N. Y. 552, 11 N. E. 268; *Flynn v. Hurd* (1889), 118 N. Y. 19, 22 N. E. 1109; *Embler v. Town of Wallkill* (1890), 57 Hun 384, 10 N. Y. Supp. 797, *affd.* (1892), 132 N. Y. 222, 30 N. E. 404; *Albrecht v. County of Queens* (1895), 84 Hun 399, 32 N. Y. Supp. 473;

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Bartlett v. Crozier (1820), 17 Johns. 439, 451; *Lorillard v. Town of Monroe* (1854), 11 N. Y. 392.

A town was not liable at common law for personal injuries caused by a defective highway. The present liability is wholly the creation of the statute. *Ferguson v. Town of Lewisboro* (1912), 149 App. Div. 232, 133 N. Y. Supp. 699.

Acceptance of highway.—Where the commissioner of highways for eight or nine years works a road at public expense, it is a sufficient acceptance of the road as a highway to charge the town with damages for negligence in not properly guarding a bridge. *Rising v. Town of Moreau* (1910), 68 Misc. 284, 125 N. Y. Supp. 249.

Nature of liability; action not legal.—This liability of the town for negligence in relation to highways and bridges did not exist at common law, but is given by statute. However, the action to recover damages for the negligence of the town or the town superintendent is in tort, and is not local, but transitory, and can be maintained wherever the wrongdoer can be found. The negligence consists in failing to perform a duty imposed by statute, and the liability is imposed on the town itself. *Dodge v. Town of North Hudson* (1910), 177 Fed. 986.

A town is only liable for injuries caused by defective highways in cases in which the highway commissioner was formerly liable for his own negligence. *Clark v. Town of Copake* (1911), 142 App. Div. 202, 126 N. Y. Supp. 982.

The liability of towns for defects of highways is based upon the neglect of the commissioner of highways and where the defect was created by an overseer of highways and it was not directly authorized by the commissioner and he was not present at any time during its creation or thereafter prior to the accident and had no knowledge of its existence, it was error to submit to the jury the question of the liability of the town in an action against it upon the theory that the overseer's negligence was imputable to the commissioner and that there could be a recovery against the town therefor. *Booth v. Town of Orleans* (1910), 66 Misc. 339, 123 N. Y. Supp. 700, *affd.* (1911), 147 App. Div. 240, 131 N. Y. Supp. 1088.

The liability of a town for injuries received by reason of defective highways is purely statutory. To justify a recovery therefor it is essential that the evidence should show acts of negligence upon the part of the town superintendent, which officer has succeeded to the general powers of the highway commissioner. Under the Highway Law a town cannot be held liable for injuries, by reason of a defect in its highways, unless upon the same facts the commissioner of highways would have been liable prior to the enactment of chapter 700 of the Laws of 1881. *Lynch v. Town of Rhinebeck* (1913), 210 N. Y. 101, 103 N. E. 888.

Individual liability of superintendent.—Where the commissioner of highways of a town negligently permits the highways to become out of repair, a person sustaining injuries thereby may bring an action against the commissioner individually, notwithstanding the provisions of this section, permitting an action to be brought against the town because of the neglect of its highway commissioner. *Campbell v. Powers* (1913), 155 App. Div. 862, 140 N. Y. Supp. 675.

Negligence of superintendent.—By the act of 1881 (ch. 700) the town was made liable where the liability for injuries resulting from neglect to keep the highways in repair rested primarily on the highway commissioner. *Whitney v. Town of Ticonderoga* (1891), 127 N. Y. 40, 27 N. E. 403; *Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657. As the law now stands the town is liable only when negligence on the part of the superintendent is clearly shown. *Clapper v. Town of Waterford* (1892), 131 N. Y. 382, 389, 30 N. E. 240; *Robinson v. Town of Fowler* (1894), 80 Hun 101, 30 N. Y. Supp. 25; *Eveleigh v. Town of Hounsfield* (1884), 34 Hun 140; *Lane v. Town of Hancock* (1894), 142 N. Y. 510, 37 N. E. 473; *Riley v. Town of Eastchester* (1897), 18 App. Div. 94, 45 N. Y. Supp. 448; *Fay v. Town of Lindley* (1890), 33 N. Y. St. Rep. 539, 11 N. Y. Supp. 355; *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356; *People ex rel. Bowles*

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v. Burrell (1895), 14 Misc. 217, 35 N. Y. Supp. 608; Waller v. Town of Hebron (1896), 5 App. Div. 577, 39 N. Y. Supp. 381; Barber v. Town of New Scotland (1895), 88 Hun 522, 34 N. Y. Supp. 968; Farman v. Town of Ellington (1887), 46 Hun 41, affd. (1891), 124 N. Y. 662, 27 N. E. 413; Bidwell v. Town of Murray (1886), 40 Hun 190; Lawson v. Town of Woodstock (1884), 20 Wk. Dig. 570; Young v. Town of Macomb (1896), 11 App. Div. 480, 42 N. Y. Supp. 351; Albrecht v. County of Queens (1895), 84 Hun 399, 32 N. Y. Supp. 473; Dorn v. Town of Oyster Bay (1895), 84 Hun 510, 32 N. Y. Supp. 341, affd. (1899), 158 N. Y. 731, 53 N. E. 1124; Osterhout v. Town of Bethlehem (1900), 55 App. Div. 198, 66 N. Y. Supp. 845.

This section does not render a town liable for the negligence of the superintendent while engaged in repairing a highway; it merely gives a right of action for damages occasioned by a defective highway and does not otherwise enlarge the liability of the town. Robinson v. Town of Fowler (1894), 80 Hun 101, 30 N. Y. Supp. 25; People ex rel. Van Keuren v. Town Auditors (1878), 74 N. Y. 310; People ex rel. Cole v. Cross (1903), 87 App. Div. 56, 61, 83 N. Y. Supp. 1083. The town is not liable for the superintendent's negligence in constructing a temporary bridge on private lands, pending repair of the highway bridge; the commissioner's act was not done in his official capacity. Ehle v. Town of Minden (1902), 70 App. Div. 275, 74 N. Y. Supp. 903. So where lands of an adjoining owner are flooded through negligence of the superintendent to remove rubbish from a sluice, the town is not liable. Winchell v. Town of Camillus (1905), 109 App. Div. 341, 95 N. Y. Supp. 688, affd. (1907), 190 N. Y. 536, 83 N. E. 1134.

A highway, in which the road-way, only eleven feet wide, slopes rapidly to a steep embankment, with a water-bar running diagonally across the road, by which water is suffered to flow over the road and freeze, and on which a loaded sleigh, however properly driven, would be likely to slip and be thrown over the embankment, and which has been in such a condition for several years, with no barrier on the sides, presents, in an action for an injury to a traveler at that point, caused by his sleigh slipping off the road and overturning, a state of facts which requires the submission to the jury of the question as to the negligence of the highway commissioners of the town to which such highway belongs. Lane v. Town of Hancock (1893), 67 Hun 623, 22 N. Y. Supp. 470, revd. (1894), 142 N. Y. 510, 37 N. E. 473.

A town is not liable for injuries caused by defective highways in the absence of statutory provision therefor. Under the statute a town is liable only for the negligence of the highway commissioner, now known as town superintendent. Where the plaintiff's horse ran away and injured her owing to the fact that it became frightened by the smell left by powder which had been used by the overseer of the road district in blasting rock from the roadbed and by seeing a pile of stones left in the highway by the overseer, the town is not liable if it do not appear that the work was done under the direction of the highway commissioner, or that he knew that it was going on, or of the existing condition, or that by the exercise of reasonable diligence he could have known of the condition. Booth v. Town of Orleans (1911), 147 App. Div. 240, 131 N. Y. Supp. 1088.

In order that the town may be held liable for a "defect in its highways or bridges" such defect must be "existing because of the neglect of any town superintendent of such town." Ferguson v. Town of Lewisboro (1912), 149 App. Div. 232, 133 N. Y. Supp. 699.

It may be proved that the defect was caused by the delinquency of any town superintendent of highways, and it need not be shown that it was the delinquency of the particular superintendent in office at the time the damage occurred. Kelly v. Town of Varona (1904), 97 App. Div. 488, 99 N. Y. Supp. 89.

What constitutes negligence; degree of care.—Negligence when applied to a

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superintendent of highways is the omission, on his part, to use ordinary care, under all circumstances, in the performance of the duty imposed upon him by law which was the proximate cause of the accident; ordinary care is such care and conduct on the part of the superintendent as a reasonable and prudent person would ordinarily have exercised under the circumstances. *Lane v. Town of Hancock* (1894), 142 N. Y. 510, 37 N. E. 473; *Sutphen v. Town of North Hempstead* (1894), 80 Hun 409, 30 N. Y. Supp. 128; *Dorn v. Town of Oyster Bay* (1895), 84 Hun 510, 32 N. Y. Supp. 341, *affd.* (1899), 158 N. Y. 731, 53 N. E. 1124; *Bostwick v. Barlow* (1878), 14 Hun 177. Towns are not liable for injuries resulting from accidents that are not to be anticipated in the exercise of reasonable forethought and prudence. The expression "reasonable care" is purely relative and must be applied to the circumstances of each particular case. *Snowden v. Town of Somerset* (1902), 171 N. Y. 99, 63 N. E. 952, *revg.* (1901), 61 App. Div. 624, 70 N. Y. Supp. 1149. The degree of care required will depend upon circumstances. For instance, a thronged city thoroughfare would require more attention than an ordinary highway running through a sparsely settled district of a town. *Glasier v. Town of Hebron* (1892), 131 N. Y. 447, 30 N. E. 239; *Dorn v. Town of Oyster Bay* (1895), 84 Hun 510, 32 N. Y. Supp. 341, *affd.* (1899), 158 N. Y. 731, 53 N. E. 1124; *Waller v. Town of Hebron* (1896), 5 App. Div. 577, 39 N. Y. Supp. 381.

A complaint against a town which sets out a defective condition of the highways coupled with an allegation of the negligence of the town in permitting such condition to exist should be construed as equivalent to an allegation of negligence by the highway commissioner. *Clark v. Town of Copake* (1911), 142 App. Div. 202, 126 N. Y. Supp. 982.

The duty of the town superintendent is merely to use reasonable care to see that the highway is reasonably safe for travel. So where a vehicle pulling aside to avoid an automobile collides with a telephone pole placed out of the traveled part of the road, the town is not liable for the town superintendent allowing such pole to remain there. *Scofield v. Town of Poughkeepsie* (1907), 122 App. Div. 868, 107 N. Y. Supp. 767.

The superintendent must exercise proper care in the maintenance of the highways in a reasonably safe condition for all travel. *Embler v. Town of Walkkill* (1890), 57 Hun 384, 10 N. Y. Supp. 797, *affd.* (1892), 132 N. Y. 222, 30 N. E. 404; *Glasier v. Town of Hebron* (1892), 131 N. Y. 447, 30 N. E. 239; *Waller v. Town of Hebron* (1896), 5 App. Div. 577, 39 N. Y. Supp. 381. And he owes no larger measure of duty to bicycle riders than to other travelers in ordinary vehicles. *Sutphen of North Hempstead* (1894), 80 Hun 409, 30 N. Y. Supp. 128. A mistake in judgment on the part of the superintendent after such careful consideration as the circumstances require is not negligence; it must be shown that negligence leads to the mistake in judgment. *Patchen v. Town of Walton* (1897), 17 App. Div. 158, 45 N. Y. Supp. 145. The width and plan upon which a bridge is built, is within the discretion of the commissioner, and cannot be reviewed by the court. *Lawson v. Town of Woodstock* (1884), 20 Wk. Dig. 570.

Defective highway.—The words "defective highway" are used in reference to their condition for public travel, and a highway may be rendered defective, no less by an obstruction placed in it, than by a physical disturbance of the roadway. *Whitney v. Town of Ticonderoga* (1891), 127 N. Y. 40, 27 N. E. 403.

The defects for which a town is liable are only those which interfere with travel on the highway, hence an adjoining owner whose lands are flooded through the stoppage of the sluice beneath a highway, has no cause of action against the town. *Winchell v. Town of Camillus* (1905), 109 App. Div. 341, 95 N. Y. Supp. 688, *affd.* (1907), 190 N. Y. 536, 83 N. E. 1134.

A town is not liable for damages caused to a person driving across a temporary

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bridge by reason of a defect therein, where it appears that such bridge was erected by the town superintendent on private lands under a license obtained by him from the owner thereof. In constructing such bridge the highway commissioner acted as a volunteer, and not in his official capacity. *Ehle v. Town of Minden* (1902), 70 App. Div. 275, 74 N. Y. Supp. 903.

Instances of defects in highways.—Branches of tree hanging so low over the roadway as to knock person from top of load of hay was held a defect in the highway. *Embler v. Town of Wallkill* (1890), 57 Hun 384, 10 N. Y. Supp. 797, *affd.* (1892), 132 N. Y. 222, 30 N. E. 404. Road scraper left in road at night. *Whitney v. Town of Ticonderoga* (1891), 127 N. Y. 40, 27 N. E. 403; and a banner suspended across street, found by the jury to be likely to frighten horses. *Champlin v. Village of Penn Yan* (1884), 34 Hun 33, *affd.* (1886), 102 N. Y. 680; and a pile of stones at side of road having tendency to frighten horses. *Eggleston v. Columbia Turnpike Road Co.* (1880), 82 N. Y. 278; and a wooden covering over sidewalk insecurely supported. *Hume v. Mayor* (1878), 74 N. Y. 264; and stones outside of traveled portion of highway. *Newell v. Town of Stony Point* (1901), 59 App. Div. 237, 69 N. Y. Supp. 583. Liability of town for injuries received upon a temporary road maintained by the state. *Coolidge v. State* (1908), 61 Misc. 38, 40, 114 N. Y. Supp. 553.

Conditions not defects.—A hole or rut ten inches deep, caused by the natural wear of wagon wheels in the spring of the year, is not such a defect as to require repair by the town superintendent. *Osterhout v. Town of Bethlehem* (1900), 55 App. Div. 198, 66 N. Y. Supp. 845. A rock two feet square, at a turn in the road, placed in close proximity to a fence which it is designed to protect, is not necessarily such a defect. *Hulse v. Town of Goshen* (1902), 71 App. Div. 436, 75 N. Y. Supp. 723. So a hydrant, the nozzle of which projected out six inches over a twelve-inch gutter. *Ring v. City of Cohoes* (1879), 77 N. Y. 83.

Action against a town to recover for the alleged negligence of the highway commissioner in failing to remove bushes or limbs of trees extending into the highway, by reason of which the plaintiff, driving upon the highway was struck in the eye and blinded. Evidence examined, and *held*, insufficient to justify a recovery. *Lutes v. Town of Warwick* (1912), 149 App. Div. 809, 134 N. Y. Supp. 298.

Barriers.—Negligence on the part of the superintendent may consist as well in the omission to erect barriers in dangerous places in a highway as in leaving the bed of the highway defective; and the necessity for erecting barriers is a question of fact for the jury. *Ivory v. Town of Deerpark* (1889), 116 N. Y. 476, 22 N. E. 1080; *Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657; *Hyatt v. Trustees of Village of Rondout* (1863), 44 Barb. 385, *affd.* (1870), 41 N. Y. 619; *Van Gaasbeck v. Town of Saugerties* (1894), 82 Hun 415, 31 N. Y. Supp. 354, *affd.* (1897), 154 N. Y. 767, 49 N. E. 1105; *Fay v. Town of Lindley* (1890), 33 N. Y. St. Rep. 539, 11 N. Y. Supp. 355.

The town superintendent is charged with guarding with barriers a cinder path used for bicycles, where not relieved of the care thereof. *Schell v. Town of German Flats* (1908), 123 App. Div. 197, 108 N. Y. Supp. 219. The proximate cause of injuries received by a driver whose horse backed the wagon off an unguarded approach to a highway bridge, is the absence of a guard, and not the negligence of the town superintendent in removing a former guard. *Wallace v. Town of New Albion* (1907), 121 App. Div. 66, 105 N. Y. Supp. 524, *affd.* (1908), 192 N. Y. 544, 84 N. E. 1122.

Absence of barrier excusable. *Lane v. Town of Hancock* (1894), 142 N. Y. 510, 37 N. E. 473; *Glazier v. Town of Hebron* (1892), 131 N. Y. 447, 30 N. E. 239; *Monk v. Town of New Utrecht* (1887), 104 N. Y. 552, 11 N. E. 268; *Patchen v. Town of Walton* (1897), 17 App. Div. 158, 45 N. Y. Supp. 145; *Warner v. Village of Randolph* (1897), 18 App. Div. 458, 45 N. Y. Supp. 1112; *Sutphen v. Town of North*

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Hempstead (1894), 80 Hun 409, 30 N. Y. Supp. 128; Mack v. Town of Shawangunk (1904), 98 App. Div. 577, 90 N. Y. Supp. 760; Hubbell v. City of Yonkers (1887), 104 N. Y. 434, 10 N. E. 858.

It must be deemed settled that, as a general rule, the necessity for barriers, including the question whether the town superintendent was negligent in omitting to supply them, is a question of fact for the jury. Coney v. Town of Gilboa (1900), 55 App. Div. 111, 67 N. Y. Supp. 116; Ivory v. Town of Deerpark (1889), 116 N. Y. 476, 22 N. E. 1080; Hewett v. Town of Thurman (1899), 41 App. Div. 6, 58 N. Y. Supp. 83; Pelkey v. Town of Saranac (1901), 67 App. Div. 337, 73 N. Y. Supp. 493; Wood v. Town of Gilboa (1894), 76 Hun 175, 27 N. Y. Supp. 586, *affd.* (1895), 146 N. Y. 383, 42 N. E. 544; Maxim v. Town of Champion (1888), 50 Hun 88, 4 N. Y. Supp. 515, *affd.* (1890), 119 N. Y. 626, 23 N. E. 1144; Wallace v. Town of New Albion (1907), 121 App. Div. 66, 105 N. Y. Supp. 524, *affd.* (1908), 192 N. Y. 544, 84 N. E. 1122.

Where a road, as originally built, has fenders on the sides of an embankment, but subsequently becomes filled in with earth higher than the fenders, and an accident thereafter occurs through a sleigh slipping off the embankment, which would not have occurred if there had then been a fender there, the jury is justified in finding, in an action brought against the town to which the highway belongs to recover damages for such accident, that the accident occurred, not on account of any defect in the plan of the road as adopted by the town officers, but on account of the road being allowed to become out of repair. Lane v. Town of Hancock (1893), 67 Hun 623, 22 N. Y. Supp. 470, *revd.* (1894), 142 N. Y. 510, 37 N. E. 473.

A town does not assume to make its highways absolutely safe and to guarantee against accident, but it is to make them reasonably safe for public use in the ordinary way. Where either side of a road rises abruptly to some height for some distance approaching a portion of a road crossing a gully, at which point there is a precipitous drop on either side, and the roadway at that point is protected on either side by a shoulder of some nine inches in height, and the roadway is straight at the point and for some distance either side thereof, the town is not negligent in failing to maintain a barrier at that place. Wade v. Town of Worcester (1910), 134 App. Div. 51, 118 N. Y. Supp. 657.

A town is not responsible for the injuries sustained by a traveler consequent upon straying from the adequate and suitable roadway prepared for travel. Highway authorities are bound to maintain guard rails or barriers only to protect those traveling within the space prepared and offered for that purpose against dangers in such close proximity thereto as to make traveling on it perilous or where there are other unusual or exceptional conditions. Flansburg v. Town of Elbridge (1912), 205 N. Y. 423, 98 N. E. 750, 41 L. R. A. (N. S.) 546.

The question as to whether a superintendent is guilty of negligence in failing to use lights indicating a trench opened by him in order to repair a sluiceway, and in guarding the opening by the construction of barricades at a distance therefrom, is for the jury to determine. Snowden v. Town of Somerset (1902), 171 N. Y. 99, 63 N. E. 952, *revg.* (1902), 61 App. Div. 624, 70 N. Y. Supp. 1149.

Consequential damage.—Where work on a highway is done not maliciously or unskillfully, the town is not liable for consequential damages. Radcliff's Executors v. Mayor of Brooklyn (1850), 4 N. Y. 195; Bellinger v. N. Y. C. Railroad (1861), 23 N. Y. 42; Boughton v. Carter (1820), 18 Johns. 405.

Notice of defect.—The defect must have existed for a sufficient period to raise a presumption that the town superintendent had notice thereof. A town superintendent cannot be charged with notice of a defect which had existed only for a few hours, and was so latent in character that a daily driver over the highway

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neither saw nor suspected any danger as he approached the place. *Riley v. Town of Eastchester* (1897), 18 App. Div. 94, 45 N. Y. Supp. 448.

Actual notice of defect is not necessary where the circumstances are such that ignorance on the part of the superintendent is, in itself, negligence. *Hover v. Barkhoof* (1870), 44 N. Y. 113; *Bostwick v. Barlow* (1878), 14 Hun 177; *Boyce v. Town of Shawangunk* (1899), 40 App. Div. 593, 58 N. Y. Supp. 26. Where the defect existed four years, a superintendent upon taking office has constructive notice of its existence. *Bullock v. Town of Durham* (1892), 64 Hun 380, 19 N. Y. Supp. 635; *Shaw v. Town of Potsdam* (1896), 11 App. Div. 508, 42 N. Y. Supp. 779; *Allen v. Town of Allen* (1898), 33 App. Div. 463, 53 N. Y. Supp. 800. In order to impute constructive notice to the superintendent, the defect must have existed in a dangerous condition a sufficient time for the superintendent, in the exercise of reasonable care, to have discovered it. *Osterhout v. Town of Bethlehem* (1900), 55 App. Div. 198, 66 N. Y. Supp. 845. The long continued existence of an excavation in a highway, without any guard around it, with actual knowledge thereof by the commissioner, is sufficient to establish negligence on his part. *Smith v. Town of Clarkstown* (1893), 69 Hun 155, 23 N. Y. Supp. 245; *Allen v. Town of Allen* (1898), 33 App. Div. 463, 53 N. Y. Supp. 800; *Rankert v. Town of Junius* (1898), 25 App. Div. 470, 49 N. Y. Supp. 850; *Foels v. Town of Tonawanda* (1894), 75 Hun 363, 27 N. Y. Supp. 113.

Where a highway has been in an obviously dangerous condition for seven years, the officers of the town in which it is situated must be deemed to have had notice of its condition. *Lane v. Town of Hancock* (1893), 67 Hun 623, 22 N. Y. Supp. 470, revd. (1894), 142 N. Y. 510, 37 N. E. 473.

Notice to town clerk.—The town clerk has no control of or duty in regard to highways, nor is he in any sense the agent or representative of the commissioners; hence notice to him is not notice to the town. *Flansburg v. Town of Elbridge* (1912), 205 N. Y. 423, 98 N. E. 750, 41 L. R. A. (N. S.) 546.

Lack of available funds as a defense.—It is a defense to an action for damages for injuries sustained in consequence of a defective highway to show that the superintendent was without adequate funds to make the repairs, or power or means of obtaining same. *Clapper v. Town of Waterford* (1892), 131 N. Y. 382, 30 N. E. 240; *Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657; *Ivory v. Town of Deerpark* (1889), 116 N. Y. 476, 22 N. E. 1080; *Monk v. Town of New Utrecht* (1887), 104 N. Y. 552, 11 N. E. 268; *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *Hines v. Lockport* (1872), 50 N. Y. 236; *Hover v. Barkhoof* (1870), 44 N. Y. 113; *Garlinghouse v. Jacobs* (1864), 29 N. Y. 297; *Quinn v. Town of Sempronius* (1898), 33 App. Div. 70, 53 N. Y. Supp. 325; *Patchen v. Town of Walton* (1897), 17 App. Div. 158, 45 N. Y. Supp. 145; *Smith v. Wright* (1857), 27 Barb. 621; *Hyatt v. Trustees of Village of Rondout* (1863), 44 Barb. 385, affd. (1870), 41 N. Y. 619; *People ex rel. Bentley v. Comrs. of Highways of Hudson* (1831), 7 Wend. 474.

Want of funds on the part of the highway commissioners to repair the highway is a defense, to be asserted and proved by the defendant town, and the existence of funds need not be alleged or shown by the plaintiff as part of his cause of action. Where, in such an action, it appears that it would have required only a small sum, as, e. g., twenty dollars, to repair an obvious defect in a highway, which had needed repair for several years, the jury can properly determine that the highway commissioners were negligent in failing to take steps to provide the necessary funds, if they did not, in fact, have means on hand to make the repair. *Lane v. Town of Hancock* (1893), 67 Hun 623, 22 N. Y. Supp. 470, revd. (1894), 142 N. Y. 510, 37 N. E. 473.

Where the superintendent has not sufficient funds to make all needful repairs, it is in his discretion to apply the funds at hand so as in his judgment the

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most necessary repairs can be made, and he is not responsible for an error of judgment in doing so. *Monk v. Town of New Utrecht* (1887), 104 N. Y. 552, 11 N. E. 268; *Young v. Town of Macomb* (1896), 11 App. Div. 480, 42 N. Y. Supp. 351. But his judgment in this respect must be reasonably exercised. *Ivory v. Town of Deerpark* (1889), 116 N. Y. 476, 22 N. E. 1080; *Rhines v. Town of Royalton* (1891), 40 N. Y. St. Rep. 662, 15 N. Y. Supp. 944; *Hyatt v. Trustees of Village of Rondout* (1863), 44 Barb. 385, *affd.* (1870), 41 N. Y. 619.

The above section does not change the rule formerly existing, that want of funds in the hands of the town superintendent with which to make the needed repairs, constituted a defense. A presumption that the town superintendent has funds with which to repair a defect is repelled by the fact that he sought to acquire funds from the town board for such purposes. *Lee v. Town of Berne* (1903), 79 App. Div. 214, 80 N. Y. Supp. 107.

It is not sufficient for the town to show that the superintendent had no funds in his possession, but it must also be shown that he had sought through the proper channels to procure the same. *Whitlock v. Town of Brighton* (1896), 2 App. Div. 21, 37 N. Y. Supp. 333, *affd.* (1898), 154 N. Y. 781, 49 N. E. 1106; *Warren v. Clement* (1881), 24 Hun 472; *McMahon v. Town of Salem* (1898), 25 App. Div. 1, 49 N. Y. Supp. 310. In order to make the defense as to funds complete, it must appear not only that there was a lack of funds, but an inability, by the exercise of reasonable diligence, to obtain them. *McMahon v. Town of Salem* (1898), 25 App. Div. 1, 49 N. Y. Supp. 310.

It is unnecessary to allege in the complaint that defendant had money with which to make repairs, though it may become necessary on the trial to prove the fact. *Oakley v. Town of Mamaroneck* (1886), 39 Hun 448; but see *Smith v. Wright* (1857), 27 Barb. 621. Where a criminal indictment is brought against the officer for failure to make repairs want of funds must be averred in the indictment. *People v. Adsit* (1842), 2 Hill 619. But the necessity of this averment is limited to criminal cases. *Adsit v. Brady* (1843), 4 Hill 630. When the negligence charged was misfeasance, or want of care in construction, the want of funds is no defense. *Rector v. Pierce* (1874), 3 T. & C. 416; *Shepherd v. Lincoln* (1837), 17 Wend. 250; *Lament v. Haight* (1872), 44 How. Pr. 1.

In an action against a town to recover damages for injuries caused by the negligence of a commissioner of highways in failing to repair a road, it is not necessary to allege that the commissioner had funds, as the lack of funds is a matter of defense. An allegation of negligence on the part of the commissioner implies that he was in a position to act and ought to have acted, and yet failed to do so. *Hayner v. Town of Schaghticoke* (1908), 126 App. Div. 498, 110 N. Y. Supp. 714.

The burden is upon the superintendent to show that he both was without funds and had no power to raise them. *Bullock v. Town of Durham* (1892), 64 Hun 380, 19 N. Y. Supp. 635; *Getty v. Town of Hamlin* (1887), 46 Hun 1; *Bidwell v. Town of Murray* (1886), 40 Hun 190; *Boyce v. Town of Shawangunk* (1899), 40 App. Div. 593, 58 N. Y. Supp. 26. The presumption that the superintendent had no funds is rebutted by the fact that, at the time he discovered repairs were needed, he took measures to acquire such funds by asking that the town board be called together. *Lee v. Town of Berne* (1903), 79 App. Div. 214, 80 N. Y. Supp. 107. As to whether the superintendent had sufficient funds to make the repairs is a question for the jury. *Shaw v. Town of Potsdam* (1896), 11 App. Div. 508, 42 N. Y. Supp. 779; *Getty v. Town of Hamlin* (1887), 46 Hun 1.

Evidence of repairs, made shortly after the accident, is competent to show that there were funds in the hands of the superintendent at the time of the accident. *Stone v. Town of Poland* (1890), 58 Hun 21, 11 N. Y. Supp. 498.

Contributory negligence.—*Bryant v. Town of Randolph* (1892), 133 N. Y. 70, 30 N. E. 657; *Ivory v. Town of Deerpark* (1889), 116 N. Y. 476, 22 N. E. 1080; *Monk*

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v. Town of New Utrecht (1887), 104 N. Y. 552, 11 N. E. 268; Patchen v. Town of Walton (1897), 17 App. Div. 158, 45 N. Y. Supp. 145; Lawson v. Town of Woodstock (1884), 20 Wk. Dig. 570; Sutphen v. Town of North Hempstead (1894), 80 Hun 409, 30 N. Y. Supp. 128; Spencer v. Town of Sardinia (1899), 42 App. Div. 472, 59 N. Y. Supp. 412; Rankert v. Town of Junius (1898), 25 App. Div. 470, 49 N. Y. Supp. 850; Hewett v. Town of Thurman (1899), 41 App. Div. 6, 58 N. Y. Supp. 83; Wood v. Town of Gilboa (1894), 76 Hun 175, 27 N. Y. Supp. 586, *affd.* (1895), 146 N. Y. 383, 42 N. E. 544; Weed v. Village of Ballston Spa (1879), 76 N. Y. 329; Boyce v. Town of Shawangunk (1899), 40 App. Div. 593, 58 N. Y. Supp. 26; Foels v. Town of Tonawanda (1894), 75 Hun 363, 27 N. Y. Supp. 113.

A person traveling upon a highway is, as a general rule, justified in assuming that it is safe; and where he is injured in consequence of a defect, previous knowledge of its existence does not, *per se*, establish negligence on his part. Weed v. Village of Ballston Spa (1879), 76 N. Y. 329.

Evidence.—Declarations of the superintendent, made before the injury, are admissible to show his knowledge of the defect. Shaw v. Town of Potsdam (1896), 11 App. Div. 508, 42 N. Y. Supp. 779. Declarations of the superintendent, made the day after the accident, are inadmissible in an action against the town. Stone v. Town of Poland (1890), 58 Hun 21, 11 N. Y. Supp. 498. It is error to allow the plaintiff to prove that after the accident guards to the approaches of a bridge and a new abutment and retaining wall were erected by the superintendent, and that he deemed them necessary. Getty v. Town of Hamlin (1891), 127 N. Y. 636, 27 N. E. 399. Negligence of a prior superintendent of highways may be shown. Kelly v. Town of Verona (1904), 97 App. Div. 488, 90 N. Y. Supp. 89.

In an action brought to recover damages for a personal injury caused by a defect in a highway, the fact that no accident had occurred before at the place in question, although some evidence tended to show that that point in the road was not dangerous, is not conclusive in that regard, especially where the plaintiff's evidence strongly indicates an unsafe condition of the highway. Lane v. Town of Hancock (1893), 67 Hun 623, 22 N. Y. Supp. 470, *revd.* (1894), 142 N. Y. 510, 37 N. E. 473.

Evidence of an accident which occurred upon a highway, at some time previous under dissimilar circumstances, some forty-two feet from the point of the accident in question was improperly admitted, since it did not tend to prove that the place was dangerous at that time or ever before. Flansburg v. Town of Elbridge (1912), 205 N. Y. 423, 98 N. E. 750, 41 L. R. A. (N. S.) 546.

Evidence, that after the accident the owner of the premises built a fence around the area adjoining the defendant's street into which the plaintiff fell, is incompetent. Corcoran v. Village of Peekskill (1888), 108 N. Y. 151, 15 N. E. 309.

Statement to be filed.—The requirement that the statement be presented within six months and that fifteen days elapse thereafter before an action may be maintained, simply imposes a condition which affects the remedy, and is not unconstitutional. Olmstead v. Town of Pound Ridge (1893), 71 Hun 25, 24 N. Y. Supp. 615; Reining v. Buffalo (1886), 102 N. Y. 308, 6 N. E. 792. The legislature has the right to prescribe, as a condition precedent to bringing the action, that the plaintiff give notice in a certain way to the municipality; but a fair and reasonable construction should be given to the statute so that the right of action of the claimant may be preserved and the municipality have the benefit of the section. Soper v. Town of Greenwich (1900), 48 App. Div. 354, 62 N. Y. Supp. 1111.

A mailing of the notice to the town clerk is a sufficient presentment to the supervisor, where the latter actually received it and acted upon it; and the statute is satisfied by serving a copy of the claim, where the original was duly verified and the copy purports to show such verification. Soper v. Town of Greenwich (1900), 48 App. Div. 354, 62 N. Y. Supp. 111.

The cause of action accrues when the injury or damage was done. The purpose

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of the statement is to give speedy information to the town of the accident, injury, and consequent damage and intention to make a claim against the town. The presentation of the claim relates to procedure and the mode and manner of enforcing the remedy and the time within which notice shall be given after the injury. Only ancillary administrators appointed in the state can prosecute the action. *Dodge v. Town of North Hudson* (1911), 188 Fed. 489.

The purpose of the notice required by section 74 of the Highway Law before bringing an action against a town for damages is to fairly apprise the officers of the town of the nature and circumstances of the accident, so that they may investigate the same fully and intelligently, and with certainty as to the place and conditions of the accident. Such a notice, to the effect that on a certain date while the plaintiff was driving his horse to a certain place, and when he was about twenty-five rods below the foot of a certain hill in the town state, the horse stepped through a hole in a sluice and broke her leg, making it necessary to shoot her, damaging the plaintiff to a certain sum, no part of which has ever been paid, is a substantial compliance with the statute. *It seems*, that the notice need not be framed with the same particularity as a complaint, and need not contain facts showing that the commissioner of highways was negligent, and that the plaintiff was free from negligence. *Griffin v. Town of Ellenburgh* (1916), 171 App. Div. 713, 157 N. Y. Supp. 813.

Sufficiency of statement.—Where the statement has served the object intended by the statute, viz., to give the town notice of the claim, such statement did not operate to limit proof of the actual extent of the plaintiff's injuries nor the amount of damages she could recover. *Eggleston v. Town of Chautauqua* (1904), 90 App. Div. 314, 86 N. Y. Supp. 279, *affd.* (1905), 183 N. Y. 514, 76 N. E. 1094. The object of the statute plainly is that the town shall have fair and timely notice of the cause of action and of the claim made against it, and time is given after the notice and before the suit is commenced for the town to examine into the claim and decide what to do with reference to it. This notice is not required to have all the formalities of a complaint or of a bill of particulars; its purpose is served by bringing the general nature of the claim to the attention of the town. *Quinn v. Town of Sempronius* (1898), 33 App. Div. 70, 53 N. Y. Supp. 325; *Spencer v. Town of Sardinia* (1899), 42 App. Div. 472, 59 N. Y. Supp. 412; *Eggleston v. Town of Chautauqua* (1904), 90 App. Div. 314, 86 N. Y. Supp. 279, *affd.* (1905), 183 N. Y. 514, 76 N. E. 1094.

Notice of a claim against a town for personal injuries caused by the alleged negligence of the highway commissioner examined, and *held*, sufficient in that it gave the date of accident, its location, the injuries received and a sufficient description of the cause. *Clark v. Town of Copake* (1911), 142 App. Div. 202, 126 N. Y. Supp. 982.

While the statute requiring the plaintiff intending to sue a town for injuries received by reason of a defective highway to serve a verified statement of the causes of action as a condition precedent thereto does not in express terms require the notice to state the time and place of injury, a notice which fails to do so is defective. *Lutes v. Town of Warwick* (1912), 149 App. Div. 809, 134 N. Y. Supp. 298.

The legislature having made the presentment of the statement of the cause of action to the supervisor a prerequisite to the bringing of an action the court cannot permit any substitute for it; the statute must be strictly complied with; so, where plaintiff's attorney wrote a letter to the supervisor, which was not returned as not being the statement required, and the town officers acted thereon and negotiated for a settlement with plaintiff, the claimant is not relieved from a literal compliance with the statute, nor have the town officers the power to waive the statutory requirement. *Borst v. Town of Sharon* (1898), 24 App. Div. 599, 48 N. Y. Supp. 996.

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As to what constitutes a sufficient statement to the supervisor of the cause of action, see *Spencer v. Town of Sardinia* (1899), 42 App. Div. 472, 59 N. Y. Supp. 412.

The statement should state facts showing the occurrence of the accident, the defects in the highway or bridge which caused it, that the town superintendent was negligent and the plaintiff was free from negligence, and that the plaintiff was injured and was entitled to damages therefor. It might well state the nature and extent of the injuries sustained, and the amount of damages claimed therefor, but the amount of damages would be merely an estimate and the plaintiff would not be restricted to the amount stated. *Eggleston v. Town of Chautauqua* (1904), 90 App. Div. 314, 86 N. Y. Supp. 279, *affd.* (1905), 183 N. Y. 514, 76 N. E. 1094.

Complaint; failure to allege filing of statement with town clerk; amendment.—An action against a town for damages to persons or property sustained by reason of any defect in its highway or bridges existing because of the neglect of the town superintendent of highways can be maintained only by virtue of this section; but where the complaint, otherwise good, contains no allegation that a verified statement of the cause of action was filed with the town clerk within six months after the cause of action accrued, as required by said section, the complaint must be dismissed, with leave to serve an amended complaint on payment of a full bill of costs. *Dye v. Town of Cherry Creek* (1914), 87 Misc. 207, 149 N. Y. Supp. 497.

The complaint must show that the claim was served upon the supervisor within six months after the accident and that fifteen days elapsed thereafter before the action was commenced; omission to allege these facts is a defect that can be taken advantage of at any stage of the action. *Olmstead v. Town of Pound Ridge* (1893), 71 Hun 25, 24 N. Y. Supp. 615.

Section cited.—*Williams v. Village of Port Chester* (1904), 97 App. Div. 84, 89 N. Y. Supp. 671, *affd.* (1905), 183 N. Y. 550, 76 N. E. 1116.

§ 75. Action by town against superintendent.—If a judgment shall be recovered against a town for damages to person or property, sustained by reason of any defect in its highways or bridges, existing because of the neglect of any town superintendent, such town superintendent shall be liable to the town for the amount of the judgment, and interest thereon, but such judgment shall not be evidence of the negligence of the superintendent in the action against him.

Source.—Former Highway L. (L. 1890, ch. 568) § 17; originally derived from L. 1881, ch. 700, § 3.

Construction.—This section should be construed with section 71. *Ferguson v. Town of Lewisboro* (1912), 149 App. Div. 232, 133 N. Y. Supp. 699.

Liability of town superintendents.—Town superintendents since the act of 1881, ch. 700, are no longer liable for their negligence to persons injured; the primary liability to such persons is that of the town. *Williams v. Village of Port Chester* (1904), 97 App. Div. 84, 89 N. Y. Supp. 671, *affd.* (1905), 183 N. Y. 550, 76 N. E. 1116. The section, as it existed in the former Highway Law, was passed in view of the law as it had been announced by the courts without contemplating any change. *People ex rel. Cole v. Cross* (1903), 87 App. Div. 56, 83 N. Y. Supp. 1083.

Proof of negligence.—The negligence of the town superintendent, although established in the action against the town, must be again proved in the action by the town against the superintendent. *Lane v. Town of Hancock* (1894), 142 N. Y. 510, 37 N. E. 473. See also *Waller v. Town of Hebron* (1896), 5 App. Div. 577, 39 N. Y. Supp. 381.

Liability of town superintendent to town is the test of the town's liability. *Mack v. Town of Shawangunk* (1904), 98 App. Div. 577, 90 N. Y. Supp. 760.

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While no charge of negligence can arise against a town superintendent if the town board neglects to act after he has informed it of an unsafe driveway, yet a failure on his part to place the matter before the town board, when he has full knowledge, indicates a negligent performance of his general duty of care and superintendence, and the continuing defect may be said to be one "existing because of the neglect" of the town superintendent, within the meaning of the statute. *Ferguson v. Town of Lewisboro* (1912), 149 App. Div. 232, 236, 133 N. Y. Supp. 699.

Acts of subordinates.—A town superintendent is not liable for the acts of a subordinate or deputy appointed by him, nor is the town liable therefor. *Lyndon v. Town of Rhinebeck* (1913), 210 N. Y. 101, 105 N. E. 888.

§ 76. Audit of damages without action.—The town board of any town may audit as a town charge, in the same manner as other town charges are audited, any one claim not exceeding five hundred dollars, for damages to person or property, heretofore or hereafter sustained by reason of defective highways or bridges in the town, if in their judgment it be for the interest of the town so to do; but no claim shall be so audited unless it shall have been presented to the supervisor of the town within six months after it accrued, nor if any action thereon shall be barred by the statute of limitations. The town board may also audit any unpaid judgment heretofore or hereafter recovered against a town superintendent for any such damages, if such town board shall be satisfied that he acted in good faith, and the defect causing such damage did not exist because of the negligence or misconduct of the superintendent against whom such judgment shall have been recovered.

Source.—Former Highway L. (L. 1890, ch. 568) § 18; originally derived from L. 1881, ch. 700, § 4.

References.—Payment of judgment against municipal corporation, General Corporation Law, § 70; audit and payments of judgment against town, Town Law, §§ 133, 170.

Judgments against town superintendent.—No absolute liability is imposed upon towns for all judgments recovered against a town superintendent of highways in actions prosecuted by him in his official name. The board of town auditors have power to determine whether the action was rightfully prosecuted. In determining as to the liability of the town the board acts judicially, and its actions cannot be reviewed or controlled by the courts through a writ of mandamus. *People ex rel. Myers v. Barnes* (1889), 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *People ex rel. Phoenix v. Supervisors of New York* (1841), 1 Hill 362.

§ 77. Closing highways for repair or construction.—If it shall appear necessary to close a highway which is being constructed, improved or repaired under this chapter so as to permit a proper completion of such work, the district or county superintendent shall upon request of the division engineer, or direction of the state superintendent of highways execute a certificate and file the same in the office of the town clerk in which such highway is situated. Such certificate shall state the necessity for the closing of such highway and describe the portion thereof to be closed; not more than two miles of any highway shall be closed at any one time. At the time of filing such certificate such district or county superintendent

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shall notify the town superintendent to close the highway, who shall thereupon close the same to public travel by erecting suitable obstruction and posting conspicuous notices to the effect that the highway is closed. The town superintendent shall, if practicable, provide a new location for, and construct a temporary highway to be used by the traveling public in lieu of the closed highway and may erect temporary bridges when necessary or cause other existing highways to be used, when so directed by the district or county superintendent. For the purpose of locating, constructing and erecting such temporary highway or bridge the town superintendent may enter upon the lands adjoining or near to the closed highway and may, with the approval of the town board, agree with the owners of such land as to the damages if any caused thereby.

If the town superintendent is unable to agree with such owner upon the amount of damages thus sustained the amount thereof shall be ascertained, determined and paid as provided in section fifty-eight. When such highway shall have been closed to the public as provided herein any person who disregards the obstruction and notice, and drives, rides or walks over the portion of the highway so closed shall be guilty of a misdemeanor. (*Amended by L. 1911, ch. 646.*)

Source.—L. 1898, ch. 115, § 11, as amended by L. 1907, ch. 717, which provided for the closing of highways constructed or improved under that act. The above section is to the same effect but was extended to all highways constructed, improved or repaired under this chapter and provision is made for the location and construction of temporary highways and bridges.

Liability of county for failure of sub-contractor to keep road open during construction work.—Where a county has entered into a contract with the state for the building of a road under the supervision of the State Engineer and in accordance with plans drawn by him, and has thereafter sublet such contract to a construction company the county is not liable for the failure of such sub-contractor to keep such road open during the work of construction. There is no statute or rule of common law that makes a municipal government liable for damages caused by the necessary closing of a road during the making of reasonable repairs or the doing of proper reconstruction work. Hence the only liability if any is on the part of the contractors actually doing the work, for closing the road before the engineer on the work, representing the State Engineer, has made and filed his certificate. *Herbert v. County of Rockland* (1909), 64 Misc. 352, 118 N. Y. Supp. 358.

Liability of contractor. Rept. of Atty. Genl. (1913), 24.

§ 78. Adoption of labor system for removing snow.—The town board of any town at its annual meeting on the first Thursday after general election, may, by resolution, determine that no money shall be raised in such town for the ensuing year for the removal of obstructions in the highways caused by snow, and that such obstructions shall be removed by the labor of persons and corporations liable to be assessed in such towns for highway taxes. (*Added by L. 1909, ch. 488, and amended by L. 1910, ch. 136.*)

Source.—New.

§ 79. Assessment of labor for the removal of snow.—The town super-

§ 80. Town superintendents; general powers and duties. L. 1909, ch. 30.

intendent of a town in which the obstructions in the highways caused by snow shall be removed by the labor of persons and corporations liable to assessment in each town for highway taxes, pursuant to the last preceding section shall annually on or before November fifteenth divide the town into a convenient number of highway districts and file a description thereof in the office of the town clerk, and before such date shall make an estimate giving the probable number of days' labor needed during the following year for the removal of obstructions caused by snow in the highways and for the prevention of such obstructions and shall assess one day's labor upon each male inhabitant of the town above the age of twenty-one years, excepting honorably discharged soldiers and sailors who lost an arm or a leg in the military or naval service of the United States, or who are unable to perform manual labor, by reason of injuries received or disabilities incurred in such service, members of any fire company formed or created pursuant to any statute, and situated within such town, persons seventy years of age or over, clergymen and priests of every denomination, paupers, idiots and lunatics. The balance of such estimated number of days shall be apportioned and assessed upon the estate, real and personal, of every inhabitant of the town, including corporations liable to taxation therein, as the same shall appear by the last assessment roll of the town, and upon each parcel or tract of land owned by the nonresidents, excepting such as are occupied by an inhabitant of the town, which shall be assessed to the occupant. The assessment of labor for personal property must be in the district in which the owner resides, and real property in the district where it is situated, except that the assessment of labor upon the property of corporations may be in any district or districts of the town, and such labor may be worked out or commuted for as if the corporation were an inhabitant of the district; but the real property within an incorporated city or village exempted from the jurisdiction of the town superintendent, and personal property of an inhabitant thereof, shall not be assessed for such labor by the town superintendent. Whenever the assessors of any town shall have omitted to assess any inhabitant, corporation or property therein, the town superintendent shall assess the same, and apportion the labor as above provided. (*Added by L. 1909, ch. 488, and amended by L. 1910, ch. 136.*)

Source.—New.

§ 80. Lists of persons assessed for removal of snow.—A copy of the lists of persons and corporations assessed shall be prepared by the town superintendent and filed in the office of the town clerk. The town superintendent may at any time file in the office of the town clerk a supplemental list containing the names of persons or corporations omitted from the original list, and the names of new inhabitants, and shall assess them in proportion to their real and personal estate as others assessed by him on such list. (*Added by L. 1909, ch. 488.*)

L. 1909, ch. 30. Town superintendents; general powers and duties. §§ 81, 82.

Source.—New.

See *McCutcheon v. Terminal Station Commission* (1915), 88 Misc. 601, 151 N. Y. Supp. 451, *affd.* (1915), 168 App. Div. 301, 154 N. Y. Supp. 711, *affd.* (1916), 217 N. Y. 127, 111 N. E. 661.

§ 81. District foreman; return and levy of unworked tax.—The town superintendent shall also, immediately after the town has been divided into districts as provided in section seventy-nine of this chapter, appoint a foreman in each district, who shall be a taxable resident thereof, who shall serve for one year and until his successor is appointed and shall receive such per diem compensation, not exceeding two dollars per day, for time actually spent in performing his duties, as the town board may prescribe, payable as the compensation of other town officers is paid. The superintendent shall prepare, from the lists prescribed in section eighty, a separate list for each district of persons and corporations assessed therein for the then current year for labor in removing obstructions caused by snow, showing the number of days' labor for which each person or corporation is assessed, and shall deliver each such list to the foreman of the proper district. It shall be the duty of each foreman to notify the several persons and corporations thus assessed, or such of them as the occasion demands, from time to time as needed, that they are required to appear and perform labor in the removal of obstructions caused by snow at a time and place stated by the foreman. On or before the first day of May each district list, showing the portions worked or commuted for, the portions in which parties were notified but failed to perform work after being so notified, and the portions upon which no notice to perform work was served, shall be returned by the district foreman to the town superintendent. All assessments upon which parties have been notified and failed to appear or commute shall then be certified by the town superintendent to the town board, who shall return the same to the board of supervisors of the county and which shall be included by them in the next tax-roll of the town and levied against the persons and corporations assessed at the rate of one dollar and fifty cents per day as other taxes are levied. (*Inserted by L. 1910, ch. 136.*)

Source.—New.

§ 82. Appeals by nonresident; certain assessments to be separate; tenant may deduct assessment.—Whenever any nonresident owner of unoccupied land shall conceive himself aggrieved by any such assessment of any town superintendent, such owner or his agent, may, within thirty days after such list has been filed in the office of the town clerk, appeal to the county judge of the county in which such land is situated, who shall within twenty days thereafter hear and decide such appeal, the owner or agent giving notice to the town superintendent of the time of the hearing before the judge, and his decision thereupon shall be final and conclusive. Whenever the town superintendent shall assess the occupant for any land not owned by such occupant, he shall distinguish in his assessment list

the amount charged upon such list, from the personal tax, if any, of the occupant thereof; but when any such land shall be assessed in the name of the occupant, the owner thereof shall not be assessed during the same year on account of the same land. Whenever any tenant of any land, for a less term than twenty-five years, shall be assessed to work on the highways for such land, and shall actually perform such work or commute therefor, he shall be entitled to a deduction from the rent due or to become due from him for such land, equal to the full amount of such assessment, estimating the same at the rate of one dollar per day, unless otherwise provided for by agreement between the tenant and his landlord. Whenever the highways in any district are obstructed by snow, the town superintendent shall immediately call upon the persons and corporations in such district assessed for labor in pursuance of the preceding sections to assist in removing such obstruction, and shall credit such persons or corporations with the days' labor so performed. If any persons, corporations or occupants of land owned by nonresidents so called out neglect or refuse to appear at the place designated by the town superintendent or to commute at a dollar a day within twenty-four hours after due notice, the town superintendent shall cause the obstruction to be immediately removed and on or before September first of each year, or at such other time as the board of supervisors may by resolution prescribe, make out a list of all persons, corporations or occupants of lands owned by nonresidents who shall fail to work out such labor or commute therefor, with the number of days not worked out or commuted for by each, charging for each day in such list at the rate of one dollar and fifty cents per day, verified to the effect that such persons, corporations or occupants of lands owned by nonresidents have been notified to appear and perform such labor or commute therefor, and that the same has not been performed or commuted. Such list shall be certified by the town superintendent of such town to the town board and by such town board to the board of supervisors and the highway commission, and the amount of such arrearages shall be levied by such board of supervisors against and collected from the real or personal estate of such persons and corporations and from the real estate owned by nonresidents specified in such list, to be collected by the collectors of the several towns in the same manner that other town taxes are collected, and shall order the same when collected to be paid over to the supervisor to be by him added to the highway fund of the town. No persons or corporations shall be allowed any sum for highway labor performed in removing obstructions caused by snow, unless authorized or directed by the town superintendent to perform such labor. It shall be the duty of the town superintendent on or before the thirty-first day of October in each year to file with the highway commission a statement showing the number of days' labor assessed. It shall also be the duty of the town superintendent to file with the highway commission on or before the first day of June in each year a statement showing the number of

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days' labor performed or commuted for, the number of days' labor on which parties were notified but failed to labor, also the number of days' labor upon which no notice to appear was given. (*Added by L. 1909, ch. 488, as § 81, renumbered and amended by L. 1910, ch. 136.*)

Source.—New.

Duty of town superintendent to direct removal of snow on failure of district foreman to act.—Where the labor system for the removal of snow has been adopted by a town it is the duty of the town superintendent to direct the work on failure of district foremen to act. He may also engage sufficient labor to remove such obstructions and make the expense a town charge in cases where the labor of the persons assessed does not result in removing the obstructions. Opinion of Atty. Genl. (1913), 27.

ARTICLE V.

HIGHWAY MONEYS; STATE AID.

Section 90. Estimate of expenditures for highways and bridges.

91. Duties of town board in respect to estimates; levy of taxes.
92. Additional tax.
93. Extraordinary repairs of highways and bridges.
94. Limitations of amounts to be raised.
95. Submission of propositions at town meetings.
96. Borrowing money in anticipation of taxes.
97. Towns may borrow money for bridge and highway purposes.
- 97-a. Power of certain towns in the Adirondack park to borrow money for highway purposes.
98. Issue and sale of town bonds.
99. Assessment of village property.
100. Statement by clerk of board of supervisors.
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104. Custody of highway moneys; undertaking of supervisor.
105. Expenditures for repair and improvement of highways.
106. Expenditures for bridges and other highway purposes.
107. Reports of supervisor as to highway moneys.
108. Highway accounts, forms and blanks.
109. Duty of town clerk.
110. Compensation of supervisor and town clerk.
111. Additional expenditure for improvement, repair and maintenance of town highways.

§ 90. Estimate of expenditures for highways and bridges.—The town superintendent shall annually, on or before the thirty-first day of October, make a written statement in respect to the amount of money which should be raised by tax in the town for the ensuing year, beginning on the first day of November, for the purposes therein set forth, which shall be filed with the town clerk. Such statement shall specify:

1. The amount of money necessary to be levied and collected for the repair and improvement of highways, including sluices, culverts and

bridges having a span of less than five feet, and board walks or renewals thereof on highways less than two rods in width, and also the amount necessary to construct or repair any public roads, walks, places or avenues on any sand beach separated by more than two miles from the main body of the town. Such amount shall not be less than an amount which when added to the amount of money to be received from the state, under the provisions of section one hundred and one, will equal thirty dollars for each mile of highways within the town, outside the limits of incorporated villages, except that no town having an assessed valuation of three thousand seven hundred and fifty dollars or less per mile outside of incorporated villages shall be required to levy and collect a tax under this subdivision in excess of four dollars on each thousand dollars of assessed valuation. (*Subd. 1, amended by L. 1914, ch. 84, and L. 1915, ch. 322.*)

2. The amount of money necessary to be levied and collected for the repair and construction of bridges, having a span of five feet or more.

3. The amount of money necessary to be levied and collected for the purchase, repair and custody of stone crushers, steam rollers, traction engines, road machines for grading and scraping, tools and implements.

4. The amount of money necessary to be levied and collected for the removal of obstructions caused by snow and for other miscellaneous purposes.

The amounts specified in such statements shall not exceed the limitations prescribed in section ninety-four. If the town superintendent is of the opinion that an amount in excess of the limitations therein prescribed be raised by tax, he shall include in his statement his reasons therefor in detail.

Source.—Former Highway L. (L. 1890, ch. 569) § 19, as amended by L. 1901, ch. 436, and L. 1906, ch. 423, which provided for an annual report by the commission of highways to the town board containing an estimate of the probable expense of highway and bridge made during the ensuing year in addition to the labor to be assessed in the several districts of the town in that year. It was then provided that the board of supervisors should cause the amount so estimated to be raised by tax in the town, provided it did not exceed the sum of five hundred dollars; if the amount so estimated exceeded such sum but was less than one thousand dollars the town board was required to approve the estimate, whereupon the board of supervisors was directed to raise the amount by tax.

Object of change.—Report of the Joint Legislative Committee on Highways contained the following statement in respect to this section: "It is proposed in this bill to abolish the labor system and provide for the improvement and repair of highways and bridges by a money tax. In analogy to the system now in use in labor system towns it is here provided that the town superintendent shall estimate as to the amount required to be raised by tax in the town for the purposes specified. The next section provides for the approval or modification of such estimate and the presenting of the approved or modified estimate to the board of supervisors, whereupon such board is required to levy the tax upon the town in accordance therewith. The amount so to be raised by tax in each town is subject to the limitations imposed in § 94. If such limitations are exceeded it is intended that before a tax is levied there shall be an affirmative vote at a regular or special town meeting."

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Statement under former law.—The former statute made it the commissioner's imperative duty to make a statement of the necessary improvements to be made on bridges and highways in each highway district, and an estimate of the probable expense thereof, to the town board at its second meeting, that is the meeting held on the Thursday prior to the annual meeting of the board of supervisors. A duplicate of such statement and estimate was required to be delivered to the supervisor of the town. The board of supervisors at its next meeting was then required to cause the amount to be assessed upon and collected in the town. *Lament v. Haight* (1872), 44 How. Pr. 1. The object of providing for such statement and estimate is to enable the town to raise money for highway purposes by annual taxation rather than by incurring indebtedness or borrowing money. *Wells v. Town of Salina* (1890), 119 N. Y. 280, 290, 23 N. E. 870, 7 L. R. A. 759.

Power of superintendent to bind town.—The town superintendent of highways cannot go beyond the statement and estimate of expenditures and incur indebtedness which will be binding upon the town unless authorized as provided by statute. *Robinson v. Town of Fowler* (1894), 80 Hun 101, 30 N. Y. Supp. 25; *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356. The town superintendent cannot borrow money for the repair of roads and bridges and in this way contract a debt against the town. *Barker v. Loomis* (1844), 6 Hill 463. Nor can he employ an attorney on the credit of the town in proceedings to lay out a highway. *People ex rel. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248.

The levy of the minimum amount of tax for repair and improvement of highways is necessary in order to compute the amount for state aid and the amount levied must not be less than that prescribed in subdivision 1. *Rept. of Atty. Genl.* (1909), 334.

Property purchased with pension money is properly taxable for each of the purposes set forth in this section, since each is, in a broad sense, directly connected with the construction or maintenance of streets and highways. (See Tax Law, sec. 4, subd. 5.) *Rept. of Atty. Genl.* (1909), 631.

"Miscellaneous purposes."—Building a new highway is a "miscellaneous purpose" within the meaning of subdivision 4. There is no limitation of the amount which may be raised for "miscellaneous purposes" except as it is controlled by the public necessities of a town. *Rept. of Atty. Genl.* (1910), 732.

Making of estimates.—Estimates may be made by town superintendent under subd. 4 of money necessary for building new highway, said estimate is then laid before the town board and if it approves, the several amounts are laid before the board of supervisors and raised in the same way as other highway taxes in the town. *Rept. of Atty. Genl.* (1910), 732.

Moneys raised as provided by sections 90-101 cannot be used either for construction or maintenance of town highways constructed under sections 320 or 320-a of the Highway Law. *Opinion of Attorney General* (1916), 7 State Dept. Reports, 549.

Storage building.—The erection of a building for the storing of road machinery belonging to a town may only be authorized under the provisions of the Town Law relating to town buildings. *Rept. of Atty. Genl.* (1912), 448.

§ 91. **Duties of town board in respect to estimates; levy of taxes.**—The town board, at its meeting held on Thursday succeeding general election day in each year, shall consider the estimates contained in such statement. It may, by a majority vote of the members thereof, approve such statement, or increase or reduce the amount of any of the estimates contained therein, subject to the limitations prescribed in section ninety-four. The statement, as thus approved, increased or reduced shall be signed in dupli-

cate by a majority of the members of the town board, one of which shall be filed in the office of the town clerk, and the other shall be delivered to the supervisor. The town clerk shall make and transmit a copy of such statement to the commission. The supervisor shall present such statement to the board of supervisors and such board shall cause the amounts contained therein, subject to the limitation requiring a vote of the electors as hereafter provided, to be assessed, levied and collected in such town in the same manner as other town charges, and such amounts shall be expended for the purposes specified in such statement. The warrant for the collection of taxes in such town shall direct the payment of the money so collected to the supervisor of the town, to be held by him and paid out for the purposes specified in such statement, as provided in this chapter.

Source.—This section is a modification of that part of former Highway Law (L. 1890, ch. 568) § 19, which provided for the adoption by the town board of an estimate made by the highway commissioner where the amount to be raised was more than five hundred dollars and less than one thousand dollars in excess of the labor assessed in a labor system town.

References.—Agreement to be entered into by the town board and town superintendent as to highway improvement, Highway Law, § 105; board of supervisors to levy tax in accordance with revised estimate, County Law, § 12, subd. 3; tax warrant to direct payment of tax collected to certain officers, Tax Law, § 59.

Insufficient appropriations.—In the absence of authority conferred upon him as provided in this and the following section the town superintendent has no power to proceed with the improvements, and apply in payment therefor the appropriation for the succeeding year, and expenditures so made create no legal claim against the town. *People ex rel. Peterson v. Clark* (1899), 45 App. Div. 65, 60 N. Y. Supp. 1045. The town superintendent of highways cannot of his own volition bind the town for a greater amount than that estimated, levied and collected. *Mather v. Crawford* (1862), 36 Barb. 564; *Barker v. Loomis* (1844), 6 Hill 463.

Burdens assumed by towns in reference to the care of highways, except where expressly imposed by statute, are quite voluntary and can be assumed only through their voluntary consent, given in open town meeting as provided by statute. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356.

§ 92. **Additional tax.**—Whenever the town superintendent and the town board shall determine that the sum of one thousand dollars will be insufficient to pay the expenses actually necessary for the removal of obstructions caused by snow and the prevention of such obstructions, and whenever they shall determine that the amounts levied and collected for any of the purposes mentioned in the statement presented to the board of supervisors, as provided in the preceding section, are insufficient to pay the expenses necessarily incurred for any of the purposes therein specified they may cause a vote to be taken by ballot at a biennial town meeting or at a special town meeting duly called therefor, authorizing such additional sum to be raised as they may deem necessary for such purpose, not exceeding one-third of one per centum upon the taxable property of the town as shown by the last assessment-roll thereof.

Source.—Former Highway L. (L. 1890, ch. 568) § 9, as amended by L. 1906, ch.

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423, modified so as to comply with the provisions relating to the annual estimate of the town superintendent as increased or reduced by the town board as provided in §§ 90 and 91.

References.—Special town meeting to be called upon application to supervisors or town superintendent, Town Law, § 46; notice of special town meeting, Id. § 47; votes upon propositions to expend over five hundred dollars to be by ballot, Id. § 52; town superintendent and town board to file with town clerk written application stating question they desire to have voted upon, Id. § 48; women taxpayers may vote on proposition to raise money by tax or assessment, Town Law, § 55.

Effect of failure to secure additional sum.—It is the duty of a town superintendent and town board to take action under this section to secure such sum, in addition to that estimated for in his annual statement, as may be necessary to keep the highways and bridges of the town in a safe condition. It has been held that as a defense to an action for injuries sustained by reason of a defective highway, it is not sufficient to show that the superintendent had no funds, but it must also be shown that he had sought through the proper channels to procure them. *Whitlock v. Town of Brighton* (1896), 2 App. Div. 21, 37 N. Y. Supp. 333, *affd.* (1898), 154 N. Y. 781, 49 N. E. 1196; *Warren v. Clement* (1881), 24 Hun 472; *McMahon v. Town of Salem* (1898), 25 App. Div. 1, 49 N. Y. Supp. 310. See also cases cited under § 74, ante, under heading, "Lack of available funds."

Exceeding appropriations.—When the superintendent fails to call for and get the vote of a town meeting under the provisions of this section, the town board by its subsequent approval, although somewhat irregular, may ratify in substance, so far as it has power, the acts of the superintendent. *Edwards v. Ford* (1897), 22 App. Div. 277, 47 N. Y. Supp. 995. But the rule is and always has been that the superintendent cannot pledge the credit of the town for the purpose of repairing bridges or highways, beyond the funds made available as provided in the Highway Law. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *Eveleigh v. Town of Hounsfield* (1884), 34 Hun 140. A town superintendent is not a general agent of a town and has no authority to make contracts in its behalf unless specifically authorized by statute. *Livingston v. Stafford* (1904), 99 App. Div. 108, 91 N. Y. Supp. 172, *affd.* (1906), 184 N. Y. 536, 76 N. E. 1099. Assumption of obligations contracted by a town superintendent, outside of those imposed by statute, is purely voluntary on the part of the town. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397.

Statutes authorizing highway officers to apply at town meeting to raise additional amount for highways reviewed. *Birge v. Berlin Iron Bridge Co.* (1892), 133 N. Y. 477, 31 N. E. 609; *Hill v. Board of Supervisors of Livingston* (1854), 12 N. Y. 52.

Contracts by superintendent.—Town superintendents of highways are charged with the duty of keeping town highways in repair as independent officers and not as agents of the town, and when they contract for ordinary repairs, it is as such officers and the liability therefor, if they exceed the statuting limitation, is assumed by them personally and not as agents of the town. Opinion of State Comptroller (1916), 9 State Dept. Rep. 482.

§ 93. Extraordinary repairs of highways and bridges.—If any highway or bridge or the board walk on any highway less than two rods in width, or a walk built to replace the same under section sixty-two, shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe for public use and travel, or if any bridge or the board walk on any highway less than two rods in width, or any such walk built to replace the

same, be condemned by the commission, as provided in this chapter, the town superintendent shall cause the same to be immediately repaired or rebuilt, with the approval of the town board. Such highway or bridge or walk shall be so repaired or rebuilt in accordance with the directions or the plans and specifications prepared or approved by the district or county superintendent; except if the bridge or walk to be repaired or rebuilt is one which has been condemned by the commission, as provided in this chapter, the same shall be repaired or rebuilt in accordance with plans and specifications to be prepared or approved by the commission. The town clerk shall prepare a statement showing the probable cost of improving, repairing or rebuilding such highway or bridge or walk which statement shall be signed in duplicate by a majority of the members of the town board, one of which duplicates shall be filed with the town clerk and one to be delivered to the supervisor. The town clerk shall make a copy of such statement and transmit the same to the commission. The supervisor shall present such statement to the board of supervisors, who shall cause the amount contained in such statement to be assessed, levied and collected in the same manner as amounts levied and collected for other highway and bridge purposes, as provided by law. The amount so raised shall be paid to the supervisor to be expended for the purposes specified in such statement. (*Amended by L. 1913, ch. 621, L. 1915, ch. 322, and L. 1917, ch. 261, in effect Apr. 25, 1917.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 10, as amended by L. 1905, ch. 417, provided for the repair or rebuilding of highways and bridges which had been damaged or destroyed by the elements or otherwise. It is provided in the above section that if a bridge be condemned by the commission it shall be repaired or rebuilt in the same manner as though it were damaged or destroyed by the elements or otherwise. It is also provided that the plans and specifications for the work shall be prepared and approved by the district or county superintendent. The limitation of fifteen hundred dollars contained in the former law beyond which an expenditure is not authorized except by vote of a town meeting is contained in § 94. The provision as to audit contained in the former law is provided for in § 106. It is intended by this section to provide in advance for the raising of money sufficient to meet extraordinary expenditures caused by the destruction or damage of highways or bridges by the elements or otherwise, and under § 96 money may be borrowed in anticipation of the tax to be levied for such extraordinary purposes, so that an available fund may be at hand to meet the expenses which are incurred. Section 97 permits the submission of a proposition at a town meeting for the issue and sale of bonds to pay the expenses of such extraordinary repairs, so that the town may extend the payment of the expenses over a prescribed period of years.

Duty to make extraordinary repairs.—It will be no answer to the omission on the part of the superintendent to perform this duty, that the town auditors might have withheld their consent, for that would have been a violation of their official duties if the safety of the public required the bridge to be repaired; for although the language relative to their consent is permissive, it is in legal effect peremptory in its nature. *Lament v. Haight* (1872), 44 How. Pr. 1.

Emergencies to which applicable.—The section only applies to an emergency created by the destruction of a bridge shortly after the holding of a town meeting, and is designed to avoid the delay and inconvenience which would result from

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waiting until the next town meeting for a vote, and the levying and collecting of a tax. It does not apply when one or more town meetings have been held since the destruction of the bridge. *People ex rel. Fellows v. Early* (1905), 106 App. Div. 269, 94 N. Y. Supp. 640; but compare *Whitlock v. Town of Brighton* (1896), 2 App. Div. 21, 37 N. Y. Supp. 333, *affd.* (1898), 154 N. Y. 781, 49 N. E. 1106.

This section does not authorize the town superintendent, upon determining that a highway bridge has become unsafe from natural wear and decay, to make a contract for the rebuilding of such bridge, with the approval of the town board, at a cost exceeding the moneys appropriated for highway purposes. The phrase, "or become unsafe," means an unsafe condition arising from an extraordinary cause. *Livingston v. Stafford* (1904), 99 App. Div. 108, 91 N. Y. Supp. 172, *affd.* (1906), 184 N. Y. 536, 76 N. E. 1099.

The commissioners of highways [town superintendents] and town board of a town cannot contract for the building of new bridges in the place of old bridges not damaged except by natural wear, unless the electors of a town duly authorize the raising of money for such purpose. A contractor is charged with knowledge of the want of such authority. *People ex rel. United Construction Co. v. Voorhies* (1906), 114 App. Div. 351, 99 N. Y. Supp. 918, *affd.* (1907), 187 N. Y. 539, 80 N. E. 1118. Section 10 of the former Highway Law was construed so as to authorize the erection of a new bridge in the place of one damaged or destroyed. *People ex rel. Graton Co. v. Town Board* (1895), 92 Hun 588, 36 N. Y. Supp. 1062; *Hall v. Town of Oyster Bay* (1901), 61 App. Div. 508, 70 N. Y. Supp. 710, *affd.* (1902), 171 N. Y. 646, 63 N. E. 1117.

Authority to contract for extraordinary repairs.—A town superintendent of highways is not an agent of the town with authority to contract for it in real or supposed emergencies, and cannot make a contract binding upon the town unless specifically authorized by statute. Where a superintendent with the consent of the town board enters into a written contract for the rebuilding of a bridge at a cost exceeding \$500, the superintendent cannot of his own accord enter into an independent contract for the supervision of the work, without the consent of the town board, although the amount involved is less than \$500. The town in such a case is not bound whatever the amount, unless the town board has consented to the contract. *People ex rel. Morey v. Town Board* (1903), 175 N. Y. 394, 67 N. E. 620, *revg.* (1903), 80 App. Div. 280, 80 N. Y. Supp. 309. If extraordinary repairs become necessary, and the funds supplied are insufficient for the purpose, the law provides the method of procedure to be taken by the superintendent with the consent of the town board, whereby a legal obligation to pay for the necessary expenditure may be created directly against the town itself. In no other way may the commissioners create an obligation or liability against the town. *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356.

A contract made by the superintendent with the consent of the town board is deemed to be the contract of the town and should be made in the name of the town. *Town of Saranac v. Groton Bridge Co.* (1900), 55 App. Div. 134, 67 N. Y. Supp. 118. In the absence of fraud, the contract may not be attacked as incomplete by being insufficient in form. *Basselin v. Pate* (1900), 30 Misc. 368, 69 N. Y. Supp. 653. Assumption of obligations contracted by the superintendent, outside of those imposed by statute, is purely voluntary on the part of the town. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397.

Consent or approval of the town board.—Without the consent or approval of the town board the town superintendent has no authority to contract for the town or incur a town indebtedness for such purpose. With it, he may contract for the rebuilding of a bridge or the repair of a highway, and such contract is binding upon the town. *People ex rel. Groton Bridge Co. v. Town Board* (1895), 92 Hun 585, 36 N. Y. Supp. 1062. In the absence of consent of town board, the superintendent has

no power to proceed with the improvements, and apply in payment therefor the appropriation for the succeeding year; and expenditures so made create no legal claim against the town. *People ex rel. Peterson v. Clark* (1899), 45 App. Div. 65, 60 N. Y. Supp. 1045. The expenditure is expressly made subject to the approval of the town board. *Matter of Niland v. Bowron* (1908), 193 N. Y. 180, 85 N. E. 1012, *affd.* (1906), 113 App. Div. 661, 99 N. Y. Supp. 914.

If extraordinary repairs become necessary, and the funds supplied are insufficient for the purpose, the law provides the method of procedure to be taken by the town superintendent, with the consent of the town board, whereby a legal obligation to pay for the necessary expenditure may be created directly against the town itself. In no other way may the superintendent create an obligation or liability against the town. *Lyth & Sons v. Town of Evans* (1900), 33 Misc. 221, 68 N. Y. Supp. 356; *People ex rel. Bowles v. Burrell* (1895), 14 Misc. 217, 35 N. Y. Supp. 608. The town board may consent in advance of the making repairs, to the expenditure of a certain amount on certain highways by the superintendent. *Bruner v. Lewis* (1889), 4 N. Y. Supp. 403, 22 N. Y. St. Rep. 93.

Effect under former law of authority to make extraordinary repairs.—It is no defense to an action for negligence in not replacing a barrier upon the bridge that the commissioner has no funds applicable to the purpose, as, by section 10 of the former Highway Law, he was authorized to make the necessary expenditure for extraordinary repairs, to be afterward audited by the town board and collected. *Rising v. Town of Moreau* (1910), 68 Misc. 284, 125 N. Y. Supp. 249.

In an action brought against a town to recover damages for an injury occasioned in 1895, to the person of the plaintiff, by the fall of a defective bridge, it is not a defense to show simply that the commissioner of highways had no funds in his hands applicable to the repair of the bridge; it must also appear that there existed an inability, by the exercise of reasonable diligence, to obtain funds for that purpose, as, by section 10 of the former Highway Law, as amended by chapter 606 of the Laws of 1895, it was provided that, if at any time a bridge shall become unsafe, the commissioners of highways of a town may, with the consent of the town board, cause the same to be immediately repaired, although the expenditure of money required may exceed the sum raised for such purposes. *Herrick, J.*, dissented. *McMahon v. Town of Salem* (1898), 25 App. Div. 1, 49 N. Y. Supp. 310.

Section 10 of the former Highway Law (L. 1890, ch. 568) was held not to apply where a bridge or its approaches were partly in one town and partly in another. *People ex rel. Canton Bridge Co. v. Town Auditors* (1909), 136 App. Div. 166, 120 N. Y. Supp. 696, *affd.* (1912), 204 N. Y. 609, 97 N. E. 1113.

Form and effect of consent.—No particular form of consent by the town board is required; and where it formally resolves that an unsafe bridge be replaced by a new one, the superintendent has sufficient authority to contract for the bridge, although the board subsequently attempts to delay action that it may obtain legal advice in the matter. *Basselin v. Pate* (1900), 30 Misc. 368, 69 N. Y. Supp. 653. Where it does not appear whether the consent was in writing or not, it will be presumed, if that be a requisite, that a record of the consent was properly made. *Boots v. Washburn* (1879), 79 N. Y. 207.

The question as to whether the consent expressed in a resolution of the town board is broad enough to authorize the superintendent to proceed in the manner he did, is one of construction for the court, and not one for the judgment of the board when the claim is presented for audit. *People ex rel. Slater v. Smith* (1894), 83 Hun 432, 31 N. Y. Supp. 749. In this case the consent provided that "the commissioner of highways of the town of Greece is hereby authorized to repair the bridges that may have gone down since the annual town meeting to the best of his judgment," and it was held sufficient to authorize the commissioner to remodel or reconstruct a bridge if in his judgment it was deemed best or necessary

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so to do. See also *Hall v. Town of Oyster Bay* (1901), 61 App. Div. 508, 70 N. Y. Supp. 710, *affd.* (1902), 171 N. Y. 646, 63 N. E. 1117.

Mandamus to compel approval.—Where the commissioner of highways [superintendent] of a town, without the previous consent of the town board, has expended moneys in excess of the amount in his hands, for the purpose of repairing highways which were in a dangerous and unsafe condition, a writ of mandamus will not issue commanding the officers of the town to convene as a town board, and give their consent to the payment of the highway commissioner's claim for reimbursement. The fact that if an application had been made to the town board prior to the expenditure of the money, they would undoubtedly have consented to the making of the repairs, does not justify the issuance of a mandamus. The consent mentioned in the statute is a judicial act contemplating a decision of the board upon evidence as to whether or not the highways are in such condition as to require immediate repair. *People ex rel. Graham v. Studwell* (1904), 91 App. Div. 469, 86 N. Y. Supp. 967, *affd.* (1904), 179 N. Y. 520, 71 N. E. 1137. The town board may make the judgment of the superintendent the measure of its consent as to reconstruction of a bridge; and it is not in the province of a writ of mandamus to review the exercise of a judicial or discretionary power of such board, or to direct what the result of its exercise shall be. *People ex rel. Slater v. Smith* (1894), 83 Hun 432, 31 N. Y. Supp. 749.

Application.—This section does not authorize the rebuilding of a bridge which has become defective by ordinary wear and tear or the natural decay of the materials of which it was constructed, at a cost exceeding the moneys appropriated for highway purposes; it only authorizes such construction where the bridge has become destroyed by some emergency or by some extraordinary cause. It is more than doubtful if this section has any relation to or was intended to apply where a bridge or its approaches are partly in two towns. *People ex rel. Canton Bridge Co. v. Town Auditors* (1909), 136 App. Div. 166, 120 N. Y. Supp. 696, *affd.* (1912), 204 N. Y. 609, 97 N. E. 1113.

§ 94. **Limitations of amounts to be raised.**—The amounts to be raised by tax upon the vote of a town board, as provided in this article, shall be subject to the following limitations:

1. The amount to be levied and collected in each year for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet and board walks or renewals thereof, on highways less than two rods in width, shall not be less than the amount prescribed under subdivision one of section ninety. (*Subd. 1, amended by L. 1915, ch. 322.*)

2. Not more than fifteen hundred dollars shall be levied and collected in any one year in any town for the repair and construction of a bridge unless by unanimous consent of all members of the town board, but in no case shall more than three thousand dollars be levied and collected unless duly authorized by a vote of a town meeting.

3. Not more than five hundred dollars shall be levied and collected in any one year in any town for the purchase or repair of stone crushers, steam rollers, traction engines or road machines for grading and scraping, tools and implements, unless duly authorized by the vote of a town meeting.

4. Not more than fifteen hundred dollars shall be levied and collected in any one year in any town for the repair or construction of any highway

or bridge which has been damaged or destroyed as provided in section ninety-three or which has been condemned by the commission as provided in this chapter, unless by unanimous consent of all members of the town board, but in no case shall more than three thousand dollars be levied and collected unless duly authorized by the vote of a town meeting. (*Subd. 1, amended by L. 1915, ch. 322; section amended by L. 1916, ch. 578.*)

Source.—Limitation contained in the former Highway L. (L. 1890, ch. 568), § 10, as amended by L. 1905, ch. 417, is retained in subd. 4 of this section. Subd. 1 provides a minimum limitation of the amount to be raised in towns for ordinary highway purposes. This limitation is different from that contained in former Highway Law, § 53, as amended by L. 1907, ch. 716, under which towns receiving state aid were required to raise an amount "which shall be equal to at least one-half the valuation, at the commutation rate of the highway labor which should be assessable under the labor system." The limitations imposed by subds. 2 and 3 are new.

Reference.—This section limits the amount of money to be raised by vote of the town board under Highway Law, § 91.

Debts in excess of limitation.—A town superintendent has no general authority to bind the town by his contracts. He must find his authority in the statute, and those who deal with him, and with the other officers of the town are presumed to know this limitation of power. See *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397; *Berlin Bridge Co. v. Wagner* (1890), 57 Hun 346, 10 N. Y. Supp. 840.

Neither the town superintendent nor the town board have authority to expend more than \$1,500 for the construction of a new bridge upon a newly laid out highway without being authorized so to do by the electors of the town. *Rept. of Atty. Genl.* (1910) 723.

Mandamus.—It seems that mandamus will not lie to compel a town to construct or repair a bridge at an expense of over \$1,500 where the proposition has been voted down by the electors of the town. *Rept. of Atty. Genl.* (1910), 714.

Individual liability of town officials in action to have refunded to a town amount paid to conditional vendor for use of machine on its highways; when costs granted.—A conditional contract for the purchase of a steam roller for a town providing for annual payments of more than \$500 each made without submission of the matter to a vote at a town meeting is illegal and void. The vendor, however, is legally and equitably entitled to retain money paid under such contract, which was a fair and reasonable price for the use of the machine for the number of days the town actually used it on its highways, and said money will be offset against the claim of the plaintiff in a taxpayer's action that it be refunded to the town. The town officials having acted in good faith will not be held either individually or collectively liable in a taxpayer's action to refund to the town any part of the amount paid to the conditional vendor for the use of the machine, and the complaint as to each of said officials will be dismissed, without costs. Plaintiff in a taxpayer's action having succeeded in having the contract adjudged void will be granted costs against the conditional vendor. *Shoemaker v. Buffalo Steam Roller Co.* (1913), 83 Misc. 162, 144 N. Y. Supp. 721, *affd.* (1915), 165 App. Div. 836, 151 N. Y. Supp. 207.

§ 95. Submission of propositions at town meetings.—A proposition to authorize the levy and collection of an amount greater than that specified in the preceding section for any of the purposes therein mentioned may be submitted upon the written application of twenty-five taxpayers upon the

last town assessment-roll or by a majority of the members of the town board, at a biennial town meeting or a special town meeting duly called as provided by law. The provisions of the town law relating to the submission of town propositions at a biennial or special town meeting shall apply to the submission of such propositions. If such proposition be adopted the town board shall include in the estimates contained in the next statement submitted by it to the board of supervisors, as provided in section ninety-one, the amounts authorized to be raised by such proposition for the purposes therein stated, and thereupon such amounts shall be levied and collected, and paid to the supervisor, to be expended by him as directed by such proposition.

Source.—New in form. This section should be considered in connection with § 94 which makes it necessary to submit propositions requiring the expenditure of sums in excess of the amounts therein specified to a vote of a town meeting.

References.—As to submission of propositions to town meeting, see Town Law, §§ 46-48, 57-60, and notes under Highway Law, § 92.

§ 96. Borrowing money in anticipation of taxes.—The supervisor may, when authorized by the town board, borrow money in anticipation of taxes to be levied and collected, on the credit of the town, and issue certificates of indebtedness therefor in the following cases:

1. When an additional sum is directed to be levied and collected by a vote of a town meeting as provided in section ninety-two.
2. When an amount necessary for the payment of expenses incurred in the improvement, repair and rebuilding of a highway or bridge has been directed to be levied and collected as provided in section ninety-three.
3. When a proposition has been adopted at a town meeting as provided in section ninety-five authorizing the levy and collection of an amount greater than that specified in section ninety-four for any of the purposes therein mentioned.

Such certificates of indebtedness shall be signed by the supervisor and the town clerk and shall bear interest at a rate not exceeding six per centum for a period not exceeding one year. The amount so borrowed shall be paid out by the supervisor for the purposes for which the taxes, in anticipation of which such certificates were issued, are to be levied and collected. The principal and interest of such certificates shall be paid by the supervisor immediately upon the collection of the taxes levied for such purposes.

Source.—Former Highway L. (L. 1890, ch. 568) § 11, authorized the issue of certificates of indebtedness for amounts to be paid for work done and materials furnished in the repair of highways and bridges damaged or destroyed by the elements or otherwise. Except in this respect the above section is new.

Insufficient appropriations under former law.—Where the appropriation for the improvement of the highways and bridges of a town, made under section 19 of the former Highway Law (Laws of 1890, chap. 568), is insufficient, the proper course of the highway commissioner was to apply, under sections 10 and 11 of that act, to the town board for consent to make the necessary improvements. In the absence of such consent the highway commissioner had no power to proceed with the improvements and apply in payment therefor the appropriation for the suc-

ceeding year; and expenditures so made created no legal claim against the town. *People ex rel. Peterson v. Clark* (1899), 45 App. Div. 65, 60 N. Y. Supp. 1045.

§ 97. Towns may borrow money for bridge and highway purposes.—A proposition may be submitted at a regular or special town meeting in the manner provided by the town law, authorizing the town to borrow money upon its bonds, or other obligations, to be expended for the following purposes:

1. Constructing, building, repairing or discontinuing any highway or bridge therein, or upon its borders.

2. Repairing or rebuilding any highway or bridge or board walk, or renewal thereof, on any highway less than two rods in width, which shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe for public use and travel. (*Subd. 2, amended by L. 1915, ch. 322.*)

3. Repairing or rebuilding any bridge which has been condemned by the commission, as provided in this chapter.

4. The purchase of stone crushers, steam rollers and traction engines.

The vote upon any such proposition shall be by ballot. If any such proposition shall be adopted, the board of supervisors, upon the application of the town board, shall by resolution authorize the town to issue bonds not exceeding the amount specified in said proposition, which shall be sufficient to refund and pay any temporary loan or certificate of indebtedness, and to provide for the completion of any work authorized. There shall accompany such application a statement signed by a majority of the members of the town board, and certified by the town clerk, containing a copy of the proposition submitted, as above provided, the vote for and against the same, and specifying the amount which it is estimated will be required to be expended, pursuant to such proposition. If the highway or bridge, proposed to be constructed, built, repaired or discontinued, is situated in two or more towns in the same county, the board of supervisors shall, if application be made by any one of such towns, apportion the expense thereof among such towns, in such proportion as shall be just. If the town adopting any such proposition shall contain any portion of the land of the forest preserve, the board of supervisors shall not authorize such town to borrow moneys without the written approval of the forest, fish and game commissioner, except in payment of a debt lawfully incurred by the town. (*Subd. 2, amended by L. 1915, ch. 322; section amended by L. 1914, ch. 202.*)

Source.—Former County L. (L. 1892, ch. 686) § 69, as amended by L. 1903, ch. 469, modified so as to permit a town to borrow money for repairing or rebuilding a bridge condemned by the highway commission and for the purchase of stone crushers, steam-rollers and traction engines.

References.—A proposition may be submitted at a town meeting as provided in the several sections of the Town Law applicable thereto. See references under Highway Law, § 92. Powers of board of supervisors in respect to issue of bonds, County Law, § 12, subd. 6. Resolutions authorizing issue of bonds to be passed

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by two-thirds vote and to provide for raising annually by tax a sum sufficient to pay the interest and principal of the bonds as they fall due, General Municipal Law, § 6. Limitation of amount of indebtedness, County Law, § 13. As to liability for construction of bridges over streams constituting boundary lines of towns, Highway Law, § 250.

Purpose of section.—The statute exists for the purpose of permitting a town to raise more money than is authorized by general statute for the construction of highways and bridges. *People ex rel. Morrill v. Supervisors of Queens* (1885), 112 N. Y. 585, 20 N. E. 549.

Power to borrow, generally.—The power to raise money for municipal purposes never means a power to borrow; it is intended that it be raised by taxation unless there be express provision of statute to the contrary. *Wells v. Town of Salina* (1890), 119 N. Y. 280, 23 N. E. 879, 7 L. R. A. 759. The established theory is that money for all highway and bridge purposes be raised by annual tax, and without some express provision as that contained in the above section, the borrowing of money by a town is unlawful. *Van Alstyne v. Freday* (1869), 41 N. Y. 174.

Town board is powerless to act where the provisions of the section have not been complied with. *Matter of Niland v. Bowron* (1908), 193 N. Y. 180, 85 N. E. 1012, affg. (1906), 113 App. Div. 661, 99 N. Y. Supp. 914.

Application to board of supervisors.—A petition by a town board and a commissioner of highways (town superintendent) to the board of supervisors of the county must be in the form required by the statute in existence at the time it is to be acted upon by the supervisors. *Webster v. Town of White Plains* (1904), 93 App. Div. 398, 87 N. Y. Supp. 783.

Conditions imposed by boards of supervisors.—In legislating for a town under the provisions of this section, the board of supervisors may impose conditions as to details for the interest of the taxpayers, not specified in the statute, such as safeguards in the letting of contract, and provisions that the work shall be prosecuted under competent supervision and the money deposited with the county treasurer to be paid out only upon the certificate of the engineer; and such conditions when so imposed are binding upon the officers effected. *People ex rel. Wakeley v. McIntyre* (1898), 154 N. Y. 628, 49 N. E. 70. Board may authorize issue of long term bonds; and may direct payment of interest out of proceeds until a tax therefor can be collected. *Ghiglione v. Marsh* (1897), 23 App. Div. 61, 48 N. Y. Supp. 604.

Resolution of board.—Resolution should require adequate security from the officers charged with the duty of executing the bonds. *Barker v. Town of Oswegatchie* (1890), 10 N. Y. Supp. 834. The act of the board of supervisors is purely legislative and cannot be reviewed on certiorari. *People ex rel. Trustees of Jamaica v. Supervisors of Queens* (1892) 131 N. Y. 468, 30 N. E. 488. Board may impose conditions as to details respecting the letting of contracts, although not expressly authorized by statutes. *People ex rel. Wakeley v. McIntyre* (1898), 154 N. Y. 628, 49 N. E. 70.

Power of towns not affected.—Section does not affect or limit powers conferred on town meetings to raise money for highway purposes. *Birge v. Berlin Iron Bridge Co.* (1892), 133 N. Y. 477, 31 N. E. 609.

Proposition to raise money for building new highway may be submitted to the voters of a town pursuant to this section. Rept. of Atty. Genl. Oct. 18, 1910.

Sufficiency of petition for special meeting to vote upon the proposition to borrow moneys for improvement of highways. Rept. of Atty. Genl. Sept. 3, 1909.

§ 97-a. **Power of certain towns in the Adirondack park to borrow money for highway purposes.**—No money shall be borrowed, as provided in sections ninety-six and ninety-seven of this act, by a town containing lands of the Adirondack park, where the assessed value of the real property of

the state equals or exceeds twenty-five per centum of the assessed value of the taxable property of the town, until the consent, in writing, of the state comptroller that such loan or loans be made, be procured and filed in the office of the town clerk of the town intending to negotiate the loan or loans. Any loan made in violation of this section, for an indebtedness thereby intended to be created, shall be null and void and no moneys of the town shall be paid thereon. (*Added by L. 1917, ch. 565, in effect May 18, 1917.*)

Source.—New.

§ 98. Issue and sale of town bonds.—The board of supervisors shall, from time to time, impose upon the taxable property of the town a tax sufficient to pay the principal and interest of such obligations as they shall become due. The supervisors and town clerk shall each keep a record, showing the date and amount of the obligations issued, the time and place of their payment, and the rate of interest thereon. The obligations shall be delivered to the supervisor of the town, who shall dispose of the same for not less than par and apply the proceeds thereof for the purposes for which they were issued. (*Amended by L. 1916, ch. 578.*)

Source.—Former County L. (L. 1892, ch. 686) § 70; so much thereof as is inconsistent with the above section is superseded.

References.—Payment of principal and interest of town bonds, General Municipal Law, § 7. Bonds issued to be signed by each officer issuing the same with the designation of his office and coupons to be signed by one of such officers, *Id.* § 9. Proceeds of bonds sold to be retained by supervisor and expended by him for purposes for which the bonds were issued, Highway Law, § 106.

Issue and sale.—Bonds issued under this section may be made payable in gold, and run for thirty years. Effect of revision upon former law. *Ghiglione v. Marsh* (1897), 23 App. Div. 61, 48 N. Y. Supp. 604. Board may legislate as to details of sale of bonds, letting of contracts and payment of money thereunder. *People ex rel. Wakeley v. McIntyre* (1898), 154 N. Y. 628, 49 N. E. 70.

It has been held that to entitle a party to recover in an action upon bonds issued by a municipality there must be affirmative and extrinsic proof that all the preliminary conditions required to authorize the issue of such bonds have been complied with. *Starin v. Town of Genoa* (1861), 23 N. Y. 439; *Town of Venice v. Woodruff* (1875), 62 N. Y. 465; *Dodge v. County of Platte* (1880), 82 N. Y. 218.

Form of bonds.—The fact that the names of the officers authorized to issue the bonds were lithographed on the coupons of such bonds was held not to make them invalid, where it appeared that such officers adopted and delivered as their own the signatures in that form. *Beattys v. Town of Solon* (1892), 64 Hun 120, 19 N. Y. Supp. 37, mod. (1893), 136 N. Y. 662, 32 N. E. 1062.

The recital contained in a municipal bond should show the authority under which the officer acted who executed it. *Dodge v. Platte* (1880), 82 N. Y. 218, 230. A recital, when all necessary legal steps and proceedings have not been taken to comply with the laws under which the bonds were issued does not estop the town board from disputing their validity, even in the hands of a bona fide holder. *Starin v. Town of Genoa* (1861), 23 N. Y. 439; *Craig v. Town of Andes* (1883), 93 N. Y. 405.

Payment of bonds.—It is the duty of the town to provide for the payment of its bonds lawfully issued. In case of a failure to perform such duty, the holder

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of the bonds may maintain an action against the town thereon, although by the act under which they were issued it is made the duty of the board of supervisors of the county to impose and levy a tax to pay the bonds. Such settled and admitted obligations of the town need not be audited and allowed by the board of town auditors. *Marsh v. Town of Little Valley* (1876), 64 N. Y. 112; *Horn v. Town of New Lots* (1880), 83 N. Y. 101.

§ 99. Assessment of village property.—In any town in which there may be an incorporated village, which forms a separate road district, and wherein the roads and streets are maintained at the expense of such village, all property within such village shall be exempt from the levy and collection of taxes levied in the town, as provided by section ninety-one of this article, for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet. The assessors of such town shall indicate in a separate column the value of the real and personal property included in such incorporated village.

Source.—Former Highway L. (L. 1890, ch. 568) § 53, in pt., as amended by L. 1907, ch. 716.

References.—Streets in villages under control of board of trustees, *Village Law*, § 141. Certain bridges within the village under the control of town superintendent of highways, *Id.* § 142. Value of village property to be included in separate column in tax-roll, *Tax Law*, § 21.

Liability of village for highway bonds.—Bonds issued by a town for the permanent improvement of highways and for the construction and repair of bridges are a charge upon the whole town including the villages within it. *Matter of Shapter v. Carroll* (1897), 18 App. Div. 390, 46 N. Y. Supp. 202.

Where a board of supervisors of a county has charged back to a town included therein fifteen per cent. of the cost of constructing a State road built pursuant to chapter 115 of the Laws of 1898, as amended, an incorporated village situated within the town (or a city so situated where the village has subsequently become incorporated as such) is liable for its proportionate part of the fifteen per cent., although at the time the road was built the village formed a separate road district and maintained its streets at its own expense without contribution from the town at large. *Town of Queensbury v. City of Glens Falls* (1911), 143 App. Div. 847, 128 N. Y. Supp. 833, *affd.* (1912), 206 N. Y. 712, 99 N. E. 1118.

Village property is taxable for the expense of reconstruction and permanent improvement of highways within the town but outside the corporate limits of village therein. *Rept. of Atty. Genl.* (1913), 22.

Tax against bank stock.—Where a town containing a village, they being separate tax districts, has two tax rates, one applicable to the whole town including the village property, the other an additional rate imposed for town highways as a special road district distinct from the village under this section, the supervisors, in apportioning the tax upon the stock of banks situate in the village between the village and the town pursuant to section 24 of the Tax Law, should not take into consideration the rate assessed for the care of roads outside the village in figuring the ratio payable to the town. *People ex rel. Village of Cobleskill v. Supervisors of Schoharie* (1910), 140 App. Div. 769, 126 N. Y. Supp. 259.

Increase of width of state highway.—Where the width of a state highway is increased within a village by petition of the village board, the increased expense must be borne by the village and cannot be shared by the town within which the village is located. *Rept. of Atty. Genl.* (1912), 287.

§ 100. **Statement by clerk of board of supervisors.**—The clerk of the board of supervisors of each county shall, on or before the first day of January of each year, transmit to the state comptroller and the commission a statement, signed and verified by the chairman of the board, and certified by the clerk, which shall state the name of each town, the assessed valuation of real property, and the assessed valuation of personal property, each separately, in the towns outside incorporated villages, and the amount of tax levied therein for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet. The towns' valuation of real property to be used in such statement shall be the valuation thereof, as equalized by the boards of supervisors, or other competent authority, during the year prior to the levy of taxes upon which is based the determination of the amounts to be paid to the several towns, as provided in this article.

Source.—Former Highway L. (L. 1890, ch. 568) § 53, in pt., as amended by L. 1907, ch. 716. The last sentence of the above section was new.

§ 101. **Amount of state aid.**—There shall be paid by the state to the several towns, in the manner hereinafter provided, an amount based upon the amount of taxes levied therein for the repair and improvement of highways, sluices, culverts and bridges having a span of less than five feet, and to be determined as follows:

1. In towns where the assessed valuation of real and personal property, exclusive of such property in incorporated villages, shall be less than five thousand dollars for each mile of highways in such towns, outside of incorporated villages, an amount equal to the amount of such taxes.

2. In towns where such assessed valuation shall be five thousand dollars or over and less than seven thousand dollars for each mile of such highways, an amount equal to ninety per centum of the amount of such taxes.

3. In towns where such assessed valuation shall be seven thousand dollars or over and less than nine thousand dollars for each mile of such highways, an amount equal to eighty per centum of the amount of such taxes.

4. In towns where such assessed valuation shall be nine thousand dollars or over and less than eleven thousand dollars for each mile of such highways, an amount equal to seventy per centum of the amount of such taxes.

5. In towns where such assessed valuation shall be eleven thousand dollars or over and less than thirteen thousand dollars for each mile of such highways, an amount equal to sixty per centum of the amount of such taxes.

6. In towns where such assessed valuation shall be thirteen thousand dollars or over for each mile of such highways, an amount equal to fifty per centum of such taxes. Provided that no town shall receive from the state in any year, under this section, an amount exceeding an average of twenty-five dollars per mile, for the total mileage of its highways outside of incorporated villages, except that in towns where the assessed valuation of real and personal property therein, exclusive of such property in incor-

porated villages, averages more than twenty-five thousand dollars for each mile of highways therein outside of such villages, the amount paid hereunder shall not exceed one-tenth of one per centum of such assessed valuation.

7. Where a town, having within its limits an incorporated village or city of the third class, shall levy a tax upon the whole town including such incorporated village or city, the same to be spent wholly without the limits of such village or city, for the repair and improvement of highways, sluices, culverts and bridges having a span of less than five feet, the amount of such tax shall be included in the statement to be transmitted by the clerk of the board of supervisors to the comptroller as required by section one hundred of the highway law and such amount shall be used as an additional basis of the amount of state aid under this section, the same as if such tax were levied wholly without the limits of such incorporated village or city of the third class. (*Subd. 7, added by L. 1913, ch. 375.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 53, in pt., as amended by L. 1907, ch. 716. There was no change in substance, but the section was arranged in subdivisions for convenience.

Reference.—The mileage and assessed valuation used in determining the amount to be paid to each town, Highway Law, § 102.

Use of "state aid" money.—Moneys known as "state aid" cannot be used for the building and construction of new town roads, or for the payment of damages awarded to land owners for the laying out of a new highway, or for any other purpose except the "repair and improvement" of the highways of the town. Rept. of Atty. Genl. (1910), 727.

A village incorporated after the collection of the highway tax in a town is not entitled to any portion of the highway fund raised either by taxation or contributed by the state. Rept. of Atty. Genl. (1911), 504.

Merger of entire town into village.—Where an entire township was merged into a village the State aid apportioned to the town and not yet expended should be returned to the State. Rept. of Atty. Genl. (1915), 113.

§ 102. **Mileage and assessed valuation.**—The mileage of highways in towns to be used in determining the amounts to be paid to such towns under the provisions of this article shall be the tables of mileage heretofore prepared by the state engineer, until the corrected tables of mileage prepared as provided in section fifteen of this chapter are filed. Such tables and all corrections thereof shall be filed with the commission and comptroller. The assessed valuation of real property to be used in determining such amounts shall be the valuation thereof, equalized as provided in section one hundred and forty-one of this chapter, during the year prior to the levy of taxes upon which is based the determination of the amounts to be paid to the several towns, as provided in this article.

Source.—Former Highway L. (L. 1890, ch. 568) § 53, in pt., as amended by L. 1907, ch. 716, without change, except that the assessed valuations to be used are those equalized by the board of supervisors during the year prior to the levy of tax in the town, thus avoiding delay in determining the amounts to be paid to the several towns.

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Reference.—Town superintendent required to measure highways in his town, Highway Law, § 69.

§ 103. **Payment and distribution of state money.**—The comptroller shall determine the amount due to the several towns, under the provisions of this article, and shall draw his warrant upon the state treasurer in favor of the county treasurer of each county for the total amount to be paid to the towns in such county, as so determined by him, and shall indicate the amount to be paid to each town. The county treasurer shall pay to the supervisor of each town the amount to which such town is entitled, as determined and indicated by the comptroller. No such payment shall be made until the supervisor has filed in the office of the county treasurer a certified copy of the undertaking given by him, as provided in this article.

Source.—Former Highway L. (L. 1890, ch. 568), in pt., as amended by L. 1907, ch. 716.

References.—Mileage tables to be filed in the office of the comptroller, Highway Law, § 15, subd. 12. Amounts to be paid to the several towns, *Id.* § 101.

§ 104. **Custody of highway moneys; undertaking of supervisor.**—All moneys levied and collected, as provided in this article, all moneys collected as penalties under this chapter, or received from any other source and available for highway, bridge and miscellaneous purposes and all moneys received from the state, as provided in section one hundred and one, shall be paid to the supervisor, who shall be the custodian thereof, and accountable therefor. Before receiving any such moneys the supervisor shall give an undertaking to the town in an amount to be specified by the commission and with such sureties, as shall be approved by the town board, conditioned for the faithful disbursement, safekeeping and accounting of the moneys so received by him. Such undertaking shall be filed in the office of the town clerk and a certified copy thereof shall be filed in the office of the county treasurer before any moneys received from the state shall be paid to him, and also in the office of the commission. In case of a failure of the supervisor to faithfully disburse, safely keep or account for moneys received from the state the commission may bring an action on such bond in the name of the town.

Source.—Former Highway L. (L. 1890, ch. 568) § 53, in pt., as amended by L. 1907, ch. 716. This section is extended in the present law so as to apply to moneys received from any source for highway and bridge purposes.

References.—Undertaking of supervisor generally, Town Law, § 100. As to provisions respecting official undertakings, Public Officers Law, §§ 10–13. Supervisor may purchase surety of solvent surety company, Town Law, § 101. Form of undertaking and liability thereon, *Id.* § 13.

Supervisor as custodian of town moneys.—The statute which relates generally to the powers and duties of the supervisor assumes that he is the legal custodian of the moneys of the town and chargeable with the duty not only of receiving and keeping them, but also of guarding their disbursement. *Bridges v. Board of Supervisors of Sullivan* (1883), 92 N. Y. 570.

Custody of highway moneys.—The board of supervisors should guard highway moneys and keep them in a separate fund not to be used for town purposes. A

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transfer of such moneys from the highway fund to the general fund of a town in accordance with a section of a city charter is unauthorized. Rept. of Atty. Genl. (1910), 709.

Highway funds to be kept in separate account.—Rules and regulations made by the highway commission requiring supervisors to keep highway funds of the town in a separate account are clearly within the authority of the commission and they may compel a compliance therewith. Rept. of Atty. Genl. (1910), 718.

The bond of the supervisor required by this section is in addition to the regular official bond which he is required to give under section 100 of the Town Law. Rept. of Atty. Genl. (1909), 624.

Bonds of supervisors of towns for the receipt of state highway moneys must be given for the faithful disbursement, safe-keeping and accounting of all such moneys received by them and may cover the full term of office. Rept. of Atty. Genl. (1911), Vol 2, p. 688.

Liability of supervisor for breach of bond.—The fact that the supervisor of a town in good faith deposited as a general deposit, moneys received by him in his official capacity, with a reputable firm of individual bankers, believed to be solvent, and that thereafter such firm failed and such moneys were lost is not a defense to an action brought upon the bond of such supervisor. *Tillinghast v. Merrill*, (1894), 77 Hun 481, 28 N. Y. Supp. 1089, *affd.* (1896), 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678. The liability upon the bond given under this section can only extend to moneys received by the supervisor thereunder. See *Bissell v. Saxton* (1876), 66 N. Y. 55.

Liability of sureties.—The surety on the general bond of a supervisor is not liable for moneys received by the supervisor for the repair of highways, for the safe keeping of which a special bond is required but had not been procured. *Town of Whitestown v. Title Guaranty & Surety Co.* (1911), 72 Misc. 498, 131 N. Y. Supp. 390, *affd.* (1911), 148 App. Div. 900, 132 N. Y. Supp. 1149.

§ 105. Expenditures for repair and improvement of highways.—The moneys levied and collected for the repair and improvement of highways, including sluices, culverts and bridges, having a span of less than five feet and board walks or renewals thereof, on highways less than two rods in width, and the moneys received from the state, as provided by section one hundred and one, shall be expended for the repair and improvement of such highways, sluices, culverts and bridges and walks, at such places and in such manner as may be agreed upon by the town board and town superintendent. The town board and the town superintendent shall constitute a board for the purpose of determining the places where and the manner in which such moneys shall be expended. Such agreements shall be written and signed in duplicate by a majority of the members of the board so constituted, and shall be approved by the commission, before the same shall take effect. One of such duplicates shall be filed in the office of the town clerk and one in the office of the district or county superintendent. Such moneys shall be paid out by the supervisor on the written order of the town superintendent in accordance with such written agreement. The town board and town superintendent may also appropriate from such moneys such a sum of money as they deem proper for the construction or repair of any public road, walk, place or avenue upon any sand beach separated by more than two miles of water from the main body of the

town, although such road, walk, place and avenue is narrower than the width of highways required by statute, but the construction or repair of any such road, walk, place or avenue with such moneys on any such beach shall not be construed as imposing any liability upon the town or upon the superintendent of highways for any injury to person or property happening thereon. (*Amended by L. 1914, ch. 84, and L. 1915, ch. 322.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 53, in part, as amended by L. 1907, ch. 716.

Purposes for which expenditures may be made.—The money to be expended by a town in the repair and maintenance of its highways, a portion of which is to be contributed by the state must be expended in the improvement and betterment of the highways, and not in the payment of salaries of town officers or the purchase of personal property, the title of which would vest in the town. Rept. of Atty. Genl. (1906) 341.

The opening and laying out of new highways is provided for separately and apart from the care and maintenance of highways and expenditures therefor cannot be made from the fund levied, collected and received as provided in this chapter for the repair and improvement of highways, a part of which is contributed by the state. Rept. of Atty. Genl. (1904) 308.

Sidewalks are a part of the highways and moneys raised and collected for the repair and improvement of highways, and moneys received by the state therefor, may be expended in the repair thereof. Rept. of Atty. Genl. (1901) 213.

Authority of town superintendent to purchase supplies.—The town superintendent of highways has no authority to purchase supplies for purposes not included in the written agreement pursuant to this section or otherwise authorized by the town board. Rept. of Atty. Genl. (1911) 325.

Claims for services of snow shovelers and workers are to be paid by the supervisor upon the written order of the superintendent of highways and need not be audited by a town board before payment. Rept. of Atty. Genl., Feb. 27, 1909.

Malfeasance in office by town superintendent.—Where, upon the hearing of charges of malfeasance and misfeasance in office preferred by the state commissioner of highways against a town superintendent of highways, he admits that he did not file a list of the names of the persons employed by him, as required by statute, and the evidence shows that he and the town board entered into a written agreement which provided for the improvement of certain highways and the expenditure of certain moneys, and he admits that he did not improve the highways specified in and required by said agreement and did not make the expenditures therein called for, but testifies that he spent the money on town highways other than those specified and authorized by said agreement, he knowingly violated this section of the Highway Law, was guilty of malfeasance in office as charged and subject to removal, and an order of the town board dismissing the charges must be reversed. *Carlisle v. Burke* (1913), 82 Misc. 282, 144 N. Y. Supp. 163.

Mandamus to compel performance of duty.—At a meeting of the town board with the elected superintendent of highway for the purpose of dividing the road funds, under this section, is obligatory, the court has power to direct the town board to perform that duty by a peremptory writ of mandamus and to recognize a lawfully elected superintendent of highways. *People ex rel. Dare v. Howell* (1916), 174 App. Div. 118, 160 N. Y. Supp. 959.

§ 106. **Expenditures for bridges and other highway purposes.**—The moneys levied and collected, or raised by the issue and sale of bonds or

certificates of indebtedness in anticipation of taxes, as provided in this article, for purposes other than the repair or improvement of highways, as specified in the preceding section, shall be paid out by the supervisor upon the written order of the town superintendent. An account shall not be so paid unless the expenditure be in accordance with the annual estimate of the town superintendent, as approved or modified by the town board, or chester county and New York, and running thence northerly through vided in this article, or be lawfully a charge upon the town. Except as herein otherwise provided the provisions of the town law relating to the audit of town accounts and claims shall apply to accounts and claims against the town arising under this chapter. (*Amended by L. 1916, ch. 463.*)

Source.—In the report submitted by the joint legislative committee on highways, 1908, there is appended to the above section the following note "Highway Law, § 11, provides for special meetings of the town board to audit claims arising from the erection and repair of bridges and highways damaged or destroyed by the elements or otherwise. Highway Law, § 53, as amended by L. 1907, ch. 716, provides for the expenditure of money raised by tax or received from the state for the ordinary repair and improvement of bridges to be paid out by the supervisor upon the order of the highway commissioner in accordance with the agreement entered into by the commissioner and the town board. This method of expenditure is retained in the preceding section. It is intended by this section to provide that all other expenditures for highway and bridge purposes shall be made after audit by the town board in the same manner as charges against the town are audited. It is thought best to provide that the town board may in emergency cases meet for the purpose of auditing claims which should be immediately disposed of."

References.—Regular meeting for audit of town accounts, Town Law, § 133. Form and verification of town accounts, Id. § 175.

The following are some of the highway and bridge claims which are to be audited and paid under this section. Compensation and expense of town superintendent and deputies, Highway Law, § 45. Removal of obstructions caused by snow, Id. § 47, subd. 2. Inspection of state and county highways, Id. § 47, subd. 9. Erection and repair of boundary monuments, Id. § 47, subd. 11. Purchase, repair and storage of stone crushers, power rollers, road machines, etc., Id. §§ 49, 90, 91, 92. Purchase of gravel and stone, Id. § 51. Removal of obstructions, noxious weeds and brush, Id. §§ 52, 54. Purchase of wire fences, Id. § 56. Damages for entry upon lands by town superintendent, Id. § 57. Damages for change of grade, Id. § 59. Maintenance and repair of sidewalks, Id. § 62. Allowances for shade trees, Id. § 63. Setting out and preservation of shade trees, Id. § 64. Allowances for watering troughs, Id. § 65. Erection and maintenance of guide boards, Id. § 68. Construction and repair of approaches to private lands, Id. § 71. Injuries sustained by defects in highways and bridges, Id. §§ 74, 76. Expense incurred in closing highways for repair or construction, Id. § 77. Amount apportioned to town for construction of county highway, Id. § 141. Cost to town for maintenance of state and county highways, Id. § 172. Costs and damages awarded in proceedings to lay out, alter or discontinue highways, Id. § 203. Construction and repair of bridges, Id. § 250. Cost of constructing and maintaining bridges over boundary streams, Id. § 254.

Presentation of claim for audit; action upon claim; judgment "upon the merits."—Under the provisions of this section a claim against a town for the contract price of building a bridge with a span of more than five feet over a creek in said town,

and for extra work, should be presented to the town board for audit. A judgment dismissing the complaint in an action against the town to recover upon such claim should be modified by striking therefrom the words "upon the merits," as it may in the future be urged that there was no merit to the claim. *Gaffey v. Town of Newfield* (1914), 163 App. Div. 66, 148 N. Y. Supp. 772.

Audit where town board has consented to expenditure.—If the town board has consented that a superintendent shall construct a bridge, it becomes its duty to audit his bill on the merits when it is duly presented to the board for that purpose. *People ex rel. Slater v. Smith* (1894), 83 Hun 432, 31 N. Y. Supp. 749.

Each account is required to be made out in items.—Such an account must be considered item by item and if the board fails to pass upon each item, a proper audit may be directed by mandamus. *People ex rel. Hamm v. Board of Auditors* (1899), 43 App. Div. 22, 59 N. Y. Supp. 615. An arbitrary deduction from the gross sum of a bill for various items for services, the compensation for which is regulated by statute, without passing upon and disallowing any specific item is not an audit. *People ex rel. Thurston v. Town Auditors* (1880), 82 N. Y. 80.

It has been held that if an account is not in proper form the town board may refuse to audit. *People ex rel. Mason v. Supervisors of Wayne* (1887), 45 Hun 62. The presentation of a claim which, through inadvertence is so informal or defective as to justify its disallowance for that reason, it is not a bar to a subsequent presentation of the same claim in proper form. *People ex rel. Andrus v. Town Auditors* (1898), 33 App. Div. 277, 53 N. Y. Supp. 739.

§ 107. Reports of supervisor as to highway moneys.—The supervisor shall present to the town board at its meeting held in each year, for considering the estimates contained in the statement of the town superintendent, as provided in section ninety-one, a verified report showing:

1. The moneys received from the state, as provided in section one hundred and one, during the year ending October thirty-first.

2. The moneys received by him during such year on account of taxes levied and collected and from the issue and sale of bonds and certificates of indebtedness in anticipation of taxes, for highways, bridges, purchase and repair of machinery, tools and implements, the removal of obstructions caused by snow and for miscellaneous purposes.

3. The moneys received by him during such year as penalties recovered pursuant to this chapter, or from any other source and available for highway purposes in his town.

4. The expenditures during such year for the improvement, repair and maintenance of highways, for the maintenance and repair of bridges, for the construction of new bridges, for damages and charges in laying out, altering and discontinuing highways, for the removal of obstructions caused by snow, for the purchase of machinery, tools and implements, for the rental or hire of stone crushers, steam rollers and traction engines, for town superintendent's salary or compensation and audited expenses, for allowances as fees on account of receiving and disbursing highway moneys, or for other highway purposes.

5. All machinery, tools and implements owned in whole or in part by the town, the present value of each article thereof, and the estimated cost

of all necessary repairs thereto, as shown by the annual inventory of the town superintendent.

The form of such report shall be prescribed by the commission. Such report shall be filed in the office of the town clerk within three days after the presentation thereof and shall be open to public inspection during the office hours of such town clerk and a duplicate shall at the same time be mailed to the commission. A certified copy of such report shall also be filed by the supervisor with the clerk of the board of supervisors, who shall cause the same to be printed in the next issue of the annual proceedings of the board of supervisors. The town board shall cause a certified copy of the report to be published in a newspaper published in the town, or if there be none published therein, then in a newspaper published within the county and having the greatest circulation within the town. The expense of such publication, which shall not exceed ten dollars, shall be a town charge. The clerk of the board of supervisors shall transmit three copies of the journal of the proceedings of the board containing such report to the commission and three copies to the comptroller.

Source.—Highway Law, § 27, as added by L. 1906, ch. 363. and amended by L. 1907, ch. 719, rewritten and modified so as to include other matters provided for in this chapter. Under the former law the highway commissioner was also required to file such a report. Under the present law the supervisor is given the entire charge of highway finances and it was thought sufficient to require that he alone make the report. The former law provided that the report be made to the state engineer. It is here provided that the report be to the town board and the commission and that it be filed with the town clerk and be open to public inspection during the office hours of the town clerk. The journal of the proceedings containing the report is to be filed with the commission which will enable them to secure the desired information. The evident purpose of the report is to inform the people of the community as to expenditures for highway and bridge purposes as well as to indicate to the department what is being done in the locality in respect to the highways. It was thought best to emphasize the importance of publicity in the locality as to the condition of highway finances. (Report of Joint Legislative Committee on Highways, 1908.)

References.—Report of supervisor to meeting of town board, Town Law, § 98. Inventory of machinery, tools and implements, Highway Law, § 49.

§ 108. Highway accounts, forms and blanks.—The commission shall prescribe the method of keeping town accounts of moneys received and expended, as provided in this article, for highways, bridges, purchase, leasing, rental or hire and repair of machinery, tools and implements, the removal of obstructions caused by snow, and miscellaneous purposes, which shall be uniform, so far as practicable, throughout the state. Such commission may adopt forms and blanks for keeping such accounts. The commission shall also prescribe the form of order to be made by the town superintendent, upon the supervisor, and the form of the agreement to be entered into by the town board and town superintendent as provided in section one hundred and five. The town superintendent and supervisor shall keep their accounts in the method, and shall use the blanks and forms,

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prescribed by the commission. All orders and records of accounts shall be filed in the town clerk's office and preserved as a part of the town records.

Source.—Highway Law, § 28, as added by L. 1906, ch. 363, and amended by L. 1907, ch. 719, rewritten, but without change in substance.

Reference.—Blank forms of orders, reports, accounts and blank books to be furnished by Commission of Highways, Highway Law, § 18.

§ 109. Duty of town clerk.—It shall be the duty of the town clerk, annually, between the fifteenth day of November, and the fifteenth day of December, to transmit to the commission a list containing the names of each supervisor, town superintendent, justice of the peace, town clerk, assessor and collector, showing his post-office address, the date of his appointment or election and the expiration of his term of office.

Source.—New.

§ 110. Compensation of supervisor and town clerk.—The supervisor and town clerk of each town shall receive annually, as compensation for services under this chapter in lieu of all other compensation and fees, an amount to be fixed by the town board. Such compensation shall be a town charge.

Source.—New.

References.—Compensation of town superintendents fixed by town board, Highway Law, § 45; of supervisor and town clerk for services generally, Town Law, § 85.

The compensation of a supervisor for services under the Highway Law is fixed by the town board and he is not to receive a commission on bridge and highway moneys paid out by him. Rept. of Atty. Genl. (1911) 519.

§ 111. Additional expenditure for improvement, repair and maintenance of town highways.—Upon the written application of twenty-five taxpayers of a town, filed with the town clerk, the electors thereof may, at a regular or special town meeting, vote by ballot upon a proposition for the expenditure of a sum, not exceeding one-third of one per centum of the total taxable property of the town, including incorporated villages, in addition to the sum authorized by this chapter for the improvement, repair and maintenance of town highways in such town. Such proposition shall be submitted in the manner provided by law for the submission of questions or propositions at a town meeting. If such proposition be adopted, the amount specified therein shall be a town charge and shall be levied and collected in the same manner as other town moneys, and when collected shall be paid to the supervisor and expended for the purposes specified in such proposition as provided in this chapter.

Source.—New.

References.—Submission of propositions at town meeting, Town Law, § 48; special town meetings, Id. § 46; notices required, Id. § 47; qualifications of electors, Id. §§ 53, 55.

Petition for vote on proposition for road and street improvement should state the amount to be raised and should be filed twenty days before the town meeting. Rept. of Atty. Genl. (1909) 606.

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Propositions for improvement of highways, sidewalks, etc., may be voted on under this section, except a proposition for acquiring additional land. Rept. of Atty. Genl. (1909) 636.

ARTICLE VI.

STATE AND COUNTY HIGHWAYS.

- Section 120. Highways to be constructed or improved by the state.
121. Apportionment of mileage of state highways to be constructed or improved.
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154. Costs; commissioners' fees.
155. Land may be sold or leased; disposition of proceeds.
156. Application of provisions of labor law.
157. Highways and bridges on Indian reservations.
158. Appointment and duties of reservation superintendent.
159. Custody of moneys, et cetera.
160. Maintenance of detours during construction.

§ 120. **Highways to be constructed or improved by the state.**—The highways which have been heretofore constructed or improved under the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, which are included in the routes hereinafter described, together with such other highways as are constructed or improved by the commission in accordance with the routes set forth and described in this section, shall be state highways and shall be constructed or improved at the sole expense of the state as provided in this article. Such routes are hereby set forth and described as follows:

Route 1. Commencing at a point on the dividing line between Westchester county and New York, and running thence northerly through Mount Vernon to the dividing line between the town of Eastchester and the city of Mount Vernon, thence northerly along Post road to White Plains, thence southeasterly along Westchester avenue to Purchase street, thence northerly by Purchase street, by Rye lake and King street to state road, thence northerly by same to Armonk, thence easterly and northeasterly through the town of North Castle to Bedford village, thence northerly to Katonah, thence along the east side of the Croton river by Golden's bridge and Purdy's station to a point on the dividing line between Putnam and Westchester counties at or near Croton Falls, running thence northerly through the eastern portion of Putnam county by the way of Brewster, to a point on the dividing line between Dutchess and Putnam counties at or near Patterson, running thence northerly by the way of Pawling, Wingdale, Dover Plains, Amenia, to a point to be determined by the commission, on the dividing line between Columbia and Dutchess counties, running thence northerly in Columbia county by way of Copake to Chatham, thence northwesterly to a point at or near Valatie, running thence northerly to a point to be determined by the commission, on the dividing line between Rensselaer and Columbia counties, running thence northerly and northwesterly through the southwestern portion of Rensselaer county to a point to be determined by the commission on the Hudson river opposite or nearly opposite the city of Albany. (*Amended by L. 1911, ch. 570.*)

Route 2. Commencing at Jerome avenue on the dividing line between Westchester county and New York city and running thence northerly along Jerome avenue and Central Park avenue to Hartsdale, thence along the

Sprain road and Landers road to fair grounds, thence northerly to Cross road between Greenburgh, and Mount Pleasant, thence westerly along the same to the Saw Mill River road and the Tarrytown Lake road to Bedford road, thence along the Sleepy Hollow road northerly and westerly to the Albany post road, thence northerly along Albany post road through Briar Cliff, Ossining and Croton Landing, thence along Old Yorktown road to Cornell dam, thence along westerly side of Croton lake to Dixie Hill, thence northerly along Croton avenue to Crompond road, thence westerly along Crompond road through Peekskill to Albany post road, thence northerly from Peekskill, to a point to be determined by the commission, on the dividing line between the towns of Phillipsburg, Putnam county, and Cortlandt, Westchester county, running thence northerly through the western portion of Putnam county to a point, to be determined by the commission, on the dividing line between Dutchess and Putnam counties, running thence northerly by the way of the city of Poughkeepsie and Rhinebeck to a point to be determined by the commission, on the dividing line between Columbia and Dutchess counties, running thence northerly through Blue Store and Johnstown to Bell's Pond, and thence northerly along the Ancram turnpike and Worth avenue to the city of Hudson, running thence northeasterly from the city of Hudson to a point at or near Valatie, connecting with route number one, as above described. (*Amended by L. 1910, ch. 648.*)

Route 3. Commencing at a point to be determined by the commission, on the dividing line between the towns of Orangetown, Rockland county, and the state of New Jersey, running thence northerly through the eastern portion of Rockland county by the way of points at or near Nyack and Haverstraw, to a point to be determined by the commission, on the dividing line between Orange and Rockland counties, running thence northerly through the eastern portion of Orange county to the city of Newburgh, thence northerly from the city of Newburgh to a point to be determined by the commission, on the dividing line between Ulster and Orange counties, running thence northerly through the eastern portion of Ulster county to a point on the Rondout creek at or near the present chain ferry known as the "Sleightsburgh Ferry," thence over said creek into the city of Kingston by suitable bridge to be constructed and maintained by the commission, running thence northerly from the city of Kingston to a point to be determined by the commission, on the dividing line between Greene and Ulster counties, running thence northerly through the eastern portion of Greene county to points at or near Catskill, Athens and Coxsackie, to a point to be determined by the commission, on the dividing line between Albany and Greene counties, running thence northerly to the city of Albany. (*Amended by L. 1912, ch. 157.*)

Route 3-a. Commencing at a point, to be determined by the commission, on the Delaware river at or near the city of Port Jervis in Orange county, running thence northwesterly along the Delaware river, as nearly as practicable, to a point to be determined by the commission on the divid-

ing line between Sullivan and Delaware counties, thence to the village of Hancock, connecting with route number four. (*Added by L. 1911, ch. 260.*)

Route 4. Commencing at a point to be determined by the commission on route number three, running thence through Orange county by the way of Middletown to a point to be determined by the commission, on the dividing line between Sullivan and Orange counties, running thence westerly and northerly through Sullivan county by the way of Monticello to a point to be determined by the commission, on the dividing line between Delaware and Sullivan counties, thence to Deposit, on the dividing line between Broome and Delaware counties, running thence westerly by the way of Windsor to the city of Binghamton, running thence westerly from the city of Binghamton by the way of Lestershire and Endicott, to a point to be determined by the commission, on the dividing line between Tioga and Broome counties, running thence westerly through the southern portion of Tioga county, to a point to be determined by the commission, on the dividing line between Chemung and Tioga counties, running thence westerly and northwesterly through the southern portion of Chemung county, to the city of Elmira, running thence northerly from the city of Elmira to a point at or near Horseheads, running thence westerly to a point to be determined by the commission on the dividing line between Steuben and Chemung counties, running thence westerly and northwesterly by the way of Corning, Addison and Canisteo, to the city of Hornell, running thence northwesterly and southwesterly from the city of Hornell to a point at or near Almond on the dividing line between Allegany and Steuben counties, running thence southwesterly to Wellsville, running thence northwesterly and westerly by the way of Belmont, Belvidere and Friendship and Cuba, to a point to be determined by the commission on the dividing line between Cattaraugus and Allegany counties, running thence southwesterly to the city of Olean, running thence westerly and northwesterly from the city of Olean by the way of Salamanca, Little Valley, Napoli and Randolph, to a point to be determined by the commission, on the dividing line between Chautauqua and Cattaraugus counties, running thence westerly to the city of Jamestown, thence northwesterly by the way of Mayville, to Westfield. (*Amended by L. 1911, chs. 96 and 747.*)

Route 4-a. Beginning at the city of Binghamton, on route number four, running thence northerly and northwesterly to Whitney Point, running thence northwesterly along the Tioughnioga river, by way of Lisle and Killawog, through a point to be determined by the highway commission on the dividing line between Broome and Cortland counties, to Marathon, and from thence through Messengerville and Blodgett Mills, to Cortland, as determined by the commission, connecting thereat with route number nine. (*Added by L. 1911, ch. 807.*)

Route 4-b. Beginning at a point on route number four to be determined

by the commission, at or near Canisteo, in the county of Steuben, running thence southerly by way of Greenwood to Rexville; running thence southerly and westerly to a point to be determined by the commission on the dividing line between the counties of Steuben and Allegany; and running thence southerly and westerly to Whitesville, Allegany county. (*Added by L. 1912, ch. 474.*)

Route 5. Commencing at the city of Kingston, running thence to a point on the boulevard to be erected by the city of New York near the present village of West Hurley, thence northerly and westerly by the way of Woodstock, Bearsville and Pine Hill, to a point to be determined by the commission, on the dividing line between Delaware and Ulster counties, running thence westerly to Margaretville, running thence northerly by the way of Roxbury to Grand Gorge, running thence northwesterly to a point to be determined by the commission, on the dividing line between Schoharie and Delaware counties, running thence northwesterly and westerly to a point to be determined by the commission, on the dividing line between Delaware and Schoharie counties, running thence northwesterly and westerly by the way of Harpersfield, North Kortright and Davenport, to a point to be determined by the commission, on the dividing line between Otsego and Delaware counties, running thence to Oneonta, Otsego county, running thence northeasterly along route number seven to Colliers; running thence northerly in Otsego county by the way of Cooperstown and Richfield Springs to a point to be determined by the commission, on the dividing line between Herkimer and Otsego counties; running thence northerly to Mohawk connecting with route number six. (*Amended by L. 1910, ch. 573.*)

Route 5-a. Commencing at a point on route number three, in the village of Catskill; thence northwesterly to the village of Cairo; thence by South Durham through East Windham to the village of Windham; thence westerly through the villages of Ashland and Prattsville to a point, to be determined by the commission, on the dividing line between Greene and Delaware counties. (*Added by L. 1911, ch. 616.*)

Route 5-b. Commencing at a point on route number five-a, in the village of Cairo, in the county of Greene; thence westerly through the village of East Durham to the village of Durham; thence northerly to a point to be determined by the commission on the dividing line between Greene and Albany counties; thence northerly to the village of Cooksburg, and connecting thereat with a highway heretofore improved by the state leading from Potter's Hollow to such village. (*Added by L. 1911, ch. 784.*)

Route 5-c. Commencing in the village of Palenville, so-called on the northerly side of the creek at a point where the Katerskill road intersects the Catskill-Tannersville highway in the town of Catskill, Greene county; thence westerly through the Kaaterskill cove to a point where the

easterly entrance leading to Twilight park intersects said Catskill-Tannersville highway, and over a route to be determined by the commission. (*Added by L. 1913, ch. 784.*)

L. 1913, ch. 784, § 2. The sum of one hundred and ninety thousand dollars (\$190,000), or so much thereof as may be necessary, is hereby appropriated out of any money in the treasury, not otherwise appropriated, to be expended, except as herein otherwise provided, in the manner provided for by article six of the highway law, for the construction and improvement of state route five-c, as established by this act. The state commission of highways may construct and improve such route by contract or by the purchase of material and securing of labor in the open market, or partly by each method, or wholly or partly by forces of the state department of highways. If such construction and improvement be made wholly by contract, maps, specifications and estimates shall be made, proposals advertised for and the contract awarded as provided in article six of the highway law, and if specified parts or items only of such construction and improvement be done by contract the provisions of such article of the highway law shall govern the making of maps, estimates and specifications and the awarding of contracts therefor so far as they may be made applicable. Such commission may, in its discretion, use convict labor, as hereinafter provided, in the construction and improvement of such route or parts thereof, or with respect to certain items of the work. The superintendent of state prisons is hereby authorized to furnish available convict labor therefor, upon the application of such commission. The expense of maintenance of convicts while so employed shall be paid from the moneys herein appropriated in the same manner as other expenses of such construction and improvement. The officers and guards of the prison department shall have the charge and custody of such convicts, but the engineers and foremen of the highway department shall direct the work to be done; and nothing herein contained shall be construed to authorize the employment of such convict labor for a person, firm, association or corporation contracting with such commission for the performance of any part or item of such construction or improvement. Moneys expended directly for material, labor and cost of maintenance of convicts shall be paid out by the state treasurer upon the audit and warrant of the comptroller upon vouchers approved by such commission. (*Amended by L. 1914, ch. 68, in effect Mch. 21, 1914.*)

Route 6. Commencing at a point to be determined by the commission at the city of Albany, running thence northwesterly to a point to be determined by the commission, on the dividing line between Schenectady and Albany counties, running thence northwesterly to the city of Schenectady, running thence northwesterly from the city of Schenectady to a point to be determined by the commission, on the dividing line between Montgomery and Schenectady counties, to the city of Amsterdam, thence crossing the Mohawk river to the south side, thence along the south side through Fort Hunter to the village of Fultonville, thence across the river to the north side, running thence westerly and northwesterly through Montgomery county by the way of Fonda and Saint Johnsville, to a point at or near East creek, on the dividing line between Herkimer and Montgomery counties, running thence westerly and northwesterly by the way of Little Falls and Herkimer, from Herkimer westerly by the way of Mohawk, Ilion and Frankfort to a point to be determined by the commission, on the dividing line between Herkimer and Oneida counties, and thence to

the city of Utica, running thence westerly from the city of Utica to Oneida, on the dividing line between Madison and Oneida counties, running thence westerly by the way of Chittenango, to a point to be determined by the commission on the dividing line between Onondaga and Madison counties, running thence westerly by the way of Fayetteville to the city of Syracuse, running thence from the city of Syracuse by the way of Camillus and Elbridge, to a point to be determined by the commission, on the dividing line between Cayuga and Onondaga counties, running thence southwesterly to the city of Auburn, running thence from the city of Auburn, to a point to be determined by the commission, on the dividing line between Seneca and Cayuga counties, running thence westerly to Seneca Falls, thence southerly through the village of Seneca Falls to the south side of Seneca Lake outlet, thence westerly on the south side of Seneca lake outlet to a point at the foot of Seneca lake, running thence westerly to a point to be determined by the commission on the dividing line between Ontario and Seneca counties, running thence westerly to Geneva, running thence westerly from Geneva to Canandaigua, running thence westerly to a point to be determined by the commission, on the dividing line between Livingston and Ontario counties, running thence westerly by the way of Avon and Caledonia, to a point to be determined by the commission, on the dividing line between Genesee and Livingston counties, running thence westerly by the way of Batavia to a point to be determined by the commission, on the dividing line between Erie and Genesee counties, running thence westerly to the city of Buffalo, Erie county. (*Amended by L. 1910, ch. 573, and L. 1911, ch. 472.*)

Route 6-a. Commencing at and intersecting route number six in the town of Tyre, in the county of Seneca, at a point known as Dutcher's Corners, thence westerly along the road known as the old free-bridge state road through the towns of Tyre and Junius to a point, to be determined by the commission, on the dividing line between the counties of Seneca and Ontario near the railroad station at West Junius on the Pennsylvania division of the New York Central and Hudson River railroad running from Lyons to Geneva; thence, passing such station, along said old free-bridge state road to the village of Phelps. (*Added by L. 1911, ch. 660.*)

Route 7. Commencing at a point to be determined by the commission on the dividing line between the town of Binghamton in Broome county, and Pennsylvania, running thence northerly to the city of Binghamton; running thence northerly and northeasterly from the city of Binghamton on the east side of the Chenango river, by the way of Port Crane, Sanitaria Springs and Harpursville, to Ninevah, on the dividing line between Chenango and Broome counties, running thence northeasterly along the Susquehanna valley, to a point to be determined by the commission, on the dividing line between Chenango and Otsego counties, at or near Sidney, running thence northeasterly along the Susquehanna valley to

Oneonta, running thence northeasterly from Oneonta by way of Maryland and Woreester, to a point to be determined by the commission, on the dividing line between Schoharie and Otsego counties, running thence easterly by the way of Cobleskill to a point to be determined by the commission, on the dividing line between Albany and Schoharie counties at or near West Berne, to Berne, thence to East Berne, thence to a point at Thompson's Lake, known as Secor's Church, thence to the top of the present so-called "Indian Ladder" road, thence in a southerly direction to New Salem, and thence to New Scotland, Slingerlands, and to the city of Albany. (*Amended by L. 1911, chs. 261 and 751.*)

Route 7-a. Commencing at the city of Schenectady on route number six and running southwesterly to Duanesburg, in the county of Schenectady; thence in a general southwesterly direction, along a course to be determined by the commission, to a point to be determined by the commission upon route number seven in the town of Schoharie in Schoharie county. (*Added by L. 1912, ch. 183.*)

Route 8. Commencing at the city of Binghamton, running thence northerly on the west side of the Chenango river to Chenango Forks, on the dividing line between Chenango and Broome counties, running thence along the west bank of the Chenango river to North Norwich, running thence northerly by the way of Sherburne to Earlville, on the dividing line between Madison and Chenango counties, running thence northerly by the way of Hamilton and Bouckville, to a point at or near Oriskany Falls, on the dividing line between Oneida and Madison counties, running thence northeasterly by the way of Deansboro to a point to be determined by the commission connecting with route number six.

Route 8-a. Commencing at the New York State Women's Relief Corps Home near the village of Oxford in the county of Chenango, running thence southerly and westerly to and into the village of Oxford and connecting with route number eight therein, upon and along the existing public highway between such points. (*Subd. 8-a, added by L. 1916, ch. 634.*)

L. 1916, ch. 634, § 2.—The sum of fifteen thousand dollars (\$15,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated, to be expended by the state commission of highways in the manner provided by the provisions of article six of the highway law relating to the improvement of state routes.

Route 9. Commencing at a point to be determined by the commission, at or near Horseheads, Chemung county, New York, on route number four, running thence northerly and northeasterly by the way of Horseheads, Breesport and Erin to a point to be determined by the commission on the dividing line between Tioga and Chemung counties, running thence easterly and northeasterly by the way of North Spencer to a point to be determined by the commission on the dividing line between Tompkins and Tioga counties, running thence northerly to the city of Ithaca, running thence

northeasterly by the way of a point to be determined by the commission at or near Dryden to a point to be determined by the commission on the dividing line between Cortland and Tompkins counties, running thence northeasterly to Cortland, thence northeasterly by the way of Truxton to a point to be determined by the commission on the dividing line between Madison and Cortland counties at or near De Ruyter, thence northerly to Cazenovia, thence easterly by the way of Morrisville to a point at or near Bouckville on route number eight.

Route 10. Beginning at the city of Syracuse, running thence southerly to a point to be determined by the commission on the dividing line between Cortland and Onondaga counties, running thence southerly by the way of Homer to Cortland, thence southeasterly by the way of McGrawville, Solon and Willett to a point to be determined by the commission on the dividing line between Chenango and Cortland counties, thence southeasterly by the way of Smithville Flats to Greene, thence easterly by the way of Coventry to Coventryville, thence southeasterly to Afton, connecting with route number seven.

Route 11. Commencing at the city of Ithaca, running thence northerly to a point to be determined by the commission, on the dividing line between Cayuga and Tompkins counties, running thence northerly to the city of Auburn.

Route 12. Commencing at a point at or near Horseheads, at a point to be determined by the commission, running thence northerly to a point to be determined by the commission, on the dividing line between Schuyler and Chemung counties, running thence northerly by the way of Watkins, to a point to be determined by the commission, on the dividing line between Yates and Schuyler counties, running thence northwesterly by the way of Dundee, to the village of Penn Yan, running thence northerly to a point on the dividing line between Ontario and Yates counties, running thence northerly to the city of Geneva, running thence northerly from the city of Geneva, to a point to be determined by the commission, on the dividing line between Wayne and Ontario counties, running thence northerly to Lyons, connecting with route number twenty.

Route 13. Commencing at Bath, Steuben county, running thence northeasterly by the way of Hammondsport to a point to be determined by the commission on the dividing line between Schuyler and Steuben counties, thence northeasterly to a point to be determined by the commission on the dividing line between Yates and Schuyler counties, thence northeasterly to Dundee on route number twelve.

Route 14. Commencing at Corning, Steuben county, running thence northwesterly by the way of Bath, Avoca to Cohocton, running thence northerly from Cohocton, to a point to be determined by the commission on the dividing line between Ontario and Steuben counties, running thence northeasterly to Naples, running thence northerly from Naples to a point to be determined by the commission, connecting with route num-

ber six, running thence along route number six to Black's corners, and from thence to Holcomb; running thence northwesterly to a point to be determined by the commission on the dividing line between Monroe and Ontario counties, thence northerly to Pittsford, thence westerly, then northerly to the city of Rochester. (*Amended by L. 1910, ch. 648.*)

Route 15. Commencing at the junction of Big Creek road and Seneca street road in the town of Hornellsville, Steuben county, running thence northwesterly within the county of Steuben to and through the village of Arkport, and northerly, within such county, along the road on the easterly side of Arkport valley, known as Dansville road, through Doty's Corners and by way of the Stony Brook Glen road in the town of Dansville, Steuben county, to the Livingston county line; thence through the town of North Dansville in Livingston county to the village of Dansville; thence northerly to the intersection of Gibson and South streets; thence northeasterly along Gibson street to Main street; thence northwesterly along Main street to the intersection of Main and Exchange streets; thence southwesterly along Exchange and South streets to the intersection of South and Gibson streets, and from the intersection of Main and Exchange streets along the highway from Dansville to Groveland station on the east side of the Genesee valley through the towns of North Dansville, Sparta and Groveland to Groveland Station; thence northerly along the highway leading from Groveland station to Geneseo on the east side of the Genesee valley in the town of Groveland to its intersection with the improved county highway running from Mount Morris to Geneseo; thence westerly through the towns of Groveland and Mount Morris to the village of Mount Morris; thence through the village of Mount Morris northwesterly and northerly by the way of the villages of Moscow and York Center to a point on route number six in the village of Caledonia; thence easterly along route six to Canawaugus; thence northerly to a point to be determined by the commission on the dividing line between Livingston and Monroe counties, thence northerly to route sixteen in Scottsville; also from the point where the street in the village of Arkport, Steuben county, intersects the north and south road leading from Hornell to Doty's Corners, running thence westerly about three-quarters of a mile, thence northwesterly and northerly to Van Scoters Corners, Allegany county, to connect with a proposed county highway in said county. (*Amended by L. 1911, ch. 752 and L. 1912, ch. 473.*)

L. 1912, ch. 473, § 2.—The moneys appropriated by chapter five hundred and fifty-nine of the laws of nineteen hundred and eleven, for the improvement and completion of that part of route number fifteen between Hornell and to and through the village of Dansville, shall be immediately available for the construction of such route as hereby amended, including that portion thereof from the point where the street in the village of Arkport, Steuben county, intersects the north and south road leading from Hornell to Doty's Corners, running thence westerly about three-quarters of a mile, thence northwesterly and northerly to Van Scoters Corners, Allegany county, to connect with a proposed county highway in said county.

Route 16. Commencing at the village of Cuba, Allegany county, running thence northeasterly by the way of Belfast and Caneadea, to a point to be determined by the commission, on the dividing line between Wyoming and Allegany counties, running thence northerly by the way of Pike, Gainsville and Rock Glen to Warsaw, running thence northerly to a point to be determined by the commission, on the dividing line between Genesee and Wyoming counties, running thence northerly to the village of Le Roy, running thence along route number six to Caledonia, running thence northerly to a point to be determined by the commission on the dividing line between Monroe and Livingston counties, running thence northerly by the way of Scottsville to the city of Rochester.

Route 17. Commencing at a point to be determined by the commission on route number four at or near Hinsdale, running thence northerly by the way of Franklinville and Machias to a point to be determined by the commission near the dividing lines of Erie, Wyoming and Cattaraugus counties, running thence northwesterly by the way of East Aurora to the city of Buffalo.

Route 18. Commencing at a point to be determined by the commission, on the dividing line between Ripley, Chautauqua county, and the state of Pennsylvania; running thence northeasterly by the way of Westfield, Brocton, Fredonia, along the old Buffalo and Erie road, to a point to be determined by the commission, on the dividing line between Erie and Chautauqua counties, running thence northeasterly and northerly to the city of Buffalo, running thence northerly from the city of Buffalo to North Tonawanda, running thence northwesterly and westerly from North Tonawanda to the city of Niagara Falls, running thence northerly from Niagara Falls by the way of Lewiston to a point near the mouth of Niagara river, Niagara county. (*Amended by L. 1911, ch. 89.*)

Route 19. Commencing at the city of Buffalo, running thence easterly to Marilla, thence southerly to Wales Center, thence easterly to a point to be determined by the commission on the dividing line between Wyoming and Erie counties, running thence easterly to Varysburg, thence northerly by the way of Attica to a point to be determined by the commission on the dividing line between Genesee and Wyoming counties, running thence northeasterly to Batavia, Genesee county, connecting with route number six.

Route 20. Commencing at a point on route number six, at or near Elbridge, in Onondaga county, running thence northerly to Jordan and westerly to a point to be determined by the commission, on the dividing line between Cayuga and Onondaga counties, running thence northwesterly and southwesterly by the way of Port Byron and Montezuma, to a point to be determined by the commission, at or near the dividing lines between Wayne, Seneca and Cayuga counties, running thence northwesterly and westerly from Savannah, Clyde, Lyons and Newark to Palmyra, running in the county of Ontario south of the Erie canal a distance of about one

mile, between Newark and Palmyra, entering and returning from the county of Ontario through such points as the commission may determine in the dividing line between the counties of Wayne and Ontario; running thence from Palmyra and Macedon to a point to be determined by the commission, on the dividing line between Monroe and Wayne counties, running thence northwesterly to the city of Rochester, Monroe county. (*Amended by L. 1915, ch. 43.*)

Route 21. Commencing at a point on the Hudson river at or near Albany and running thence easterly to a point at or near Sand Lake, running thence southerly to a point at or near Nassau, in Rensselaer county, running thence southeasterly to a point to be determined by the commission, on the dividing line between Columbia and Rensselaer counties, to a point to be determined by the commission, on the dividing line between Columbia county and the state of Massachusetts.

Route 22. Commencing at a point in Rensselaer county at or near the city of Troy, running thence northeasterly by the way of Raymertown, to Potter Hill, running thence northerly through Hoosick Falls, to a point at or near Eagle Bridge, on the dividing line between Washington and Rensselaer counties, running thence northerly by the way of Cambridge, Salem and Granville by the way of Whitehall and the shore road along Lake Champlain to Putnam; and commencing at a point on route twenty-five at Riparius in Warren county, and running thence to a point to be determined by the commission on the dividing line between Essex and Warren counties, and running thence northerly by way of Schroon Lake village to Elizabethtown, running thence westerly to Keene, thence northerly to Ausable Forks and a point on the dividing line between Clinton and Essex counties, thence northeasterly to a point at or near Ausable Chasm, thence northerly by the way of Plattsburgh and Chazy to Rouses Point.

Route 22-a. Commencing at a point at the end of county highway petition number sixteen hundred and fifty-one, in the village of Newman and running thence northeasterly through Wilmington Notch and High Falls to Hathaway Corners, thence northerly across Ausable river to Nye's Corners, thence easterly through the village of Wilmington to the village of Jay connecting with route number twenty-two, Essex county. (*Added by L. 1913, ch. 785, and amended by L. 1914, ch. 201.*)

Route 22-b. Commencing at a point on county highway number eight hundred and ninety-one outside of the village of Ticonderoga and extending westerly through the towns of Ticonderoga and Schroon through the village of Chilson, to a point on route number twenty-two at or near Severance hill, being within the boundaries of the county of Essex. (*Added by L. 1913, ch. 785.*)

Route 22-c. Commencing at a point on county highway number ten hundred and twenty-three, and running thence northerly and westerly to Pottersville on the easterly side of the Schroon river, terminating at route

number twenty-two, all within the boundaries of Warren county. (*Added by L. 1913, ch. 785.*)

Route 23. Commencing on the Cherry Valley turnpike at the westerly line of the village of West Winfield near the intersection of the three counties, Otsego, Oneida and Herkimer, running thence westerly to the village of Bridgewater, running thence northerly to the city of Utica, running thence northeasterly through the town of Deerfield to a point to be determined by the commission on the dividing line between Herkimer and Oneida counties, at or near Poland, there intersecting route number twenty-six, running thence northeasterly through Cold Brook, Wilmurt and Nobleboro to the Hamilton county line there joining the county highway of Hamilton county which leads through Morehouseville to Lake Pleasant, joining route twenty-four at Lake Pleasant and running thereon to Speculator, running thence northerly by way of Lewey Lake to Indian Lake village; thence northwesterly to Blue Mountain Lake there joining route twenty-five. (*Amended by L. 1910, ch. 573, and L. 1914, ch. 47.*)

Route 23-a. Commencing on route six in the village of Ilion at its intersection with Otsego street, running thence southerly through Cedarville, Chepachet and to the westerly line of the village of West Winfield, there connecting with route twenty-three. (*Added by L. 1912, ch. 535.*)

Route 24. Commencing at a point on route number six at Fonda, Montgomery county, running thence northerly to a point to be determined by the commission on the dividing line between Fulton and Montgomery counties, running thence northerly by the way of Johnstown and Gloversville to Northville, running thence northerly to a point to be determined by the commission on the dividing line between the counties of Hamilton and Fulton, running thence northerly to Lake Pleasant.

Route 25. Commencing at Whitesboro near Utica on route number twenty-eight in Oneida county, running thence northerly, by the way of Marcy, Holland Patent, Remsen, Alder Creek and White Lake Corners, to a point to be determined by the commission at or near the dividing lines between Herkimer, Lewis and Oneida counties, running thence northeasterly by the way of Fulton Chain, and on or near the highways laid out, to a point to be determined by the commission, on the dividing line between Hamilton and Herkimer counties, running thence easterly by the way of Raquette Lake, and on the south shore of Raquette Lake, running thence northeasterly to Blue Mountain Lake, running thence northerly to Long Lake, running thence easterly to a point to be determined by the commission, on the dividing line between Essex and Hamilton counties, running thence easterly to Newcomb, running thence southeasterly by the way of Minerva, to a point to be determined by the commission, on the dividing line between Warren and Essex counties, running thence by the way of North Creek, Riparius and Warrensburg to Lake George, running thence southerly to a point to be determined by the commission on the dividing

line between Saratoga and Warren counties at or near Glens Falls, running thence southerly by the way of Saratoga Springs to Ballston Spa, running thence southeasterly to a point to be determined by the commission on the dividing line between Albany and Saratoga counties, running thence southerly to a point to be determined by the commission at or near the city of Albany.

Route 26. Commencing in the village of Mohawk near the intersection of routes five and six, thence running easterly through Jacksonburg to Little Falls, thence running northwesterly through Eatonsville, Middleville, Newport and Poland, across the corner of Oneida county, thence in Herkimer county to a point on the dividing line between Oneida and Herkimer counties near Gravesville, thence by the way of Trenton Falls to join route number twenty-five at or near Trenton. (*Amended by L. 1910, ch. 573.*)

Route 27. Commencing at a point on route number twenty-five, to be determined by the commission, near Alder Creek, running thence northwesterly by the way of Boonville, to a point on the dividing line between Lewis and Oneida counties, running thence northerly by the way of Lowville, to a point at or near Carthage, on the dividing line between Jefferson and Lewis counties, running thence northwesterly and westerly to the city of Watertown, running thence northwesterly from the city of Watertown to Clayton, thence northeasterly to Alexandria Bay, Jefferson county.

Route 28. Commencing at the city of Utica, Oneida county, running thence northwesterly to Rome, running thence northwesterly from Rome, by the way of Camden, to a point to be determined by the commission, on the dividing line between Oswego and Oneida counties, running thence northwesterly by the way of Parish to Union Square, Oswego county.

Route 29. Commencing at Rome, running thence southwesterly to Oneida, being a point on the dividing line between Madison and Oneida counties.

Route 30. Commencing at Rouses Point, in Clinton county, running thence westerly through the northern part of Clinton county, to a point to be determined by the commission, on the dividing line between Franklin and Clinton counties, running thence westerly by the way of Burke, Malone and Moira, to a point to be determined by the commission, on the dividing line between Saint Lawrence and Franklin counties, running thence westerly to Lawrenceville, running thence southerly to a point at or near Nicholville, running thence westerly and southwesterly by the ways of Potsdam, Canton and Gouverneur, to a point to be determined by the commission, on the dividing line between Jefferson and Saint Lawrence counties, running thence southwesterly by the way of Philadelphia to Watertown, running thence southerly from Watertown, by the way of Adams and Pierrepont Manor, to a point to be determined by the commission on the dividing line between Oswego and Jefferson counties, running thence southerly and southwesterly and westerly by the way of Pulaski and Union

Square to Oswego, running thence southerly from Oswego by way of Hannibal to a point to be determined by the commission, on the dividing line between Cayuga and Oswego counties, running thence southwesterly through the northern part of Cayuga county to a point to be determined by the commission on the dividing line between Wayne and Cayuga counties, running thence southwesterly and westerly by the way of Red Creek, Wolcott, Alton, Sodus, Williamson and Ontario to a point to be determined by the commission on the dividing line between Monroe and Wayne counties, running thence southwesterly to the city of Rochester, running thence westerly from the city of Rochester by way of Spencerport, to a point to be determined by the commission, on the dividing line between Orleans and Monroe counties, running thence westerly to points at Albion and Medina, running thence northwesterly and northerly to Ridgway on the Ridge road; thence westerly along the Ridge road to Jeddox, Johnson Creek, Hartland Corners and Ridge Road Settlement; thence southwesterly to Wright's Corners; thence westerly through Warren's Corners and Cambria to a point two and five-tenths miles directly north of Pekin on the Ridge road; thence southerly along the Town Line road through Pekin to a point on the Saunders Settlement road to Sanborn; thence westerly and southwesterly along the Saunders Settlement road to Niagara Falls to connect with route number eighteen; continuing on the River road at the easterly city limits of the city of Niagara Falls and continuing along said river road to the northerly city limits of the city of North Tonawanda and thence southerly along said River road and Main street to the place of intersection of Island street in said city of North Tonawanda; also continuing a spur from the point in Center street in the village of Medina where said route thirty as above described turns toward the north, and from said point in said village of Medina continuing said spur westerly along Center street and the country highway to and through the village of Middleport and thence westerly along the settlement and canal roads to and through Gasport and thence continuing southerly to McNalls Corners and thence continuing westerly along the Lewiston road to the city of Lockport, in Niagara county. Also continuing a spur from the point in the Ridge road in the town of Ridgway where said route thirty as above described turns toward the west, and from said point at said Ridgway continuing said spur easterly along said Ridge road to the dividing line between Orleans and Monroe counties. (*Amended by L. 1910, ch. 648, L. 1911, ch. 716, L. 1912, chs. 51 and 477, and L. 1914, ch. 276.*)

Route 30-a. Commencing at the point mentioned in the description of route twenty-seven at or near Carthage, on the dividing line between Jefferson and Lewis counties, running thence northerly and northwesterly to Antwerp in Jefferson county, terminating at and intersecting route thirty at or near Antwerp aforesaid. (*Added by L. 1910, ch. 650.*)

Route 31. Commencing at Malone, Franklin county, running thence southerly by the way of a point at or near Duane and Meacham Lake to Saranac Junction.

Route 32. Commencing at Lawrenceville in Saint Lawrence county, running thence northerly to North Lawrence, running thence westerly to Brasher Falls, running thence southwesterly to Winthrop, running thence northerly to Massena, running thence northerly on the Town Line road between the towns of Massena and Louisville to the Saint Lawrence river road, running thence westerly and southwesterly on the Saint Lawrence river road to the village of Waddington, running thence westerly and southwesterly on the roads known as the Sucker Brook and Van Rensselaer roads to the end of the boulevard at the corporation line of the city of Ogdensburg. (*Amended by L. 1910, ch. 648 and L. 1911, ch. 179.*)

Route 33. Commencing at Syracuse, running thence northerly to a point to be determined by the commission, on the dividing line between Oswego and Onondaga counties, running thence northerly by the way of Central Square to a point at or near Colosse on route number twenty-eight.

Route 34. Commencing at the city of Oswego on the east side of the river, running thence by the way of Fulton through Phoenix to a point to be determined by the commission on the dividing line between Onondaga and Oswego counties, running thence by the way of Liverpool to Syracuse.

Route 35. Commencing at a point to be determined by the commission on the dividing line between Nassau and Queens counties, running thence easterly through the northern portion of Nassau county to a point to be determined by the commission on the dividing line between Suffolk and Nassau counties, running thence easterly by the way of Jericho turnpike to Smithtown branch, Saint James, Port Jefferson and Wading River to Riverhead, running thence southerly to West Hampton, running thence westerly by the way of south country road to Patchogue, Sayville, Islip, Bay Shore and Babylon to Amityville, running thence westerly to a point to be determined by the commission on the dividing line between Nassau and Suffolk counties, running thence westerly through the southern portion of Nassau county to a point to be determined by the commission on the dividing line between Queens and Nassau counties.

Route 36. Commencing at Owego in Tioga county, running thence northerly to a point to be determined by the commission on the dividing line between Tompkins and Tioga counties, running thence northwesterly to the city of Ithaca, running thence northwesterly from the city of Ithaca to Trumansburg, at or near the dividing line between Seneca and Tompkins counties, running thence northwesterly and northerly by the way of Ovid to a point to be determined by the commission, on route number six.

Route 37. Commencing at a point on route twenty-six at Dolgeville, running thence easterly along the old state road by way of Oppenheim, Lasellville, Garoga and Rockwood to the city of Johnstown in Fulton county, running thence easterly by way of West Perth to Perth Center, thence in a northerly direction to Broadalbin by way of Vail Mills, thence easterly through Mills Corners to a point to be determined by the commission on the dividing line between Saratoga and Fulton counties, thence

easterly through Whiteside Corners, Greens Corners, Mosherville, East Galway, Rock City Falls, and North Milton to Saratoga Springs, connecting there with route number twenty-five. (*Amended by L. 1910, ch. 648 and L. 1912, ch. 475.*)

Route 37-a. Beginning at the hamlet of Malta, in the town of Malta, Saratoga county, and running thence westerly to east line; thence north-westerly to Corps Corners; thence northerly through V Corners to the village of Ballston Spa. (*Added by L. 1912, ch. 476.*)

[*Note.* This provision was superseded by L. 1912, ch. 542, which provided for Route 37-b, to same effect.]

Route 37-a. Beginning at the village of Ballston Spa, on route twenty-five, running thence westerly along the town line road between the towns of Ballston and Milton, through Tibbetts Corners, Harmony Corners and Pettits Corners to Scotch church, and thence northerly through Galway village, connecting with route thirty-seven at General Carpentier mansion. (*Added by L. 1912, ch. 542.*)

Route 37-b. Beginning at the hamlet of Malta, in the town of Malta, Saratoga county, and running thence westerly to east line; thence north-westerly to Corps Corners; thence northerly through V Corners to the village of Ballston Spa. (*Added by L. 1912, ch. 542.*)

Route 38. Commencing at such point in or near the village of Schoharie, in the county of Schoharie, in the line of route number seven as the commission may determine; running thence southerly through the towns of Schoharie, Middleburg, Fulton, Blenheim, Gilboa and Conesville to, and intersecting route number five, at a point to be determined by the commission. (*Added by L. 1909, ch. 504.*)

Route 38-a. Commencing at the village of Cobleskill, Schoharie county, upon state route seven, and running thence northwesterly, or westerly and northerly, along a course to be determined by the commission, to Sharon Springs, connecting thereat with an improved stone road leading northerly from Sharon Springs. (*Added by L. 1912, ch. 179.*)

Route 39. Commencing at a point on route twenty-five in the county of Saratoga at or near Ballston lake; thence southwesterly to a point to be determined by the commission on the dividing line between the counties of Saratoga and Schenectady; thence southwesterly to a point at or near the city of Schenectady connecting with route six. (*Added by L. 1910, ch. 649.*)

Route 39-a. Commencing at a point to be determined by the commission on route nine, running thence northerly through the hamlet of Sullivanville, running thence through Bacon Hollow to a point to be determined by the commission on the dividing line between Chemung and Schuyler counties, running thence in a general easterly direction to a point to be determined by the commission on the dividing line between Schuyler and Tompkins counties, running thence northeasterly through

Pony Hollow and the village of Newfield to connect with route thirty-six. (*Added by L. 1911, ch. 531.*)

Route 39-b. Commencing at a point on route number three at or near the village of Nyack, in Rockland county; running thence westerly and northerly through Rockland county, by way of Suffern, to a point to be determined by the commission on the dividing line between Rockland and Orange counties; thence through Orange county to a point to be determined by the commission on route number four. (*Added by L. 1911, ch. 662.*)

Route 41. Beginning on the dividing line between the city and county of New York and the town of Pelham in the county of Westchester, running thence northeasterly along the Shore road in the town of Pelham to the city of New Rochelle, and from the city of New Rochelle along the Boston post road through the towns of Mamaroneck and Rye to the Connecticut boundary line; and also beginning on the said dividing line between the city of New York and the town of Pelham and running thence northerly along the Boston post road through the town of Pelham to the city of New Rochelle. (*Added by L. 1911, ch. 395.*)

Route 42. Beginning at the city of Schenectady at trunk line six and extending thence southeasterly along the following highways: Troy-Schenectady, section number one; Troy-Schenectady, section number two; Troy-Schenectady, section number three; Troy-Schenectady, section number four; Watervliet-Nineteenth street; thence along Nineteenth street to and across the bridge at the Troy and West Troy Bridge Company to Congress street in the city of Troy; thence easterly along Congress street to Pawling avenue; thence along Pawling avenue to Pinewoods avenue; thence along Pinewoods avenue to Eagle Mills connecting with Brunswick-Turnpike number two hundred and twenty-seven; thence to Quackenkil, Grafton and Petersburg, to a point on the state line of Massachusetts, to be determined by the commission. (*Added by L. 1911, ch. 614, and amended by L. 1914, ch. 376.*)

Route 43. Beginning at Main street in the village of Mount Morris, running thence southwesterly along what is known as the state road to the village of Nunda, in Livingston county, thence along what is known as the Oakland-Portage road to Portage bridge and Letchworth park. (*Added by L. 1911, ch. 166.*)

Route 43. Commencing at a point at or near the village of Stillwater in Saratoga county, running thence northerly and northwesterly through Bemis Heights and the Saratoga battlefield to Quaker Springs, running thence northerly and northeasterly through Victory Mills, thence to Schuylerville by way of Creamery Hill to Broad street; thence northerly to Spring street; and thence westerly until it connects with county highway number two hundred and forty-four. (*Added by L. 1911, ch. 259.*)

Route 45. Commencing at a point on route twelve in the village of Watkins and running thence easterly and thence northerly on the east

shore of Seneca lake through the hamlets of Hector and North Hector to a point on the dividing line of Schuyler and Seneca counties, thence northeasterly through the hamlet of Caywood to the village of Lodi and thence easterly to the village of Interlaken, connecting with route thirty-six. (*Added by L. 1911, ch. 356 and amended by L. 1912, ch. 57.*)

Route 46. Commencing at a point on route number fourteen at or near Coopers Plains in Steuben county and running thence northerly to a point on the dividing line of Steuben and Schuyler counties; thence northeasterly through the village of Monterey and easterly by the valley road through the hamlet of Townsend; thence northeasterly following Old Folks picnic ground road to the village of Watkins, connecting with route number twelve; thence southerly on route twelve to its intersection with route number forty-five; thence along said route forty-five to a point about one and one-half miles from the village of Burdett; thence northeasterly to the village of Burdett; thence easterly and northeasterly through Bennettsburg to Reynoldsville; thence southeasterly to Mecklenburg; thence northeasterly to Perry City; thence to a point on the dividing line between Schuyler and Tompkins counties; thence northeasterly to the village of Trumansburg, connecting with route number thirty-six. (*Added by L. 1911, ch. 320.*)

Source.—New.

Reference.—Classification of highways, Highway Law, § 3.

Note.—The Legislature of 1911 enacted a large number of special laws appropriating money for the improvement of specified routes and parts of routes. They are not deemed of sufficient general interest to be printed in full, but the following table indicates the chapter numbers, the amounts appropriated and the routes to be improved:

L. 1911		
CHAP.	AMT.	ROUTES.
92	\$1,000,000	4, 12, 36
133	1,500,000	25, 22
134	500,000	25
135	625,000	7, 38
136	1,200,000	4
154	1,000,000	18, 30
155	110,000	5, 3
348	500,000	4
426	700,000	5
463	1,100,000	25, 27
467	380,000	1
496	600,000	30
559	850,000	4, 15, 14
614	210,000	42, 21, 22
657	750,000	1, 2
715	380,000	6
726	165,000	43
733	800,000	4
741	575,000	28, 30, 33
742	250,000	3

L. 1911

CHAP.	AMT.	ROUTES.
743	450,000	34
753	200,000	9
754	110,000	41

Locating route; notice to taxpayer; acts of commission not judicial; certiorari.—The State Commission of Highways, in locating a route for a state road pursuant to this section of the Highway Law, acts simply in an administrative capacity and may reach its determination without giving a taxpayer notice of hearing or an opportunity to be heard. That the duties of the commission in locating the route call for the exercise of judgment and discretion does not make its action judicial in character, and certiorari does not lie to review it. *Matter of Sherman* (1912), 76 Misc. 45, 133 N. Y. Supp. 931.

Town and county officers, as a matter of law, have no voice in the fixing of the route of a state highway. *Rept. of Atty. Genl.* (1912) 225.

Authority of State Highway Commission to change route as designated upon Skene map. *People ex rel. Waful v. Reel* (1913), 157 App. Div. 128, 141 N. Y. Supp. 980.

Improvement as county highway.—Where a road is fully described in a route laid down in this section as a State highway, it may not be improved under the system provided for county highways. *Rept. of Atty. Genl.* (1915) 84.

Effect of referendum of 1912 on state routes.—Where a State highway route was materially extended by act of the Legislature in 1914, moneys provided under the referendum of 1912 may not be expended upon the construction of the extension, because the referendum contemplated that the funds provided for thereunder should be expended upon State routes substantially as described in the Highway Law at the time the proposition was adopted by the people.

In so extending the State route the Legislature had power to include therein a part of an unimproved county highway, the location of which had been settled upon previous to the referendum by the State Highway Commission and the Board of Supervisors, and which had been designated for improvement. So much of the county highway as is included within the extension of the State route is taken out of the "county system," and the expenditure of referendum moneys thereon for a construction at the joint expense of the State and county, as originally planned, is therefore prevented. However, the description of the extended State route is so general that a question of administration is presented to determine whether, in fact, any part of the county highway will be included within the State route extension when it is actually laid down and constructed. *Rept. of Atty. Genl.* (1915) 150.

§ 121. Apportionment of mileage of state highways to be constructed or improved.—The mileage of state highways to be constructed or improved from the amount available from the sale of bonds issued as provided by chapter four hundred and sixty-nine of the laws of nineteen hundred and six, as amended by chapter seven hundred and eighteen of the laws of nineteen hundred and seven, and appropriated for the construction or improvement of state highways, shall be equitably apportioned by the commission among the several counties without discrimination; but not more than one-half of the amount appropriated each year from the proceeds of the sale of such bonds shall be expended under this article for the construction and improvement of state highways. In making the apportionment between counties the commission shall take into consideration the

mileage which may be constructed from the amount to be expended under this article in each county for the construction or improvement of county highways, together with the mileage of state and county highways theretofore constructed out of moneys derived from the sale of bonds issued as above provided.

If moneys are not available for the improvement of any portion of a state route described in this article, the same may be improved as a county highway, provided the board of supervisors of the county within which such section is located designate it as a county highway as provided in this chapter, and proceed in all respects as provided herein for the improvement of county highways. (*Amended by L. 1911, ch. 646, and L. 1917, ch. 315, in effect May 2, 1917.*)

Source.—New.

Constitutional provision.—Legislature may authorize issue of bonds for construction of highways, Const., art. 7, § 12.

The duty of making an equitable apportionment rests with the commission and the Comptroller can assume it has done so. The Legislature can make special appropriations for specified state roads and only the remaining sum is subject to apportionment between state and county roads. Rept. of Atty. Genl. (1912), Vol. 2, p. 264.

A general appropriation is subject to apportionment between state and county roads. General appropriations can only be used in counties benefited by special appropriations when such counties have not received their equitable apportionment. General appropriations cannot be used to complete the unfinished portions of a route covered by a special appropriation where the special appropriation was intended to cover the route from a given point to a given point. The application of section 38 of the Finance Law depends on the wording of the special act. Rept. of Atty. Genl. (1912), Vol. 2, p. 264.

New state or county highways cannot be constructed through the forest preserve by the highway commission but the routes therein laid out may be followed and improved. Rept. of Atty. Genl. (1909) 663.

§ 122. Construction or improvement of county highways.—The county highways to be constructed or improved under this article at the joint expense of the state and county shall be those highways in each county determined by the commission to be of sufficient public importance to come within the purposes of this chapter so as to constitute a part of a properly developed system of improved market roads within the county, taking into account the use, location and value of such highways for the purposes of common traffic and travel. Such county highways shall be equitably apportioned by the commission among the several counties without discrimination. In making such apportionment the commission shall take into consideration the total mileage of state highways which shall be hereafter constructed or improved in each county, and also the highways therein which have been constructed or improved prior to the taking effect of this article from funds made available by the issue and sale of bonds as provided in section twelve of article seven of the constitution, so that there shall be an equitable distribution as between the counties of all

highways built in whole or in part from such funds. (*Amended by L. 1912, ch. 83.*)

Source.—New. The language used in this section describing the character of the highways to be constructed or improved as county highways is similar to that contained in L. 1898, ch. 115, § 3, as amended by L. 1907, ch. 717.

Report of Joint Legislative Committee on Highways, 1908, contains the following statement in respect to this section. "Article 7, § 12, of the Constitution, which authorizes the creation of a debt not exceeding fifty million dollars for the improvement of highways provides that 'such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties.' It is assumed in this section that the Commission in apportioning county highways among the counties will take into consideration those highways which are declared by this chapter to be state highways to be improved at the sole expense of the state. The evident purpose of the Constitution was to provide for an equitable apportionment of the highways among the counties whether they be constructed or improved by the state, or jointly by the state, county and town. An equitable apportionment of the highways to be constructed from the proceeds of the bonds issued under the constitutional provision must necessarily include both state and county highways. The Commission in exercising the authority conferred upon it by this section will be governed both by the statute and the Constitution."

References.—County highways described, Highway Law, § 3. Commission limited in determining highways to be improved as county highways to roads outlined in county highway maps, Id. § 315.

Reapportionment of cost of construction; revision of plans.—Where a county board of supervisors has adopted a final resolution and approved plans and specifications for improvement of a county highway, prior to the enactment of L. 1912, ch. 83, there should not be a reapportionment of the cost of construction of such highway so as to eliminate the towns therefrom. Where the plans for construction of a county highway must be revised and an additional sum is necessary for its construction, such sum should be apportioned between the state and county, as provided by chapter 83 of the Laws of 1912. Rept. of Atty. Genl. (1912), Vol. 2, p. 230.

§ 123. Preliminary resolution of board of supervisors.—The board of supervisors of any county may pass a resolution stating that public interest demands the improvement of a highway or section thereof within the county, and requesting that it be constructed or improved as provided in this article. Such resolution shall contain a description of such highway or section thereof. Such highway or section thereof shall not include a portion of a highway within a city, except that portion of the cities of Rome and Oneida lying outside of the respective corporation tax districts of said cities, nor any portion of a highway within an incorporated village, unless it be necessary to complete the connection of such highway with a highway already improved or to be improved under this article. The clerk of the board of supervisors shall, within ten days after the passage of such a resolution, transmit a certified copy thereof to the commission. (*Amended by L. 1909, ch. 487.*)

Source.—L. 1898, ch. 115, § 1, as amended by L. 1907, ch. 717. The only change relates to the construction of connecting highways through villages.

References.—Construction of county highway through village, Highway Law, §

L. 1909, ch. 30.

State and county highways.

§§ 124, 125.

137. Form and contents of resolution of board of supervisors, County Law, § 17. Construction of county highways through cities, even to form a connecting link, is not authorized by statute. Rept. of Atty. Genl. (1910) 733.

Effect of amendment of sections 170-174 by L. 1916, ch. 578. Opinion of Atty. Genl. (1916), 8 State Dept. Rep. 526, 535.

§ 124. Examination of county highway; approval or disapproval by commission.—The commission after receipt of such resolution, and at such times as it deems proper, shall examine the highway or section thereof sought to be constructed or improved, and shall determine whether it is of the character specified in section one hundred and twenty-two, and whether the construction or improvement thereof will provide for an equitable apportionment of the highways among the several counties as provided in such section. After such examination the commission shall certify its approval or disapproval of such resolution to the board of supervisors adopting it; if it disapprove thereof it shall certify its reasons therefor.

Source.—L. 1898, ch. 115, § 3, as amended by L. 1907, ch. 717, without change in substance.

§ 125. Maps, plans, specifications and estimates.—Whenever the commission shall have determined upon the construction or improvement of a state highway, or section thereof, or shall have approved a resolution adopted by a board of supervisors in any county requesting the construction or improvement of a county highway, or a section thereof, the commission shall direct the division engineer of the division wherein such highway or section thereof is situated to make surveys, and prepare suitable preliminary maps, plans and specifications. Such division engineer shall, subject to the direction and control of the commission, have the following powers and duties in respect to such highways:

1. He shall cause the highway or section thereof designated by the commission, or described in such resolution, to be mapped both in outline and profile.

2. He may provide for a deviation from the line of a highway already existing, if thereby a shorter or more direct highway, or a lessened gradient may be obtained without decreasing the usefulness of the highway.

3. He may provide for the widening of an existing highway.

4. He shall prepare preliminary plans and specifications for the construction or improvement of such highway or section thereof providing for a telford, macadam or gravel roadway, or other suitable construction, taking into consideration climate, soil and materials to be had in the vicinity thereof, and the extent and nature of the traffic likely to be upon such highway, specifying in his judgment the kind of highway a wise economy demands.

5. He shall provide in such plans and specifications for necessary culverts, drains, ditches, waterways, embankments, guard-rails and retaining walls.

§§ 126, 127.

State and county highways.

L. 1909, ch. 30.

6. He may provide therein for the removal or planting of trees, and seeding or sodding, within the boundaries of the highway, when necessary for the preservation thereof.

6-a. He may provide therein for the removal of, or the trimming of any trees within the boundaries of the highway necessary for the convenience or safety of the public, or the construction or preservation of the highway.

7. He shall provide therein for the erection of suitable guide boards.

8. He may provide for such other work as may be required to complete the construction or improvement in a proper manner.

9. He shall cause an estimate to be made of the cost of the construction of such highways or section thereof in accordance with such plans and specifications. In making such estimate he shall ascertain with all practical accuracy the quantity of embankment, excavation and masonry, the quantity of all materials to be used and all items of work to be placed under contract and specify the estimated cost thereof. (*Amended by L. 1911, ch. 646.*)

Source.—L. 1898, ch. 115, § 4, in part, as amended by L. 1907, ch. 717, rewritten so as to provide for construction of state highways. The part of subd. 9 relating to items of estimate is new.

References.—Acquisition of right of way where highway deviates from line of existing highway, Highway Law, §§ 148-155.

§ 126. Submission of maps, plans and specifications to district or county superintendent.—The commission shall cause the preliminary maps, plans and specifications for either a state or county highway, or a copy thereof, to be presented to the district or county superintendent of the district or county in which such highway or section thereof is situated, who shall personally examine the highway, or section thereof and the proposed maps, plans, and specifications, and shall recommend any modification thereof which in his judgment seems to be necessary and shall report thereon * with fifteen days to the commission. He shall also take such other action in respect thereto as may be required by law or by the commission. (*Amended by L. 1911, ch. 646.*)

Source.—New. The Report of the Joint Legislative Committee on Highways, 1908, states: "The object of this section is to secure the benefit of the knowledge and experience of the local officer. His acquaintance with local conditions makes his advice desirable, the ultimate object being to secure a specific plan adopted to the specified highway instead of a general plan."

Town and county officers, as a matter of law, have no voice in the fixing of the route of a state highway, the determination of the details of which is vested in the Highway Commission. Rept. of Atty. Genl. (1912), Vol. 2, p. 225.

§ 127. Action of commission in respect to maps, plans, specifications and estimates.—Upon receiving the report of the district or county superintendent, as provided in the preceding section, the commission shall finally

* So in original.

adopt the maps, plans, specifications and estimates which are to be used for the construction or improvement of the state or county highway to be constructed or improved. If such highway be a state highway the commission shall thereupon proceed to advertise and award contracts for the construction or improvement thereof as provided in section one hundred and thirty. If such highway be a county highway the commission shall transmit such plans, specifications and estimates as adopted by them to the board of supervisors of the county from which the resolution proceeded, together with their certificate approving the construction or improvement of the highway or section thereof designated in such resolution.

Source.—Provisions relating to state highways are new; those relating to county highways are the same in substance as in L. 1898, ch. 115, § 5, as amended by L. 1907, ch. 717.

§ 128. **Final resolution of board of supervisors.**—The board of supervisors, after the receipt of plans, specifications and estimate of a county highway or section thereof, and after such modification thereof as may be made by a majority vote of such board, with the consent of the commission, may approve such plans, specifications and estimate, and adopt a resolution requesting that such county highway or section thereof be constructed or improved under the provisions of this article, in accordance therewith. In the case of a county highway or a section thereof which divides two or more counties, such resolution must be separately adopted by the board of supervisors of each county within which a portion of such highway lies. The form of such resolution shall be prescribed by the commission and shall contain the matter required by this article to be inserted therein. Immediately upon the adoption of such resolution the clerk of the board of supervisors shall transmit a certified copy thereof to the commission. When a board of supervisors has once adopted a resolution providing for the construction or improvement of a highway or a section thereof in accordance with such plans and specifications, no resolution thereafter adopted by such board shall rescind or annul such prior resolution either directly or indirectly, excepting under the advice and with the consent of the commission. Notwithstanding the adoption of such a resolution, the commission may modify such plans, specifications and estimate, prior to the award of a contract therefor and, upon the approval thereof by the board of supervisors as above provided, such highway or section thereof shall be constructed or improved in accordance with such plans, specifications and estimate. (*Amended by L. 1909, ch. 240, § 45.*)

*See
Ch 316
Laws 18*

Source.—L. 1898, ch. 115, § 6, first three sentences, as amended by L. 1907, ch. 717, without change in substance. The last sentence in this section is new.

References.—Board of supervisors may call upon county or district superintendent for expert advice, Highway Law, § 33, subd. 8. Form of resolution of board of supervisors, County Law, § 17. Resolution to provide for raising money to pay share of cost to be borne by town and county, Highway Law, § 139.

Alteration of plans and specifications by state engineer.—Where the State Engineer, pursuant to chapter 115 of the Laws of 1898, as amended, prepared maps,

plans and specifications for the improvement of a highway around a mountain, and the board of supervisors of the county in which the road was situated, and which was to bear a large share of the expense, adopted a resolution that the road be constructed in accordance with such maps, plans and specifications, the State Engineer has no power thereafter, without the consent of the supervisors, to alter the plans so as to cause the road to go through the mountain by a tunnel over 1,200 feet long with no side openings and to substitute a rock fill for a steel bridge across a gully. The board of supervisors did not ratify the altered plans by adopting a resolution directing a committee to procure the necessary rights of way to enable the work to proceed, where it appears that at the time they did not know that the alterations had been made. *Dunning v. County of Orange* (1910), 139 App. Div. 249, 124 N. Y. Supp. 107, *affd.* (1912), 204 N. Y. 647, 97 N. E. 1104.

See *Sutherland v. Skene* (1911), 142 App. Div. 162, 126 N. Y. Supp. 901.

§ 129. **Order of construction of county highways.**—Upon the receipt of such resolution the commission shall proceed with the improvement or construction of such county highway as provided in this article. The construction and improvement of such county highways and sections thereof shall be taken up and carried forward within a county in the consecutive order as determined by the date of the receipt by the commission in each case of the certified copy of the final resolution, so far as is practicable in the opinion of the commission. No such highway shall be placed upon the list of highways to be constructed or improved nor receive a consecutive number on such list, unless such resolution shall appropriate and make immediately available for such construction or improvement the counties' share of the cost thereof. (*Amended by L. 1910, ch. 247, L. 1911, ch. 646 and L. 1912, ch. 83.*)

Source.—L. 1898, ch. 115, § 11, as amended by L. 1907, ch. 717, first two sentences without change, except that the order is to be determined in each case by the date of the receipt of a certified copy of the final resolution "so far as is practicable in the opinion of the commission."

§ 130. **Contracts for construction or improvement of highways.**—State and county highways shall be constructed or improved by contract. Upon the completion and final adoption or approval, as provided by law, of the plans, specifications and estimate for the construction or improvement of a state or county highway, contracts therefor shall be executed as provided herein.

1. **Advertising for proposals.**—The commission shall advertise for proposals for the construction or improvement of such highways or sections thereof according to the plans, specifications and estimate prepared therefor. The advertisement shall be limited to a brief description of the work proposed to be done, with an announcement stating where the maps, plans, specifications and estimate may be seen, the terms and conditions under which proposals will be received, the time and place where the same will be opened, and such other matters as the commission may deem advisable to include therein. Such advertisement shall be published at least once in each week for two successive weeks in a newspaper published at the

county seat of the county in which such highway or section thereof is to be constructed or improved, and in such other newspapers as the commission may designate. If no newspaper is published at such county seat, then the publication of the advertisement shall be in such newspaper or newspapers within the county as the commission may select. If no newspaper is published in the county, the publication of the advertisement shall be in such newspaper or newspapers in an adjoining county as may be selected by the commission. (*Subd. 1, amended by L. 1917, ch. 261, in effect Apr. 25, 1917.*)

2. **Proposals.**—Each proposal shall specify the gross sum for which the work will be performed and shall also include the amount to be charged for each item specified in the estimate. The commission may prescribe and furnish forms for the submission of such proposals and may prescribe the manner of submitting the same which shall not be inconsistent herewith. The proposals when opened shall be subject at all reasonable times to public inspection, and at the time of opening shall be publicly read, and conspicuously posted in such a manner as to indicate the several items of the proposal.

3. **Award of contracts.**—The contract for the construction or improvement of such highway or section thereof shall be awarded to the lowest responsible bidder, except that no contract shall be awarded at a greater sum than that required for the work alone as shown in the estimate made for the construction or improvement of such highway or section thereof in accordance with such plans and specifications. The lowest bid shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate therefor. (*Subd. 3, amended by L. 1917, ch. 261, in effect Apr. 25, 1917.*)

4. **Estimates may be amended.**—If no proposal otherwise acceptable is made within the estimate accompanying the plans and specifications, the commission may cause the estimate to be amended. If the highway to be constructed or improved is a county highway the commission shall certify the amended estimate to the board of supervisors and the board shall take action thereon as in a case where plans, specifications and estimates are originally submitted to a board of supervisors. Upon the amendment of such estimate, and its approval by the board of supervisors in case of a county highway, the commission may proceed anew to obtain proposals and award the contract as provided in this section.

5. **Rejection of proposals.**—The commission may reject any or all proposals and may advertise for new proposals as above provided, if, in their opinion, the best interests of the state will thereby be promoted.

6. **Form of contract.**—The commission shall prescribe the form of contract and may include therein such matters as they may deem advantageous to the state. Such forms shall be uniform so far as may be.

7. **Bond of contractor.**—Each contractor, before entering into a contract

for such construction or improvement, shall execute a bond in the form prescribed by the commission, with sufficient sureties, to be approved by the commission, conditioned that he will perform the work in accordance with the terms of the contract, and with the plans and specifications, and that he will commence and complete the work within the time prescribed in the contract. Such bond shall also provide against any direct or indirect damages that shall be suffered or claimed on account of such construction or improvement during the time thereof, and until the highway is accepted.

8. Payments on contract.—The contract may provide for partial payments to an amount not exceeding ninety per centum of the value of the work done, which shall be paid in the manner provided by this article when certified to by the commission. Ten per centum of the contract price shall be retained until the entire work has been completed and accepted.

9. Contingencies.—All contingencies arising during the prosecution of the work shall be provided for to the satisfaction of the commission and as may be agreed upon in the original or by a supplemental contract executed by the commission; the amount to be expended shall not exceed the original estimate, unless such estimate shall have been duly amended by the commission and, in the case of a county highway, submitted to the board of supervisors for its approval. If a supplemental contract be executed by the commission for the performance of work or furnishing of material not provided for in the original contract, the amount to be charged thereunder for any such work or material shall not exceed the rate for which similar work or material was agreed to be performed or furnished under the original bid upon which the contract was awarded. Such supplemental contract shall not be binding unless it be approved by the commission in case of a state highway and in case of a county highway, by the chairman of the board of supervisors and the district or county superintendent.

Source.—L. 1898, ch. 115, § 8, as amended by L. 1907, ch. 717. All of the provisions of the former law are retained. The advertisement is required to describe the work and specify where the plans and specifications may be seen and the time and place where the proposals will be opened. The present law provides that the contract shall not be awarded at a greater sum than the estimate, and nothing is contained therein in respect to the form and method of submitting proposals; so that all of subd. 2 is new in effect. The provision in subd. 3 describing what constitutes the lowest bid is new. Subd. 6 is also new. The part of subd. 9 requiring the supplemental contract to conform to the rates specified in the original bid and requiring the approval of such supplemental contract by the chairman of the board of supervisors and the district or county superintendent in case of a county highway is new.

References.—Subletting contracts, State Finance Law, § 43. Contracts not to exceed amount available by appropriation, Id. §§ 35, 38. Officers not to be interested in contracts, Penal Law, § 1868.

Approval of supplemental contracts.—Supplemental contracts relating to county highways made without submission to or approval by the board of supervisors are void even if they are within the original estimate. Rept. of Atty. Genl. (1909) 627.

The approval of a supplemental contract by the chairman of the board of supervisors is a ministerial act which cannot and ought not to nullify and abrogate the express will of the board, hence the failure to indorse the approval of the chairman upon a written contract does not invalidate the same. Rept. of Atty. Genl. (1909) 620.

A supplemental contract is not binding unless it is approved, in the case of a county highway by the chairman of the board of supervisors and the district or county superintendent; if it involves an increase in the cost beyond the original estimate it must be approved by the board of supervisors after the estimate has been duly amended. Rept. of Atty. Genl. (1909) 678.

Rejection of bids by the state engineer for construction or improvement of the highways. Rept. of Atty. Genl. (1908) 271.

Award of contracts; rejection of bids.—The Commissioner of Highways has authority to reject the lowest bids and award the contract to the next lowest bidder, or may reject all the bids and readvertise the work, and may adopt whichever course is deemed for the best interest of the State, but the course to be pursued in that respect is one of policy, the responsibility therefor resting upon the Highway Department. Atty. Genl. Opin. (1915), 6 State Dep. Rep. 413.

The mere announcement by the highway commission that a bid will be awarded to a certain person does not make a contract and said person cannot hold the state for damages on account thereof. Rept. of Atty. Genl. (1910) 721.

Power of the State Highway Commission to reject bids is discretionary with the commission, but should be exercised for the benefit of the state. Rept. of Atty. Genl. (1911) 286. See generally. Rept. of Atty. Genl. (1911) 442.

Where a contractor has defaulted in performing several contracts, his bid on another contract, although the lowest, may be rejected. Atty. Genl. Opin. (1915), 6 State Dep. Rep. 413.

Item and gross prices under contract.—Where the State Commission of Highways, representing the state, has entered into a contract with a person to repair the highways, such contract containing a gross sum smaller than the item price extended and added, and a substantial part of the contract work has been eliminated by the State, the relative prices (the relation that the extended and totaled item prices bear to the gross sum and that ratio applied to the unit item prices) should control the allowance for the work and materials eliminated. Rept. of Atty. Genl. (1911) 331.

Cancellation of uncompleted contracts.—The Highway Commission has the power to cancel an uncompleted contract for the improvement of a highway if the work is not being done in full accord with the terms of the contract and the specifications. Rept. of Atty. Genl. (1912), Vol. 2, p. 567.

Retention of ten per cent of contract price.—The provision of this subdivision that "ten per centum of the contract price shall be retained until the entire work has been completed and accepted" is mandatory, and a contractor cannot be paid any portion of such amount until his contract has been finally completed and the road accepted. Atty. Genl. Opin. (1915), 6 State Dep. Rep. 428.

The State Commissioner of Highways may pay over the balance of the money due upon a contract to the assignee thereof, unless conflicting claims are made to it, notwithstanding the fact that the contractor refuses to enter into or sign a special agreement covering the changes made in the contract. Atty. Genl. Opin. (1916), 6 State Dep. Rep. 491.

The bond of a contractor should not be released where work upon his contract has been suspended because of weather conditions, although ten per cent. of the contract price has been reserved by the state and the amount of unperformed work will not exceed the ten per cent. reserved. Rept. of Atty. Genl. (1909) 672.

Liability of contractor for damages.—See opinion of Atty. Genl. (1913) 24.

§ 131. Award of contracts to board of supervisors or town board.—A board of supervisors of a county, or a town board of a town, in which any portion of a state or county highway is situated, may present proposals and be awarded a contract for the construction or improvement of such highway, as provided in this article, for and on behalf of such county or town. If such contract be awarded to a board of supervisors or a town board such board shall, by resolution, designate some suitable person or persons to carry into effect, on behalf of the town, such contract, and transact all business in respect thereto as may be necessary. A member of the board of supervisors or town board at the time such contract was awarded or such designation was made, or a person who is a partner of, or a stockholder in the same corporation as that of such member, shall not be so designated. A member of the board of supervisors or town board at the time such designation was made, or a firm, corporation or association of which he is a member or has an interest, shall not be directly or indirectly interested in any such contract nor shall such member, or such firm, corporation or association furnish materials or perform labor or services, either directly or indirectly, under or in connection with the performance of any of the work required in accordance with such contract, nor shall such member, firm or corporation or association, be paid for materials furnished or services rendered in respect to such contract. The clerk of the board of supervisors or the town clerk shall transmit a certified copy of the resolution designating the person or persons to carry into effect such contract to the commission prior to the awarding of a contract to the board of supervisors or town board. The person or persons so designated shall, before the contract is executed, give an undertaking to the county or town, with sureties to be approved by the commission and the board of supervisors or town board, for an amount equal to the amount of the bid presented by the county or town. Such undertaking shall be conditioned on the faithful performance of their duties in respect to such contract and for the proper accounting, safe-keeping and lawful disbursement of all moneys that may come into their hands thereunder. Such undertaking shall be filed in the office of the county or town clerk and a copy thereof shall be transmitted to the commission. The person or persons so designated shall thereupon be competent to receive all moneys payable under such contract under the provisions of this article, and they shall account therefor to the county or town. The board of supervisors or town board, after such contract is awarded, shall designate, by resolution, a banking corporation or a trust company wherein the moneys received under such contract shall be deposited. Such bank or trust company shall, upon the request of the board of supervisors or town board, make a statement of the money so deposited. The commission shall, by rules and regulations, prescribe the manner in which the moneys received under such contract shall be expended and the forms of accounts to be kept by the person or persons designated as above provided; and where convict labor is used, as hereinafter provided, an

account shall be kept of the items incurred daily for maintenance of convicts and compensation of other laborers, if any. Reports may be required by the commission from time to time from such person or persons.

When a contract is entered into under the provisions of this section, the board undertaking thereby to construct or improve a highway or section thereof, may, by resolution, direct the person or persons designated for carrying out the contract to apply to the superintendent of state prisons for convict labor, in the construction of such highway or section thereof. The resolution shall specify the maximum number of convicts to be applied for, for such work. Such designated person or persons shall make request, in writing, to the superintendent of state prisons for convict labor, in conformity to the provisions of such resolution, such request to be accompanied with a copy of such resolution. A copy of such resolution and of such request shall also be filed with the commission. The superintendent may detail for labor, pursuant to such resolution and request, such number of convicts as may be available therefor, not exceeding the number applied for. Such convicts shall be in the immediate charge and custody of the officers and guards detailed by the superintendent of state prisons, and at all times subject to the control of such superintendent, except that the work to be done shall be directed by the engineers and foremen of the state highway department. The expense of maintenance of such convicts shall be paid by the county or town entering into such contract from funds due thereon, to such municipality. A county or town may purchase machinery and tools for the construction of a highway or section thereof, under any such contract, out of moneys to be paid thereon, within the estimates for such items contained in the proposals at the time of the letting of the contract, but such machinery and tools shall be the property of the state, and after the completion of the work shall be subject to disposal or to any lawful use by the commission. Moneys realized from selling or renting any such used machinery or tools shall be paid into the state treasury to the credit of the highway fund. Any such used machinery or tools may be loaned by the commission, if requested, for construction of a highway or section thereof, by a county or town, by contract under this section, to be kept in repair and operated at the expense of the county or town with moneys payable under the contract.

If a county or town shall construct a highway or section thereof, by contract as above provided, for a lesser sum than the contract price, as the same shall appear from the accounts and reports herein provided for, the county or town, as the case may be, shall be paid only the amount of the actual cost of such construction, paid or incurred, and the surplus shall remain in the state treasury and continue available for any state or county highway construction for which the same may have been or shall be appropriated. (*Amended by L. 1914, ch. 60.*)

Source.—Under the former law, L. 1898, ch. 115, § 8, as amended by L. 1907, ch. 717, "a board of supervisors of a county or a town board of a town in which any

portion of such highway lies may offer bids and be awarded such contracts for and on behalf of their respective counties and town." The above section is for the purpose of safeguarding the interests of state, county and town by providing a detailed method of executing a contract which is awarded to the county or town. It is sought to make some person designated either by the board of supervisors or town board directly responsible for carrying out the contract, which has been awarded. (Report of Joint Legislative Committee on Highways, 1908.)

§ 132. Responsibility of commissioner of highways for the performance of contracts for construction or improvement of state and county highways; suspension of work under contract; completion by commissioner of highways.—The performance of every contract for the construction or improvement of a state or county highway shall be under the supervision and control of the commissioner of highways, and it shall be his duty to see that every such contract is performed in accordance with the provisions of the contract and with the plans and specifications forming a part thereof. For such purpose, the commissioner of highways shall have the direction and control of the deputies, secretary, division engineers, officers, clerks and employees of the commission. If the commissioner of highways shall determine that the work upon any contract for the construction or improvement of a state or county highway is not being performed according to the contract or for the best interests of the state, he may suspend or stop the work under the contract while it is in progress, and the commissioner of highways shall thereupon complete the work in such manner as will accord with the contract specifications, and be for the best interests of the state, or he may cancel the contract and readvertise and relet as provided in section one hundred and thirty and any excess in the cost of completing the contract beyond the price for which it was originally awarded shall be charged to and paid by the contractor failing to perform the work. Every contract for the construction or improvement of a state or county highway shall reserve to the commission the right to suspend or cancel the contract as above provided, and to complete the work thereunder or readvertise and relet as the commission may determine. (*Amended by L. 1911, ch. 646, and L. 1913, ch. 517.*)

Source.—New. See Barge Canal Law, L. 1903, ch. 147, § 7.

Cancellation of contracts for road construction.—*It seems*, that the provision of this section empowering the State Commissioner of Highways to cancel a contract for road construction, or to stop the work, applies only where there has been a default or failure properly to perform on the part of the contractor. *Matter of Standard Bitulithic Co. v. Carlisle* (1914), 161 App. Div. 191, 146 N. Y. Supp. 386, *affd.* (1914), 212 N. Y. 179, 105 N. E. 967.

Reletting contracts; use of old plans and specifications.—Where the Highway Commission has cancelled State contracts for the construction of roads because the work was not being performed according to the contract, and the Commission proceeds thereafter to readvertise and relet, it is not necessary to prepare new plans and specifications. The original plans may be used, with new estimates attached of the quantities of work required to complete the road. *Rept. of Atty. Genl.* (1915) 10.

Effect of cancellation and discontinuance of contract for completion of highway.—

A cancellation and discontinuance of the contract for the completion of highway No. 976 could not affect a pending action brought by the State against a former contractor and his bondsmen for the failure of such former contractor to perform his contract. The Commissioner of Highways has authority to enter into a stipulation with a contractor to cancel and discontinue a contract made between the State and such contractor when sufficient funds are not available for the completion of such contract but a bond given by such contractor could not be released or withdrawn until the contract is fulfilled, canceled or otherwise terminated. Rept. of Atty. Genl. (1915) 17.

When a contract for the construction of a State highway has been cancelled by the State Commissioner of Highways because the work under the contract is not being performed for the best interests of the State, but the contractor is not at blame or in default, and where a formal order of cancellation has been entered by the Commissioner setting forth the reasons in detail, accompanied by a final account of the work done by the contractor, it will be sufficient authority for the Comptroller to pay the full amount earned by the contractor to the time of such cancellation of contract. Rept. of Atty. Genl. (1915) 179.

A writ of certiorari does not lie to review the action of the State Highway Commissioner canceling a contract for the construction of a State road upon the ground that, under the plans and specifications, the highway would be improperly constructed to the irreparable damage of the State. *It seems*, however, that if the State Commissioner of Highways stops work upon a contract without cause the State is responsible for the damage to the contractor, and he has his remedy by action before the Board of Claims. Matter of Standard Bitulithic Co. v. Carlisle (1914), 161 App. Div. 191, 146 N. Y. Supp. 386, *affd.* (1914), 212 N. Y. 179, 105 N. E. 967.

Change of method of construction.—Under this section the Highway Commissioner is given authority to determine the method of construction of the highways. It would seem as a necessary incident to that power, in case it should be found that a method determined upon proved inadequate, that the Highway Commissioner should have authority to change the method of construction if necessary by the annulment of a contract made. Matter of Standard Bitulithic Co. v. Carlisle (1914), 161 App. Div. 191, 195, 146 N. Y. Supp. 386, *affd.* (1914), 212 N. Y. 179, 105 N. E. 967.

Liability of State Highway Commission to pay amounts due to the assignee of some of the funds accruing upon a contract made between the State and a bankrupt contractor.—In the absence of fraud or preferential transfer an assignment by a contractor under a contract to build a certain piece of highway, of a certain portion of the moneys accruing upon such contract made more than four months before the filing of a petition in bankruptcy by such contractor, should be respected and followed by the State Highway Commission in making payments upon such contract of all sums that matured upon such contract prior to the filing of a petition in bankruptcy by the contractor and are payable under the terms of the assignment. Rept. of Atty. Genl. (1915) 139.

Liability of contractor for excess cost.—The highway commission may readvertise and complete roads and claim the excess cost from the contractor, even though the cost of completion exceeds the amount appropriated. Rept. of Atty. Genl. (1909) 676.

§ 133. **Acceptance of state highway when completed.**—Upon the completion of a state highway or section thereof constructed or improved under a contract let as provided in this article, the division engineer shall inspect the same and if it be completed as provided in the contract, he shall there-

upon so report to the commission, which shall, if it approve, notify the county or district superintendent of the county in which the road is located, in writing, that it will accept the work within twenty days from the date of such notice, unless protest in writing be filed by such county or district superintendent. In case a protest is filed the commission shall hear the same and if it is sustained then it shall delay the acceptance of the highway or section thereof until the same is properly completed. In case no protest is filed the highway or section thereof shall at the expiration of said twenty days be deemed finally completed and accepted and shall thereafter be maintained as provided in this chapter. (*Amended by L. 1911, ch. 646 and L. 1915, ch. 548.*)

Source.—New.

Reference.—Division engineer to examine and inspect state highway before acceptance, Highway Law, § 17, subd. 3.

Payment of final estimate to contractor should be made when the contract is fully performed and the work accepted, without waiting for the expiration of the time in which to file lien under § 12 of the Lien Law. Rept. of Atty. Genl. (1911) 246.

Where liens are filed against contractors between the time of issuance of requisition upon the state comptroller for final estimate but before the delivery of the state treasurer's check to the contractor, such check should be held until the liens are discharged. Rept. of Atty. Genl. (1911) 267.

If a County or District Superintendent refuses or neglects to join in a report with the Division Engineer after the completion of a State highway, and the county representatives have been given an opportunity to be heard, and not showing any reason why the road should not be accepted, the State Commissioner of Highways may attach to the final estimate a certified copy of the order endorsed by him stating that such Commissioner has found that the road has been completed and accepted, and upon such papers the Comptroller will be justified in paying the final estimate. Rept. of Atty. Genl. (1915) 179.

§ 134. Acceptance of county highway.—Upon the completion of a county highway or section thereof, constructed or improved under a contract let as provided in this article, the division engineer shall inspect the same and if it be completed as provided in the contract he shall thereupon so report to the commission, which shall, if it approve, notify, in writing, the county or district superintendent and the board of supervisors of the county in which such highway or section thereof is located that it will accept the highway within twenty days from the date of such notice unless protest in writing be filed with the commission by such district or county superintendent or by the board of supervisors. In case a protest is filed, the commission shall hear the same, and if it is sustained, the commission shall delay the acceptance of the highway or section thereof until it be properly completed. In case no protest is filed, the highway or section thereof shall at the expiration of the said twenty days be deemed finally completed and accepted on behalf of the county and the state, and shall thereafter be maintained as provided in this chapter. (*Amended by L. 1911, ch. 646, and L. 1916, ch. 460.*)

Source.—L. 1898, ch. 115, § 12, as amended by L. 1907, ch. 717, first two sentences

without change, except that the district or county superintendent is also to be notified of the intention to accept the completed highway.

Reference.—Inspection of county highway during construction and before acceptance by district or county superintendent, Highway Law, § 33, subd. 9.

Construction of section. People ex rel. Carlisle v. Supervisors of Onondaga (1916), 217 N. Y. 424, 111 N. E. 1057, affg. (1914), 164 App. Div. 922, 149 N. Y. Supp. 1103. The intent of this section seems to be to fix the point of time when it becomes the duty of the public officials physically to maintain and repair and to expend public moneys for that purpose. Matter of Carlisle v. Supervisors of Onondaga (1914), 84 Misc. 511, 146 N. Y. Supp. 665.

Effect of waiver of 20-day period.—A resolution of the board of supervisors waiving the twenty-day period prescribed by this section after receiving notice of the completion of the work on a county highway, is not alone sufficient to warrant the immediate acceptance of the work and payment of the contract price by the State Highway Commission. Rept. of Atty. Genl. (1911), Vol. 2, p. 701.

Liability for injuries occurring on a road being improved or graded by the state.—Under the statute a highway constructed or improved by the state shall not be turned over to the supervision of the local authorities until after the Commission has accepted the same and notified the board of supervisors that its duties in regard thereto have been finished, and, consequently, a town and its highway commissioners do not resume their jurisdiction or reassume their liability as to a highway and approaches which were being built or graded by the state until after acceptance thereof by the state. Farrell v. Town of North Salem (1912), 205 N. Y. 453, 98 N. E. 760.

Acceptance of a highway may be revoked by the state commissioner of highways at any time before the final account is paid, where such acceptance was procured through fraud, mistake, concealment or misrepresentations. Atty. Genl. Opin (1915), 4 State Dep. Rep. 547. But where the work has been done according to contract and payment made, and no fraud exists, the commissioner cannot revoke or rescind the acceptance of a highway. Atty. Genl. Opin. (1915), 5 State Dep. Rep. 451.

Mandamus may issue to compel the board of supervisors pursuant to section 172 to provide funds for the maintenance and repair of county highways. Matter of Carlisle v. Supervisors of Onondaga (1914), 84 Misc. 511, 146 N. Y. Supp. 665.

§ 135. Entry upon adjacent lands for drainage purposes.—Lands adjacent to a state or county highway may be entered upon and occupied for the purpose of opening or constructing a drain or ditch so as to properly drain such highway:

1. By a contractor, or any of his agents or employees, when directed by the commission, during the construction or improvement of such highway.

2. By the commission or its duly authorized officers, agents or employees, at any time, for the purpose of making surveys for such drain or ditch.

3. By the commission, or its duly authorized officers, agents or employees, or by a county, district or town superintendent, when directed by the commission, after the completion and acceptance of the highway for the purpose of opening, constructing or maintaining ditches or drains upon such lands, necessary for the proper maintenance of such highway.

Source.—This section is intended as a substitute for that part of §§ 4 and Vol. III—51

§§ 136, 137.

State and county highways.

L. 1909, ch. 30.

13 of L. 1898, ch. 115, as amended by L. 1907, ch. 717, which authorizes an entry upon adjacent lands for the purpose of constructing and maintaining drains. Under the former law it was made the duty of the highway commission to enter upon adjacent lands and open existing ditches for the purpose of draining a county highway. It is here proposed to permit either the commission, its duly authorized employees, or a county, district or town superintendent to provide for drainage after the completion of a highway.

Reference.—Entry upon adjacent lands by town superintendent of highways, Highway Law, § 57.

Condemnation proceedings.—Although the Highway Commission has the power to go upon lands adjacent to state highways in order to construct drains or ditches before instituting condemnation proceedings, it would be better practice in view of the fact that the statute is not entirely clear to start condemnation proceedings first in case a reasonable agreement cannot be made with the owner of the land. Rept. of Atty. Genl. (1909) 609.

§ 136. **Damages for entry.**—The commission may agree with the owner of lands entered upon and occupied as provided in the preceding section for the payment of damages caused by such entry, or if unable to so agree the right to enter and occupy such lands may be acquired and the damages therefor shall be ascertained as provided in the condemnation law. Such damages shall, in the case of a state highway, be paid out of moneys available for the construction or improvement of such highway, and in the case of a county highway shall be a county charge and paid in the same manner as other county charges.

Source.—Under L. 1898, ch. 115, §§ 4 and 13, as amended by L. 1907, ch. 717, all damages agreed upon or awarded in case of an entry upon adjacent lands for the digging of a ditch during the construction were made a charge upon the fund available for the work. In case of an entry upon adjacent lands and ditching after the highway is completed the damages were made, under § 14, a town charge. It is here proposed to make the damages in every case a county charge where the highway is a county highway and a state charge where it is a state highway.

References.—Condemnation proceedings generally, Code Civil Procedure, §§ 3357-3397.

§ 137. **State and county highways in villages.**—A state or county highway may be constructed through a village, unless the street through which it runs has, in the opinion of the commission, been so improved or paved as to form a continuous and improved highway of sufficient permanence as not to warrant its reconstruction, in which case such highway shall be constructed or improved to the place where such paved or improved street begins. A state or county highway within a village shall be of the same width and type of construction as the highway outside of the village which connects with the highway within the village, unless a greater width or different type of construction is desired by the municipality, in which case the board of trustees of such village shall by resolution petition the commission to provide the width and type of construction desired. The additional expense caused by the increased width or different type of construction or both shall be borne wholly by the village. The commission shall, in its discretion, upon receipt of such petition, if filed prior to the adver-

tisement for bids, provide for the width and type of construction described in such petition. Whenever the commission shall have approved such a village petition the plans, specifications and estimates of cost, together with an estimate showing the additional cost to be borne by the village, to provide for the greater width or different type of construction or both, shall be submitted to the board of trustees who, if it approve such plans, specifications and estimate of cost, shall by resolution appropriate the funds necessary to provide for the portion of the cost of construction to be borne by the village. Such fund shall, prior to the award of the contract, be deposited by the village with the state comptroller subject to the draft or requisition of the state commission of highways, and a certified copy of the resolution shall be filed with the commission. The moneys so required shall be raised by tax or from the issue and sale of bonds as provided in the village law. Upon the completion of a highway within a village where a portion of the cost is borne by the village the commission shall transmit to the board of trustees a statement showing the actual cost of the additional width or changed construction including a proportionate charge for engineering, and shall notify the village clerk that it will accept the work within twenty days from the date of such notice, unless protest in writing against the acceptance shall be filed by such clerk with the commission. In case a protest is filed the commission shall hear the same and if it is sustained the commission shall delay the acceptance of the highway or section thereof until the same be properly completed. If no protest is filed the highway or section thereof shall at the expiration of the said twenty days be deemed finally completed and accepted on behalf of the village and the state, and shall thereafter be maintained in the manner provided in this chapter for the maintenance and repair of state and county highways. The provisions of the village law, special village charters and other general or special laws relative to the pavement or improvement of streets and the assessment and payment of the cost thereof shall apply, as far as may be, to such additional construction and the assessment and payment of the cost thereof, except that the provisions of any general or local act affecting the pavement or improvement of streets or avenues in any village and requiring the owners, or any of the owners, of the frontage on a street to consent to the improvement or pavement thereof, or requiring a hearing to be given to the persons who, or whose premises, are subject to assessment, upon the question of doing such paving or making such improvement shall not apply to the portion of the improvement or pavement of a state or county highway the expense for which is required to be paid by the village to the state.

The provisions of this act shall not prevent the improvement by state aid under the statute as it existed prior to the passage of this act, of streets in cities of the second and third class, where, prior to the passage of this act, highway numbers had been assigned as provided by article six of this act; nor shall the provisions of this act prevent the improvement in such

cities of streets heretofore petitioned for and approved, in cases where the proposed improvement of each street does not exceed one and one-half miles in length; but the total mileage of all such streets not exceeding one and one-half miles in length, shall not in the aggregate exceed four miles.

Wherever plans for such improvement in a city of the second class have been approved and a highway number assigned, and the work is ready for contract as hereinbefore described and the common council of such city has appropriated and made available the city's share of the cost of such improvement, the city treasurer of such city is hereby authorized and empowered to borrow a sufficient amount in anticipation of the collection thereof, and to pledge the faith and credit of the city for the payment of such amount when due, with interest, and is further authorized, empowered and directed to deposit such moneys with the state comptroller in the same manner as is provided by this section with regard to the improvement of village streets. (*Amended by L. 1910, ch. 233, L. 1911, ch. 88, L. 1912, ch. 88, L. 1913, chs. 131, 319, and L. 1916, ch. 571.*)

Source.—New.

Application of section.—Rept. of Atty. Genl. (1909) 639.

Jurisdiction of commission.—Where a state or county highway is to be improved through a city of the second or third class or a village and the village or city desires that it be made at a greater width than provided for in the plans and specifications, or that the plans and specifications be modified so as to increase the cost, and the proper city or village authorities petition the Commission for such change, the Highway Commission must make such change as to increased width, but as to form of construction only when such changed form would be proper construction for the locality, the increased cost to be paid wholly by the city or village. Opinion of Atty. Genl. (1913) 192.

Widening of highways through villages.—Rept. of Atty. Genl. (1910) 719.

Where the width of a state highway is increased within a village by petition of the village board, the increased expense must be borne by the village and cannot be shared by the town within whose boundaries the village lies. Rept. of Atty. Genl. (1912), Vol. 2, p. 287.

A highway through a village may be changed or improved by the Highway Commission at an increased expense to be borne by the village. Rept. of Atty. Genl. (1909) 648.

Liability of incorporated village for proportionate share of cost of state road.—Town of Queensbury v. City of Glens Falls (1911), 143 App. Div. 847, 128 N. Y. Supp. 833, *affd.* (1912), 206 N. Y. 712, 99 N. E. 1118.

Section cited. People ex rel. City of Olean v. Western New York and Pennsylvania Traction Co. (1915), 214 N. Y. 526, 108 N. E. 847, *revd.* (1914), 165 App. Div. 947, 150 N. Y. Supp. 1104.

§ 138. Connecting highways in villages.—The board of trustees of a village may, by resolution, petition the commission for the construction or improvement of a highway to connect streets or highways within the village which have been paved or improved with county highways which have been heretofore built under the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof. If in the judgment of the commission public convenience requires the construction or improvement of such connecting high-

way, the commission shall cause plans, specifications and estimates to be prepared, and shall cause the same to be transmitted to the board of supervisors of the county wherein such highway is situated. The board of supervisors shall thereupon adopt a resolution providing for such construction or improvement as provided in this article. The payment of the cost of such construction or improvement shall be provided for in such resolution and such payment shall be made in the same manner as provided for other county highways. A certified copy of such resolution shall be filed in the office of the commission. The construction or improvement of such connecting highway shall then be taken up in the order and manner provided in this article for the construction or improvement of county highways. If it is desired to construct or improve any portion of such a connecting highway at a width greater than that provided for in the plans and specifications therefor, or if a modification of such plans and specifications is desired by which the cost thereof will be increased, the board of trustees of the village shall proceed as in the preceding section to secure such a modification of the plans and specifications as will provide for such desired construction. The provisions of the preceding section shall apply in like manner to the connecting highway to be constructed or improved as provided in this section.

The provisions of this act shall not prevent the improvement by state aid under the statute as it existed prior to the passage of this act, of streets in cities of the second and third class, where, prior to the passage of this act, highway numbers had been assigned as provided by article six of this act; nor shall the provisions of this act prevent the improvement in such cities of streets heretofore petitioned for and approved in cases where the proposed improvement of each street does not exceed one and one-half miles in length; but the total mileage of all such streets not exceeding one and one-half miles in length shall not in the aggregate exceed four miles.

Wherever plans for such improvement in a city of the second class have been approved and a highway number assigned, and the work is ready for contract as hereinbefore described and the common council of such city has appropriated and made available the city's share of the cost of such improvement, the city treasurer of such city is hereby authorized and empowered to borrow a sufficient amount in anticipation of the collection thereof, and to pledge the faith and credit of the city for the payment of such amount when due, with interest, and is further authorized, empowered and directed to deposit such moneys with the state comptroller in the same manner as is provided by this section with regard to the improvement of village streets. (*Amended by L. 1911, ch. 88, L. 1912, ch. 88, and L. 1916, ch. 570.*)

Source.—L. 1898, ch. 115, § 15, as renumbered and amended by L. 1907, ch. 717, modified so as to apply only to highways connecting improved streets with county highways outside of the village.

§ 138-a. State and county highways of additional width and increased

cost at expense of town.—Whenever the commission shall have determined upon the construction or improvement of a state or county highway or section thereof and it is desired by any town in which such proposed highway is situated to construct or improve the same at a greater width or in a manner involving greater cost, or both, than that provided in the plans and specifications as prepared by the commission, the town board may petition the commission for an estimate of the additional cost of constructing or improving the same to a width or in a manner, or both, as desired by such board. The commission shall as soon as practicable make an estimate of such additional cost and transmit the same to the town board, and the town board may thereupon by resolution petition the commission to provide the width and type of construction desired. The additional expense caused by the increased width or different type of construction, or both, shall be borne wholly by the town. The commission shall, in its discretion, upon receipt of such resolution, if filed prior to the advertisement for bids, provide for the width and type of construction described in such resolution. Whenever the commission shall have approved such a resolution the plans, specifications and estimate of cost shall be submitted to the town board, who, if it approve such plans, specifications and estimate of cost shall, by resolution, duly adopted by a vote of a majority of all the members of such board, appropriate the funds necessary to provide for the portion of the cost of construction to be borne by the town. Such funds shall, prior to the award of the contract, be deposited by the town with the state comptroller, subject to the draft or requisition of the state commission of highways, and a certified copy of the resolution shall be filed with the commission. If the town board adopts a proposition to raise such funds by the issue and sale of town bonds the bonds may be issued and sold in the manner prescribed in section one hundred and forty-two of this chapter. Upon the completion of the highway within a town where a portion of the cost is borne by the town the commission shall transmit to the town board a statement showing the actual cost of the additional width or changed construction including a proportionate charge for engineering and shall notify the town clerk that it will accept the work within twenty days from the date of such notice unless protest in writing against the acceptance shall be filed by such clerk with the commission. In case a protest is filed the commission shall hear the same and if it is sustained the commission shall delay the acceptance of the highway or section thereof until the same be properly completed. If no protest is filed the highway or section thereof shall at the expiration of the said twenty days be deemed finally completed and accepted on behalf of the town and the state and shall thereafter be maintained in the manner provided in this chapter for maintenance and repair of state and county highways. (*Added by L. 1911, ch. 375, and amended by L. 1916, ch. 461.*)

Source.—New.

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§ 139. **Resolution to provide for raising money.**—The resolution of the board of supervisors providing for the construction or improvement of a county highway or section thereof shall appropriate and make immediately available to the requisition of the commission an amount sufficient to pay the share of the cost of such construction or improvement which is to be borne by the county within which such highway or section thereof is located. (*Amended by L. 1910, ch. 247, and L. 1912, ch. 83.*)

Source.—L. 1898, ch. 115, § 10, in part, as amended by L. 1907, ch. 117, without change in substance.

Apportionment against town need not be made until after a contract is let, or it is definitely known what the cost of the work will be. *Matter of Business Men's Association*, 54 Misc. 11, 103 N. Y. Supp. 847 (1907).

§ 140. **Modifying method of payment.**—If a resolution has been heretofore adopted by a board of supervisors requesting the state to pay the entire cost of the construction or improvement of a county highway in the first instance and that the state charge the county and town or towns annually with their share of the interest and sinking fund, as provided in chapter four hundred and sixty-nine of the laws of nineteen hundred and six, and the acts amendatory thereof, such board of supervisors may adopt a resolution rescinding such prior resolution and appropriating and making immediately available an amount sufficient to pay the share of the cost of the construction or improvement of such highway. The clerk of the board of supervisors shall transmit certified copies of such resolution to the commission and the state comptroller. If such prior resolution shall not be so rescinded it shall have the same force and effect which it had prior to the amendment of this section. The adoption of a resolution modifying the method of payment of the share of the county and town or towns shall not affect or change the date of the filing of the original resolution providing for the construction or improvement of such highway nor alter in any way the order of construction determined by the date of the filing of the original resolution.

Wherever a board of supervisors has in the past by resolution requested, and the state has paid, the entire cost of the construction or improvement of a county highway, the board of supervisors of a county wherein any such highway is located may, by resolution, provide for the payment of such share of the cost so advanced by the state towards the construction of such county highway, and said board of supervisors is hereby authorized to appropriate and make immediately available an amount sufficient to pay to the state the share due to the state on account of the construction and improvement of such highways. If any board of supervisors shall pass such resolution providing for the payment to the state of the moneys so advanced the said board of supervisors shall have the power and authority to borrow the moneys necessary to make such payment, and in case there is due to the county any sum of money from the town in which said county highway is located, the said town is also authorized to borrow and

appropriate its share of the cost of such county highway to the county treasurer of the county in which said highway is located.

All moneys paid to the state pursuant to the provisions of this section, shall be deposited by the comptroller with the state treasurer to the credit of the highway improvement fund, from which fund the said moneys so advanced to said counties were originally taken, and may be used by the state commission of highways in the construction of state and county highways in any county or counties designated by the state commission of highways. (*Amended by L. 1910, ch. 247, and L. 1915, ch. 400.*)

Source.—L. 1898, ch. 115, § 6, as amended by L. 1907, ch. 717, rewritten but without change in substance, except that the resolution modifying the method of payment of the share of the county and town must be transmitted to the commission prior to the advertisement for bids for the work rather than prior to the letting of the contract as provided under the former law

§ 141. Division of cost of county highways; payments by county treasurer.—Whenever the construction or improvement of a county highway or section thereof under a contract shall be completed and the final payment therefor shall have been made the commission shall prepare a statement of the cost of such construction or improvement, including engineering expenses, inspection and all charges and expenses properly chargeable thereto, showing in detail the date of each payment, and the purpose and amount of such payment. Such payments shall be grouped as far as practicable by dates and the total thus obtained shall be deemed the cost of such construction or improvement, and a certified copy of said statement shall be filed by the commission in the office of the comptroller. If a county highway or section thereof so constructed or improved shall be situate in two or more counties, the commission shall apportion such expense to such counties according to the cost of such construction or improvement in each of such counties. Such statement when audited and approved by the comptroller shall be filed in his office and shall be final, and a duplicate thereof shall be filed with the county treasurer of each county wherein the highway or section thereof has been improved. If the board of supervisors of any county shall have heretofore provided funds to pay two per centum of the cost of such county highway as thus determined, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said county for each mile of public highway within such county to be ascertained and determined by dividing the total assessed valuation of taxable property in said county as equalized for state purposes by the total mileage of highways in said county, exclusive of the streets and highways within any incorporated city or village in said county, but not exceeding thirty-five per centum of the cost for the county as shown by such statement, it shall be the duty of the county treasurer to pay the amount thereof upon the requisition of the commission and thereafter the county shall be deemed to be fully discharged of its obligation to the state on account of the construction or improvement

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of such county highway, except the obligation to pay their proportionate amount of the state tax for the state's share of the cost of construction. At least ten days' notice shall be given by the commission to the county treasurer prior to the making of such a requisition. A copy of each contract providing for the construction or improvement of a county highway, and the plans and specifications therefor, together with copies of certificates showing the progress of the work, upon which requisitions are drawn, shall be filed with the county treasurer. The mileage of highways to be used in determining the amounts to be charged to a county under this section shall be the tables of mileage formerly prepared by the state engineer until the tables as provided in this chapter are filed. (*Amended by L. 1912, ch. 83.*)

Source.—L. 1906, ch. 469, § 4, as amended by L. 1907, ch. 718, which was intended as a substitute for L. 1898, ch. 115, § 9, as amended by L. 1907, ch. 716. The part of such section is included which determines the amount to be paid by the county when a resolution has been adopted providing for the construction or improvement of a county highway and making immediately available county funds for the purpose of paying the portion of the cost to be borne by the county and town. The provisions for notice before requisition, the filing of contracts and copies of certificates upon which requisitions are drawn, are new.

Completion of highways approved prior to amendment of 1912.—The State Department of Highways should prosecute and complete the construction and improvement of county highways, plans for which had been approved and appropriations for which had been made prior to April 2, 1912, in accordance with the provisions contained in section 141 of the Highway Law as it existed previous to its amendment by chapter 83 of the Laws of 1912. Rept. of Atty. Genl. (1912), Vol. 2, p. 234. The town in which a grade crossing is eliminated upon the county highway which was constructed prior to the amendment of this section by L. 1912, ch. 83, is still liable for fifteen per cent of the expenses of such elimination, but towns are not liable for any portion of the expenses of elimination of grade crossings upon such county highways as have been constructed since said amendment. Opinion of Attorney General (1916), 10 State Dept. Rep. 471.

§ 141-a. Alternative method of apportioning the expense of county highways.—The board of supervisors of any county may in its discretion provide by resolution that fifty per centum of the cost of construction or improvement of any county highway within the county shall be borne by the county. The portion of the cost to be borne by the county shall be appropriated and made immediately available to the requisition or draft of the state commission of highways at the time of the final resolution by the board of supervisors approving the plans and estimate of cost submitted by the state commissioner of highways as provided by section one hundred and twenty-eight of this act. If, in any county, a town shall have heretofore paid or become liable to pay fifteen per centum or less of the cost of construction or improvement of any such county highway pursuant to the former provisions of this section, the amount so paid or to be paid may be repaid by the county to such town, and a tax may be levied by the board of supervisors on the taxable property in the county at large sufficient

to provide moneys for such repayment so far as other county moneys are not available therefor.

In the case of a county highway where the plans have heretofore been approved by the board of supervisors of a county, and the distribution of cost for such highway has been made as provided by section one hundred and forty-one of this act, and the county has heretofore appropriated and made available its share of the cost of the construction or improvement of such highway based upon an apportionment other than that provided by this section, but the final payment has not been made by the county, the board of supervisors may in accordance with the provisions of section one hundred and twenty-eight of this act rescind the resolution previously adopted appropriating its share of the cost, and in such case, shall adopt a resolution appropriating such an amount as will equal fifty per centum of the total estimated cost of such highway as shown in an estimate to be provided by the state commissioner of highways, making such amount so appropriated immediately available to the draft or requisition of the commission for the construction or improvement of such highway.

If there be not sufficient funds in the county treasury to pay the share of the county, the county treasurer is hereby authorized and empowered to borrow, in anticipation of taxes to be collected therefor or of the issuance of bonds as hereby provided, such an amount as may be necessary, and is hereby authorized to pledge the faith and credit of the county for the payment, with interest, of the moneys so borrowed.

The board of supervisors of the county may by resolution authorize the issuance of county highway bonds, in amounts to be determined by such board, the proceeds of which shall be applied to the payment of the share of the cost of construction or improvement of such highway to be borne by the county as hereinbefore provided. Such bonds shall be payable not more than thirty years from their date.

The board of supervisors shall provide for the assessment, levy and collection by tax of the moneys required to meet the obligation of the county for its share of the cost of such improved highway; and the moneys so raised shall be paid into the county treasury and shall become available for the draft or requisition of the state commission of highways, or for the payment of moneys borrowed by the county treasurer as hereinbefore provided together with interest thereon, or for the payment of bonds and the interest thereon issued as hereinbefore provided, or any part thereof. (*Added by L. 1916, ch. 179, and amended by L. 1917, ch. 550, in effect May 18, 1917.*)

Source.—New.

§ 142. County or town may borrow money.—Whenever the board of supervisors shall have, by resolution, appropriated and made immediately available to the requisition of the commission an amount sufficient to pay its share of the cost of such construction or improvement which is to be borne by the county within which such highway or section thereof is located,

such amount so appropriated shall be a county charge and shall be paid by the county treasurer of the county in which such highway or section thereof is located, upon the requisition of the commission. If there is not sufficient funds in the county treasury to pay such share of the county of the cost of construction of such improvement so appropriated and made available, the county treasurer is authorized to borrow a sufficient amount to pay such share in anticipation of taxes to be collected therefor, or the issuance of bonds as hereinafter provided, and to pledge the faith and credit of the county for the payment of the amount when due, with interest. The board of supervisors may, by resolution, authorize the issuance and sale of bonds of the county to an amount not exceeding the share of the county as apportioned by the commission, or if such apportionment has not been made, to an amount not exceeding thirty-five per centum of the estimated cost of the construction or improvement of such county highway as shown by the estimate approved by the board of supervisors pursuant to section one hundred and twenty-eight of this chapter, and apply the proceeds of such bonds to the payment of the share of the cost of construction of such highway to be borne by the county, appropriated and made immediately available as aforesaid or to the payment and redemption of any certificates of indebtedness issued as above provided. Said bonds shall be payable not more than thirty years from their date. The board of supervisors shall provide for the assessment, levy and collection by tax of all or any part of the share of the cost of such improvement apportioned to the county which has not been provided for by the issuance of county bonds as a county charge. Upon the petition of the town board of any town, the board of supervisors of the county may, by resolution, authorize the town to borrow a sufficient sum to pay the share of the cost of the construction or improvement of a county highway, which is to be borne by the town as apportioned by the commission and to issue and sell town bonds therefor. Such bonds shall be payable not more than thirty years from their date, to be sold by the supervisor for not less than par, and the proceeds thereof shall be paid into the county treasury to be applied in payment of the share of such cost which is to be borne by such town and the redemption of any bonds or certificates of indebtedness issued by the county to pay such share. The board of supervisors shall, from time to time, impose upon the taxable property of the town a tax sufficient to pay the principal and interest of such bonds as the same shall become due. The board of supervisors shall provide for the assessment, levy and collection by tax of all or any part of the share or shares of the town or towns which has not been provided for by the issuance of town bonds as a town charge. (*Amended by L. 1909, ch. 486, L. 1910, ch. 580, L. 1912, ch. 83, and L. 1913, chs. 538 and 623.*)

Source.—L. 1898, ch. 115, § 10, last two sentences, as amended by L. 1907, ch. 717, without change. The second paragraph is new.

References.—Issue of town bonds when authorized by board of supervisors, Highway Law, §§ 97, 98.

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Issuance of bonds for highway purposes.—Although there is a plain authority in this section for a county treasurer to borrow temporarily in anticipation of taxes and to pledge the faith and credit of the county for the payment of the amount, the right of the board to issue bonds for such highway purposes is extremely doubtful and the action of the board of supervisors in issuing bonds under the County Law for highway purposes would be invalid. Rept. of Atty. Genl. (1909) 890.

A county treasurer may, without authority from the board of supervisors, borrow money to meet drafts drawn upon him by the State Commission of Highways for the county's portion of the cost of a county highway. Opinion of Comptroller (1916), 8 State Dept. Rep. 580.

§ 142-a. **Street surface railroad on highway.**—Where a street surface railroad shall be laid in any street, highway or public place in any town, village, or in any city of the second or third classes, which it was heretofore or shall hereafter be determined to pave, improve, reconstruct or repair, as provided in this chapter, the proposals and contract for such improvement, reconstruction or repair shall include the improvement, reconstruction or repair of the space between the tracks of such street surface railroad, the rails of such tracks and two feet in width outside of such tracks, and the work of improvement, reconstruction or repair in such space shall be done at the same time and under the same supervision as the work of improvement, reconstruction or repair of the remainder of such street, highway or public place. The commission may prescribe the materials to be used in paving, improving, reconstructing or repairing such street, highway or public place within the railroad space above described, and upon the proper completion of the work, the commission shall certify to the board of trustees of such village, or the common council of cities of the second or third classes, as the case may be, the cost of the pavement, improvement, reconstruction or repair of such street, highway or public place within such railroad space, and the entire expense of the pavement, reconstruction or repair within such railroad space whether heretofore or hereafter made or ordered, shall be assessed and levied upon the property of the company owning or operating such railroad, and shall be collected in the same manner as other expenses for local improvements are assessed, levied and collected in such town, village or city; and an action may also be maintained by the municipality against the company in any court of record for the collection of such expense and assessment. This section shall not apply to such pavement, reconstruction or repairs in villages in counties adjoining cities of the first class. (*Added by L. 1913, ch. 177, and amended by L. 1916, ch. 578.*)

Source.—New.

§ 143. **Apportionment and payment of expense of constructing county highway through or into cities of the second and third classes.**—If a county highway be constructed, under the provisions of this chapter, through or within a city of the second or third class, the board of supervisors of the county in which the city is situated shall, by resolution, apportion the cost thereof between the county and city as follows: Fifteen per centum

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of the portion of such highway within a city shall be borne by the city and thirty-five per centum thereof by the county. The share to be borne by the county shall be paid or provided for in the manner required by this chapter in the case of an apportionment of such cost between the county and a town. The share to be borne by the city shall be paid by the imposition of a tax therein for the full amount thereof or, in case of a city of the second class, if the common council and the board of estimate and apportionment shall so determine, then by the issuance and sale of city bonds as provided in the second class cities law, and in the case of a city of the third class, if the common council or board of aldermen thereof so determine, then by the issuance and sale of city bonds, to be payable in not more than thirty years from their date, bearing interest at not to exceed the legal rate, and to be sold for not less than par; or, such common council or board of aldermen may cause a portion of the city's share to be raised by tax at the time of the next ensuing annual city tax levy and the balance to be raised by the issuance and sale of bonds as herein above provided. (*Added by L. 1912, ch. 88; former § 143, repealed by L. 1910, ch. 247.*)

Source.—L. 1898, ch. 115, § 6, in part, as amended by L. 1907, ch. 717.

Apportionment by board of supervisors.—The board of supervisors of a county shall, by resolution, apportion the cost between the city and county of a county highway constructed through or within a city of the second or third class situate in such county. Rept. of Atty. Genl. (1912), Vol. 2, p. 230.

§ 144. Payment of cost of state highway.—The entire expense of the construction or improvement of a state highway shall be paid by the state treasurer upon the warrant of the comptroller issued upon the requisition of the commission out of any specific appropriation made available for the construction or improvement of state highways.

Source.—New.

The expense of construction of a bridge carrying a state highway across another highway should be borne by the state. Rept. of Atty. Genl. (1912), Vol. 2, p. 428.

§ 145. Abolition of railroad grade crossings.—The commission shall provide for and cause the abolition of railroad grade crossings on a state or county highway whenever practicable, in the manner provided by the railroad law. The portion of the cost of abolishing such grade crossings, which is payable under the railroad law by the state and town or village, shall be paid out of the funds available for the construction or improvement of such state or county highway as provided in this article.

Source.—L. 1898, ch. 115, § 4, in part, as amended by L. 1907, ch. 717.

References.—Provisions of Railroad Law, §§ 91-95 are applicable to abolition of railroad grade crossings on state or county highway.

The rights of a railroad company are taken and held subject always to the right of the proper public authorities to improve the highway as the public interest requires; also subject to the liability of being required to change its location, grade, etc., to conform to the requirements of such public improvement of the surface of the highway, at its own expense, without recourse in the way of dam-

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ages against those lawfully engaged in improving the highway for any injury which may be done to the railroad property, when no reckless, wanton or negligent act on the part of those improving the highway caused the damage. Such changes and consequent injury to the plaintiff's property cannot be deemed the taking of private property for a public use. *M. F. C. & H. P. R. Co. v. Spuyten Duyvil Co.* (1909), 65 Misc. 367, 121 N. Y. Supp. 656.

§ 146. Railroads and other works and structures in and upon highways.—

No street surface or other railroad shall be constructed upon any portion of a state or county highway which has been or may be improved under the provisions of this article, nor shall any person, firm or corporation enter upon or construct any works in or upon any such highway, or construct any overhead or underground crossing thereof, or lay or maintain therein drainage, sewer or water pipes underground, except under such conditions and regulations as may be prescribed by the commissioner of highways, notwithstanding any consent or franchise granted by any town, county or district superintendent, or by the municipal authorities of any town. Any person, firm or corporation violating this section shall be liable to a fine of not less than one hundred* dollars nor more than one thousand dollars for each day of such violation, to be recovered by the commissioner of highways and paid to the state treasurer to the credit of the fund for the maintenance and repair of state and county highways, and may also be removed therefrom as a trespasser by the commissioner of highways upon petition to the county court of the county or the supreme court of the state. (*Amended by L. 1911, ch. 646, and L. 1913, ch. 80.*)

Source.—L. 1898, ch. 115, § 20, as added by L. 1902, ch. 379, and renumbered and amended by L. 1907, ch. 717, without change.

References.—Restoration of highway when railroad is built thereon, *Railroad Law*, § 11. Construction of street railroads on highways with the consent of property owners and local authorities, *Id.* §§ 91, 92.

Application of section.—The Highway Commission cannot compel a street railway company to change the grade of its tracks; this question is one for the Public Service Commission. *Rept. of Atty. Genl.* (1909) 641.

Permits should be issued by the State Department of Highways for work on city streets which have been improved by state aid. *Opinion of Atty. Genl.* (1916), 8 State Dept. Rep. 526.

Damages to street railway on account of changes in highway.—The state, county or town is not liable to an electric railway for any damages which it may sustain on account of the changes made by the Highway Commission in the roadbed along the trolley line, it not being the purpose of the commission to oust the trolley company from its use of the highway. *Rept. of Atty. Genl.* (1909) 644.

Telephone and telegraph companies.—Under the provisions of this section the Highway Commission has the power to make such rules and regulations or make such conditions as it may deem wise for telephone and telegraph companies. *Rept. of Atty. Genl.* (1909) 600.

§ 147. Where cost is assessable against abutting owners.—If fifteen per centum of the cost of constructing or improving a highway has been or may be assessed upon abutting owners, as authorized by section ten of chapter

* So in original.

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one hundred and fifteen of the laws of eighteen hundred and ninety-eight, as the same existed prior to its repeal by chapter four hundred and sixty-eight of the laws of nineteen hundred and six, such highway shall be constructed or improved at the joint expense of the state, county and town as provided herein, and the portion of the cost so assessable upon such owners shall be paid by the town in which such highway is located, as provided in this article.

Source.—L. 1898, ch. 115, § 2, as amended by L. 1907, ch. 717, modified.

§ 148. Acquisition of lands for right of way and other purposes.—If a state or county highway, proposed to be constructed or improved as provided in this article, shall deviate from the line of a highway already existing, the board of supervisors of the county where such highway is located, shall acquire land for the requisite right of way prior to the advertisement for proposals. The board of supervisors may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction, improvement or maintenance of highways, or for spoil banks together with a right of way to such spoil banks and to any bed, pit, quarry, or other place where such gravel, stone or other material may be located. (*Amended by L. 1917, ch. 261, in effect Apr. 25, 1917.*)

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Source.—L. 1898, ch. 115, § 7, as amended by L. 1907, ch. 717, and L. 1901, ch. 240, §§ 1 and 2, in part.

References.—Maps may provide for deviation from existing highway, Highway Law, § 125, subd. 2. Practice on acquisition of lands, *Id.* §§ 150–154.

Forest Preserve, highways through. See Constitution Art. VII, § 7.

Eminent domain.—The act of 1901, ch. 240, from which this section was in part derived, was intended to confer upon the board of supervisors, as the official representative of the county in its corporate capacity, the power of eminent domain in respect to rights of way, required for the construction and improvement of state and county highways. *County of Orange v. Ellsworth* (1904), 98 App. Div. 275, 90 N. Y. Supp. 576.

An easement for use of spoil area may be obtained by a board of supervisors in acquiring lands pursuant to this and the following sections. Opinion of Atty. Genl. (1916), 9 State Dept. Rep. 446.

The State Highway Commission has no power to purchase land adjoining a State highway, even though the land is absolutely necessary for highway purposes due to the fact that a highway embankment cannot be prevented from oversliding the land. Such power is vested in the board of supervisors of the particular county. Rept. of Atty. Genl. (1915) 13.

Construction of section. Rept. of Atty. Genl. (1899) 216.

§ 149. Purchase of lands.—The board of supervisors may, by resolution, authorize its chairman, a member, or a committee to purchase the lands to be acquired for the purposes specified in the preceding section. But the amount to be paid under this section to a single owner shall not exceed the sum of two hundred dollars, unless approved by the county judge and county treasurer, and in no case shall such amount exceed the sum of one thousand dollars. The purchase price of such lands shall be a county

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charge, and shall be paid in the same manner as awards are paid in cases where the proceedings are taken as herein required.

Source.—L. 1901, ch. 240, § 2, as amended by L. 1902, ch. 510, rewritten but without change in substance.

§ 149-a. Purchase of land in certain counties.—The board of supervisors in a county adjoining a city of the first class containing over two million inhabitants may, by resolution, authorize the purchase of lands to be acquired for the purpose specified in section one hundred and forty-eight of this chapter. The purchase price of such lands, however, shall not exceed the sum of five thousand dollars; it shall be a county charge and shall be paid in the same manner as other county charges are paid. (*Added by L. 1916, ch. 12.*)

§ 150. Petition to acquire lands.—If the board of supervisors is unable to acquire land by purchase as provided for in the last section, the board may present to the county court of the county or to the supreme court, at a special term thereof, to be held in the judicial department in which said county is located, a petition for the appointment of three commissioners of appraisal to ascertain and determine the compensation to be paid to the owners of the land to be acquired and to all persons interested therein. Such petition shall describe the land to be acquired with a reference to the map upon which the same is shown which shall be annexed to such petition. A copy of such petition and map shall be filed in the office of the county clerk. Such petition shall be signed and verified in the name of the board of supervisors, by the chairman or a member thereof designated for that purpose by resolution. Notice of presentation of such petition to such court shall be given by the petitioner by publishing such notice in two newspapers published in such county, once in each week for two weeks successively preceding the day of such presentation, and also at least eight days preceding the day of such presentation by serving a copy of such notice, personally or by mail, on the occupant or owner of the land to be acquired, and by posting a copy of said notice in not less than three public places in each town in which property to be acquired is located. (*Amended by L. 1911, ch. 503, and L. 1917, ch. 140, in effect Apr. 6, 1917.*)

Source.—L. 1901, ch. 240, § 3, without change.

References.—Pleadings in proceeding for condemnation of land, Code Civil Procedure, §§ 3357-3384.

Pleading of land owner.—While this section does not provide that the defendant land owner shall have an opportunity to deny or controvert the petition, or to interpose any pleading or defense or to litigate the right of the plaintiff to maintain the proceeding, such land owner may interpose a defense by petition and do whatever is authorized to be done under the Condemnation Law to protect his interests in respect to the premises sought to be acquired. *County of Orange v. Ellsworth* (1904), 98 App. Div. 275, 90 N. Y. Supp. 576.

Sufficiency of petition.—The objection that the petition in a proceeding instituted under this chapter failed to allege that the proceeding was authorized by the board of supervisors is not tenable as a preliminary objection, where the petition avers

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"that the preliminary steps required by law have been taken." Such objection must be raised by answer. *County of Orange v. Ellsworth* (1904), 98 App. Div. 275, 90 N. Y. Supp. 576.

General appearance of defendant confers jurisdiction of his person upon the court, and is a waiver of any question as to the sufficiency of the published notice. *County of Orange v. Ellsworth* (1904), 98 App. Div. 275, 90 N. Y. Supp. 576.

§ 151. Commissioners to be appointed.—Upon such presentation, such court shall, after hearing any person owning or claiming an interest in the lands to be acquired who may appear, appoint three disinterested persons as commissioners. And in case a commissioner shall at any time decline to serve, or shall die, or for any cause become disqualified or disabled from serving as such, the said court, at a similar special term, may, upon similar notice, application and hearing, and upon such notice to the land owners as the court may prescribe, appoint another person similarly qualified, to fill the vacancy caused thereby.

Source.—L. 1901, ch. 240, § 4, without change.

§ 152. Duties of commissioners.—The said commissioners shall take the oath of office prescribed by the constitution, which oath shall be filed in the office of the county clerk of the county. Upon the filing of such oath the title to the lands described in the petition and map filed in the office of the county clerk shall vest in the county for the purpose of a highway forever. The commissioners shall, with all reasonable diligence, proceed to examine such highways and lands. Said commission shall cause a notice to be published in two such newspapers as aforesaid, once each week for two weeks successively next preceding the day of meeting mentioned in such notice, that at a stated time and place within such county they will meet for the purpose of hearing the parties claiming an interest in the damages to be awarded for the lands taken for such highways. Said notice shall also state the fact that a map or maps showing the land acquired has been filed in the county clerk's office. At the time and place of said meeting and at any adjournment thereof which said commissioners shall publicly make, they shall hear the proofs and allegations of all interested parties. They may adjourn the proceedings before them from time to time, issue subpoenas or administer oaths in such proceedings; and shall keep minutes of their proceedings and reduce to writing all oral evidence given before them. They shall thereafter make and sign a report in writing, in which they shall assess, allow and state the amount of damages to be sustained by the owners of the several lots, pieces or parcels of land taken for the purposes aforesaid. Such report shall contain the names of the owners of any parcel of land acquired as aforesaid, except that in case the commissioners are unable to ascertain the names of such owners, they may in place of the names of such undiscovered parties insert the words "unknown owners," in their report. The said commissioners shall file their said report, together with the minutes of their proceedings, in the office of county clerk of such county. After said report shall have been completed

and filed as aforesaid, the commissioners shall, after publishing a notice in like manner as that provided in section one hundred and fifty-two, apply to the county court of the county or to the supreme court, at a special term thereof to be held in the judicial department in which said county is located, to have the said report confirmed. If no sufficient reason to the contrary shall appear, the court shall confirm said report. Otherwise it may refer the same back to the said commissioners for revision or correction; and after such revision or correction the same proceedings shall be taken as are hereinbefore provided for, and the commissioners shall in the same manner make renewed application for the confirmation of such report, and the court shall thereupon confirm or refer back the said report, and such proceedings shall be repeated until a report shall be presented which shall be confirmed by the said court. (*Amended by L. 1911, ch. 503.*)

Source.—L. 1901, ch. 240, § 5, without material change.

§ 153. County treasurer to pay awards.—Within six months after the report of said commissioners shall be confirmed as aforesaid, the county treasurer of such county shall pay to the persons named therein the amounts awarded to them for damages with six per centum interest thereon from the date of the filing of the oath of the commissioners in the office of the county clerk. Such amounts with interest and the amounts paid in pursuance of this article shall be a county charge and shall be paid by the county treasurer, in case of purchase upon requisition of the chairman of the board of supervisors of said county, or by any member or committee thereof designated for that purpose by said board and in case of a petition for the acquisition of such lands, upon service of a certified copy of the order confirming such awards. In case there are unknown owners, to whom the award is made in said report, the said county treasurer shall deposit the amounts awarded to them with like interest in some trust company or bank in such manner as the said court shall in the order of confirmation direct, such amount to be paid out upon the application of said unknown owners when discovered. (*Amended by L. 1911, ch. 503.*)

Source.—L. 1901, ch. 240, § 6, without change.

Section cited. Bush v. Delaware, Lackawanna and Western R. R. Co. (1901), 166 N. Y. 210, 219, 59 N. E. 838.

§ 154. Costs; commissioners' fees.—In all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be awarded pursuant to the provisions of section thirty-three hundred and seventy-two of the code of civil procedure and shall be a county charge in the first instance, and be paid by the county treasurer as hereinbefore provided, except when reassessment of damages shall be had on the application of the party for whom damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment, and when application shall be made by two or more persons for reassessment of damages all persons who may be

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liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to them by the first assessment, and may be recovered by action. Each commissioner appointed by the court as provided in this article for each full day necessarily employed as such, shall be entitled to the sum of six dollars and his necessary expenses. The amount of compensation to which such commissioners are entitled shall be determined by the court in which the proceeding is pending, upon verified accounts presented by such commissioners, stating in detail the number of hours necessarily employed in the discharge of their duties; and the nature of the services rendered, upon eight days' notice to the attorney for the petitioner in the proceeding. (*Amended by L. 1912, ch. 182, and L. 1915, ch. 497.*)

Source.—L. 1901, ch. 240, § 7, as amended by L. 1902, ch. 510, § 2, without change.

§ 155. **Land may be sold or leased; disposition of proceeds.**—Any lands acquired by purchase or condemnation, for the purpose of obtaining gravel, stone or other materials, for the construction or maintenance of highways improved or constructed as provided in this article, or required for spoil banks, may be sold or leased by the board of supervisors of any county, when no longer needed for any of such purposes. The proceeds thereof shall be paid into the county treasury and shall be retained therein as a separate fund available for the construction or maintenance of highways improved or constructed under this article. The board of supervisors may, where it has acquired land by purchase or condemnation as a right-of-way for a state or county highway, sell, convey, grant or lease to the owner or owners of property adjoining the same, so much thereof as may be unnecessary for such highway purposes, provided the strip of land retained for such highway purposes is not less than sixty feet in width, and provided such sale, conveyance, grant or lease will give said adjoining owner or owners of land a frontage immediately in front of their respective premises upon the new highway and right-of-way when completed. The board of supervisors may make such sale, conveyance, grant or lease to such owner or owners of real property for the purpose of compensating such owner or owners for damages sustained by reason of the change of the location of such highway and in full settlement thereof. (*Amended by L. 1911, ch. 552.*)

Source.—L. 1901, ch. 240, § 8, as added by L. 1902, ch. 510, without change.

§ 156. **Application of provisions of labor law.**—The provisions of section three of the labor law, as amended by chapter five hundred and six of the laws of nineteen hundred and six, which except from the provisions of that section labor performed in the construction, maintenance and repair of highways outside the limits of cities and villages, shall apply to the construction, improvement and maintenance of state and county highways as provided in this chapter.

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Source.—Substitute for L. 1898, ch. 115, § 18, as renumbered and amended by L. 1907, ch. 717.

§ 157. **Highways and bridges on Indian reservations.**—When any portion of a county highway designated for improvement or construction in a county, as provided in this article, is located on an Indian reservation, the entire cost of the improvement or construction of such portion shall be paid by the state in the same manner as the state's share of the cost of such county highway, out of any specific appropriation made available for the construction or improvement of county highways. The commission shall have exclusive supervision and control of all bridges constructed or to be constructed by the state on any Indian reservation, and may make and enforce such reasonable rules and regulations concerning their use, as it shall deem necessary.

Source.—New.

Control of bridges.—The State Highway Commission, not the Superintendent of Public Works, has sole supervision and control over bridges on Indian reservations. Rept. of Atty. Genl. (1914) 285.

Supervision and control of highways and bridges constructed by state on Indian reservations is vested in the Highway Commission. Rept. of Atty. Genl. (1910) 918.

§ 158. **Appointment and duties of reservation superintendent.**—The commission may appoint a reservation superintendent for any Indian reservation in the state who shall exercise the powers and perform the duties conferred and imposed upon town superintendents, except that the written statement as provided for by section ninety of the highway law shall be filed with the commission on or before the thirty-first day of October in each year, and excepting that all orders of the Indian reservation superintendent shall be drawn upon and presented for payment as hereinafter provided to the county treasurer of the county in which such Indian reservation or major portion thereof exists.

While any such reservation superintendent shall be acting in that capacity no highway within such reservation shall be laid out, altered or discontinued, without his consent. Whenever land may be acquired without expense or is dedicated for highway purposes within any Indian reservation, the reservation superintendent in charge thereof may make an order laying out the said highway by filing and recording said order in the town clerk's office of the town in which said highway is located. He shall also file said order with the recording officer of the tribe through whose lands such highway extends. (*Added by L. 1910, ch. 46, and amended by L. 1913, ch. 474.*)

§ 159. **Custody of moneys, et cetera.**—There shall be paid by the state treasurer to the county treasurer of each county in the state containing an Indian reservation, reservations, or major portion of an Indian reservation,

an amount which shall not be less than thirty dollars per mile, based on the entire mileage of the public highways within the Indian reservation in such county. All moneys of the state available for the improvement, repair and maintenance of highways and bridges and for the purchase of machinery, tools and implements within Indian reservations shall be paid to the county treasurer of each county containing such Indian reservation or major portion thereof, who shall be the custodian thereof and accountable therefor, and it shall be expended for the repair and improvement of the public highways and bridges and for the purchase of machinery, tools and implements within such Indian reservations at such places and in such manner as may be directed by the commission, and such moneys shall be paid out by the county treasurer upon the written order of the Indian reservation superintendent in accordance with such directions. The county treasurer and the Indian reservation superintendent shall keep their accounts according to the methods and use the blanks as prescribed by the commission. All orders and records of accounts shall be filed in the office of the commissioner on or before the thirty-first day of October in each year and shall be preserved by the commission as Indian reservation records. The reservation superintendent shall receive a per diem or annual allowance as compensation for services and expenses in an amount to be fixed by the commission, which shall be paid by the county treasurer to the reservation superintendent upon orders of the commission. The commission shall annually cause to be inspected all of the bridges within the Indian reservations of each county and shall require a complete report of such inspection which shall show in detail the condition of the bridges inspected, the necessary work to be performed in the repair and maintenance of such bridges and the estimated cost thereof. The commission shall revise such estimates and annually report to the legislature its estimated cost for such repairs and construction for the ensuing year in detail by reservation and county. The maintenance, repair and construction of the public highways within the Indian reservation shall be under the direct supervision and control of the commission and the state superintendent of highways and they shall be responsible therefor as herein provided. There shall be annually appropriated for the construction, repair and maintenance of such highways and bridges and for the purchase and repair of machinery, tools and implements, an amount sufficient to provide therefor, based upon the estimates prepared and submitted by the commission to the legislature. The comptroller upon requisition of the commission shall draw his warrant on the state treasurer in favor of the county treasurer who is the custodian of such funds as herein provided for an amount which shall not be in excess of the total amount apportioned by the commission to the Indian reservation of any county. The moneys so paid shall be deposited by said county treasurer to the credit of the fund for the maintenance, repair and construction of highways and bridges and the purchase and repair of

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machinery, tools and implements in the Indian reservation of said county. (*Added by L. 1910, ch. 46, and amended by L. 1911, ch. 646, and L. 1913, ch. 474.*)

Source.—New.

Construction of bridges on Indian reservation is within the control of the commission. Towns have no authority to build. Rept. of Atty. Genl. (1911) 56.

§ 160. **Maintenance of detours during construction.**—The maintenance and repair of any highway or right of way designated by the commission for use as a detour, during the construction, reconstruction or repair of a state or county highway, shall be under the supervision of the commission and shall be paid for out of the construction fund, in cases of construction or improvement contracts, or the state's share of the money available for maintenance and repair of improved roads in such county in cases of reconstruction or repair contracts. Such highway or right of way designated as a detour by the commission shall be deemed as an improved highway during construction, reconstruction or repair. (*Added by L. 1912, ch. 83, and amended by L. 1916, ch. 578.*)

Source.—New.

ARTICLE VI-A.

(Article added by L. 1917, ch. 462, in effect May 14, 1917.)

IMPROVEMENT WITH FEDERAL AID.

Section 161. Commissioner of highways to designate roads.

162. Cost of preliminary surveys.

163. Approval of plans.

164. Advertisements, proposals, contracts, appropriation, closing roads, detours, termination of contract, entry for drainage, permits, maintenance and repair, contingencies and agreements.

165. Acceptance of work.

166. Acquisition of right of way.

167. State's share of cost.

168. General authorization.

§ 161. **Commissioner of highways to designate roads.**—The state commissioner of highways is hereby authorized, empowered and directed to designate the public highways or portions thereof, outside of cities, which, in his discretion, he may deem proper to be improved or constructed as co-operative roads with the moneys to be appropriated by the state of New York and the moneys contributed to the state of New York for highway improvement by the federal government under the provisions of an act of congress, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," approved July eleventh, nineteen hundred and sixteen; provided that the highways or portions thereof thus designated shall form a portion of the system of state or of county highways as provided by this chapter, or shall

form a connection between state, county and federal highways duly authorized by law of this or any other state or nation, for the purpose of aiding in the completion of the system of improved highways of the United States of America. The highways thus designated shall be tentatively indicated on a map to be prepared by, and filed in the office of, the state commissioner of highways; and a duplicate thereof shall be filed in the office of the secretary of state of New York state on or before the fifteenth day of May, nineteen hundred and seventeen, subject, however, to such modification as may hereafter be submitted by the state commissioner of highways and approved by the United States secretary of agriculture in accordance with section one of the act of congress hereinbefore referred to. The designations indicated on such map are dependent, however, on provision being made by the governing boards of the political subdivisions of the state for the improvement of such other highways as are deemed necessary, in the opinion of the state commissioner of highways, to complete the combined highway system of the state. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

§ 162. **Cost of preliminary surveys.**—Preliminary surveys, plans, specifications and estimates of cost for the highways or portions thereof so designated shall be made by the state department of highways in the same manner as prescribed in section one hundred and twenty-five of the highway law and the expense thereof shall be paid out of the moneys appropriated by the state for the purposes of this article. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

§ 163. **Approval of plans.**—After the submission to, and approval by the secretary of the United States department of agriculture, of such plans, specifications and estimates of cost, as required by the provisions of said act of congress, the same shall be approved by the commissioner of highways by executive order; which order shall give a consecutive number to the highway or portion thereof covered by said plans. A certified copy of such order shall be filed with said secretary of agriculture and with the state comptroller. Roads shall be taken up for construction or improvement in the order of final approval unless the commissioner of highways deems otherwise advisable, in which event an executive order shall be filed in the office of the highway department giving the reasons for deviating from such order, and a certified copy thereof filed with said secretary and with the state comptroller. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

§ 164. **Advertisements, proposals, contracts, appropriation, closing road, detours, termination of contract, entry for drainage, permits, maintenance and repair, contingencies and agreements.**—The form of proposal, contract and bond, the method of advertising for proposals, the rejection of proposals, the award of contracts and the payments to contractors shall be

governed by the provisions of section one hundred and thirty of this chapter. To expedite the payment of the share of the federal government as shown by monthly estimates rendered on existing contracts as provided herein it is hereby provided that upon the filing of the report of the commissioner of highways with the legislature, showing the amount of construction under federal aid contemplated for the ensuing year, and in case an appropriation is made by the legislature to provide the state's share of the construction shown in such report, there shall also be appropriated such an additional amount as is necessary to pay in the first instance the share of the federal government of the cost of such work. Itemized statements showing the entire cost of construction of such roads shall be rendered by the commissioner of highways to the state comptroller and the federal government as the work progresses and such statements shall show the subdivision of cost between the state and the federal government and shall be accompanied by drafts on the federal government for the amount of its share of such cost. Upon the payment of such drafts the proceeds shall be deposited by the commissioner of highways with the treasurer of the state for the purpose of reimbursing the appropriation made by the state on account of such advance payments, and upon the final completion of the work a report thereof filed with the state comptroller. The provisions of sections seventy-seven and one hundred and sixty of this chapter, relative to closing highways for repair or construction and the maintenance of detours during construction; also the provisions of section one hundred and thirty-two of this chapter relative to the authority of the commissioner to secure the completion of the work; also the provisions of sections one hundred and thirty-five and one hundred and thirty-six of this chapter, relative to the entry upon adjacent lands for drainage purposes and the payment of damages for such entry; also the provisions of sections one hundred and thirty-seven, one hundred and thirty-eight and one hundred and thirty-eight-a, relative to construction in villages and to additional width and increased cost; also the provisions of section one hundred and forty-six of this act, relative to the issuance of permits for work by persons, firms or corporations; also the provisions of section one hundred and fifty-six relative to the application of the labor law; shall all be applicable for the purposes of highways improved or constructed under the provisions of this article. The provisions of article seven of this chapter relative to the maintenance of state and county highways shall apply to the maintenance and repair of highways improved or constructed under the provisions of this article. All contingencies arising during the prosecution of the work shall be provided for to the satisfaction of the commissioner of highways and as may be agreed upon in the original or by a supplemental contract executed by the commissioner. If a supplemental contract be executed for the performance of work or the furnishing of material not provided for in the original contract, the amount to be charged thereunder for any such work or material shall not exceed the rate for

which similar work or material was agreed to be performed or furnished under the original bid upon which the contract was awarded. Any work necessarily required for the proper completion of the contract and for which no item price bid was contained in the proposal shall be performed upon prices to be agreed upon by the contractor and the commissioner prior to the performance of such work, and such work and the prices therefor shall be provided in a supplemental contract. The total amount to be expended in the improvement or construction of a highway or section thereof shall not exceed the original estimate, unless such estimate shall have been duly amended by the commissioner with the approval of the secretary of agriculture. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

§ 165. **Acceptance of work.**—Upon the completion of a highway or section thereof constructed or improved under the provisions of this article, the division engineer shall inspect the same and shall report in writing to the state commissioner of highways his recommendation as to whether or not the contract should be finally accepted, and the decision of the said commissioner, which shall be conclusive, as to the acceptance of said highway or portion thereof thus constructed or improved, shall be entered in the form of an executive order, a certified copy of which shall be filed with the secretary of agriculture. (*Added by L. 1911, ch. 462, in effect May 14, 1917.*)

§ 166. **Acquisition of right of way.**—The provisions of article six of this chapter relative to the acquisition of lands for right of way and other purposes shall be applicable for the purposes of highways improved or constructed under the provisions of this article. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

§ 167. **State's share of cost.**—The proportion of the total cost of the improvement or construction of highways to be borne by the state of New York under the provisions of this article, exclusive of the expenses incurred prior to the beginning of construction work for the purposes of making surveys, plans, specifications and estimates of cost, shall not exceed fifty per centum of such total cost. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

§ 168. **General authorization.**—The state commissioner of highways is hereby authorized, empowered and directed to perform and do such other and further acts not hereby specifically provided in this article as may be necessary to conduct the improvement or construction of co-operative highways with state and federal aid in compliance with the act of congress hereinbefore referred to and the rules and regulations promulgated by the secretary of agriculture under authority conferred upon him by said act of congress, the provisions of which act are hereby assented to, the good faith of the state of New York being hereby pledged to make such provision

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from time to time as may be necessary to provide its share of the cost of the improvement of such highways. (*Added by L. 1917, ch. 462, in effect May 14, 1917.*)

ARTICLE VII.

MAINTENANCE OF STATE AND COUNTY HIGHWAYS.

Section 170. Commission to provide for maintenance and repair.

- 170-a. State to maintain roads improved by state appropriation under special laws.
- 171. Appropriations by state; apportionment of moneys.
- 172. Cost to town for maintenance of state and county highways.
- 172-a. Saving clause; temporary provisions.
- 173. Disbursement of maintenance funds.
- 174. Reports of county treasurer.
- 175. Compensation of town superintendents.
- 176. Liability of state for damages.
- 177. Additional width or different type of construction under repair contracts.
- 179. Sprinkling; removal of filth and refuse.
- 180. Payment by counties of a portion of the cost of construction under repair contracts.

§ 170. Commission to provide for maintenance and repair.—The maintenance and repair of improved state and county highways in towns and incorporated villages, exclusive, however, of the cost of maintaining and repairing bridges having a span of five feet or over, shall be under the direct supervision and control of the commissioner of highways and he shall be responsible therefor. Such maintenance and repair may be done in the discretion of the commissioner either directly by the department of highways or by contract awarded to the lowest responsible bidder at a public letting after due advertisement, and under such rules and regulations as the commissioner of highways may prescribe. The commissioner of highways shall also have the power to adopt such system as may seem expedient so that each section of such highways shall be under constant observation and be effectively and economically preserved, maintained and repaired. The commissioner of highways shall have the power to purchase materials for such maintenance and repairs, except where such work is done by contract, and contract for the delivery thereof at convenient intervals along such highways. (*Amended by L. 1911, ch. 646, L. 1912, ch. 83, L. 1913, ch. 80, and L. 1916, ch. 578.*)

Source.—Substitute for portion of L. 1898, ch. 115, § 12, as amended by L. 1907, ch. 717.

Orange County Act.—The special law (L. 1901, ch. 83) providing for the construction and maintenance of highways in the county of Orange is not repealed by the provision of this section, relative to the maintenance and repair of state and county highways. Matter of Business Men's Association (1907), 54 Misc. 13, 103 N. Y. Supp. 843.

Construction of this section in connection with section 130, *ante*, clearly shows

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that it was the intention of the Legislature to have the work upon the state and county highways done by the town, district or county superintendent under rules and regulations of the commission, and if proper performance of such work cannot be secured in that manner then the work must be done by contract. Rept. of Atty. Genl. (1909) 602.

Amendments to sections 170-174 by L. 1916, ch. 578 effected a repeal by implication of those provisions which existed prior to such amendments relating to the maintenance and repair of state and county highways within cities of the third class, so far as future work is concerned. Such amendment did not affect the liability on bonds given to assure and guarantee the surface condition of such streets for a period of three years after completion. Opinion of Atty. Genl. (1916), 8 State Dept. Rep. 526.

Purchase of lands.—The Highway Commission has no power to purchase land adjoining a highway absolutely necessary for highway purposes. Such power is vested in the board of supervisors. Rept. of Atty. Genl. (1915) 13.

Cancellation of contracts.—The Highway Commission may cancel an uncompleted contract for the improvement of a highway if the work is not being performed in compliance with the specifications. But after a contract has been completed and the highway accepted it shall be maintained according to the provisions of the statute relating to maintenance. Rept. of Atty. Genl. (1912) 567.

Obstructions caused by snow.—Obstructions in an improved state and county highway caused by snow should be removed by town superintendents. The removal is not "maintenance and repair" within the meaning of this section. Rept. of Atty. Genl. (1912) 566.

Town superintendents have no duty to perform with respect to the maintenance and repair of county and state highways except as directed by the state commission. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

Authority of State Highway Commission to control motor vehicle races.—Where permission has been given by the proper local authorities for the running of a motor vehicle race under provisions of section 296, *post*, the State Highway Commission is without authority to impose conditions additional to those imposed by such local authorities. The consent of the State Highway Commission need not be obtained before such a race can be run. So the State Highway Commission has no right to promulgate a rule that before a motor vehicle race is run the participants shall make a deposit with it of \$200 per mile for each mile or road to be raced over for each day of the race. *Morrell v. Skene* (1909), 64 Misc. 185, 119 N. Y. Supp. 28.

§ 170-a. State to maintain roads improved by state appropriations under special laws.—When any highway has been constructed or improved under a special law, with moneys taken from the state treasury and under plans prepared by a state department, the commissioner of highways may at any time inspect such highway and if he determine it to be of sufficient importance and properly constructed, he may make an order directing that such highway become a part of the system of state and county highways in such county, and thereafter such highway shall be maintained as a state or county highway in the manner provided in article seven of the highway law. Such order shall be served upon the chairman of the board of supervisors, and a certified copy thereof shall be filed in the office of the county clerk and one in the office of the state comptroller. (*Added by L. 1917, ch. 261, in effect Apr. 25, 1917.*)

3523
§ 170b ad
'18 c 146

3523
§ 170c ad
'18 c 324

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L. 1909, ch. 30.

Source.—New.

§ 171. Appropriations by state; apportionment of moneys.—There shall be annually appropriated for the maintenance and repair of improved state and county highways an amount sufficient to provide therefor, based upon the estimates prepared and submitted by the commission to the legislature as provided in section twenty-three of this chapter. Not less than ninety per centum of the amount so appropriated shall be apportioned by the commission each year among the counties in accordance with the proportion which the amount to be apportioned bears to the total amount of such estimates. The comptroller, upon the requisition of the commission, shall draw his warrant upon the state treasurer in favor of the county treasurer of the county in which the improved state or county highways are located, for an amount which shall not be in excess of the total amount apportioned by the commission to such county. The moneys so paid shall be deposited by the county treasurer to the credit of the fund for the maintenance of improved state and county highways in the county. Any moneys so deposited and placed to the credit of the fund for such maintenance shall be available and subject to the order of the state highway commission at any time prior to the total expenditure thereof. Not more than ten per centum of the amount so appropriated each year may be reserved by the commission for the repair or rebuilding of improved state or county highways, which ten per centum shall not be deemed to be available until after the moneys paid the county treasurer of a county as heretofore provided shall have been expended, and which shall be paid by the state treasurer upon the warrant of the comptroller drawn upon the requisition of the commission issued when required for such purposes. (*Amended by L. 1912, ch. 83, and L. 1916, ch. 578.*)

Source.—New.

Reference.—Estimate of probable cost of repair and maintenance of state and county highways, Highway Law, § 21.

Cost of maintenance.—The cost of material used or to be used in maintenance of improved highways cannot be paid for from construction funds. Rept. of Atty. Genl. (1913) 49.

§ 172. Cost to town for maintenance of state and county highways.—Each town shall pay for the maintenance and repair of state and county highways each year the sum of fifty dollars for each mile or major fraction of a mile of the total mileage of state and county highways within the town, each incorporated village shall pay for such maintenance and repair at the rate of one and one-half cents for each square yard of surface of such improved highway maintained by the state within its corporate limits; except where a maintenance bond for a period of five years satisfactory in form and sufficiency to the commission shall have been given to the village prior to January first, nineteen hundred and sixteen, such tax herein provided for shall not be levied or paid until the period covered by such maintenance bonds shall have expired, or shall have failed in sufficiency.

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On or before the first day of November in each year the commission shall transmit to the clerk of the board of supervisors of each county and to the board of trustees of each village a statement specifying the number of miles of improved state and county highways in each town, the number of square yards of surface of such improved highway as hereinbefore provided in each village in such county and the amount which each of such towns and villages is required to pay into the county treasury on account of the maintenance of state and county highways and a copy of such statements shall be forwarded to the county treasurer. The board of supervisors of the county and the board of trustees of an incorporated village shall cause the amount to be paid by each town and incorporated village of the county, to be assessed, levied and collected therein in the same manner as other town and village charges, in the several towns and villages and such amount when collected shall be paid into the county treasury to the credit of the fund for the maintenance of state and county highways in the several towns and incorporated villages of the county. (*Amended by L. 1912, ch. 83, L. 1915, ch. 551, L. 1916, ch. 578, and L. 1917, ch. 124, in effect Apr. 2, 1917.*)

Source.—L. 1898, ch. 115, § 12, as amended by L. 1907, ch. 717, and modified so as to guarantee to each locality its own money and its proportion of the amount appropriated by the preceding legislature.

Application of section.—The Highway Commission may require the city of Oneida to raise fifty dollars per mile for highways improved by state aid within the city limits but outside the corporation tax district. Rept. of Atty. Genl. (1909) 667.

The auditing of accounts against the town growing out of highway work devolves upon the town board of auditors in those towns wherein such boards are elected. Rept. of Atty. Genl. (1909) 887.

Maintenance and repair of highways after acceptance by board of supervisors of county.—In the fall of 1912 two state highways, and two county highways, running through six towns of Onondaga county were completed or nearly so and, as required by section 172 of the Highway Law, a statement of the number of miles of state and county highways in each town and the amount which each, respectively, was required to pay on account of maintenance for the year 1913 was transmitted to the clerk of the board of supervisors, and thereafter pursuant to section 134 of the Highway Law notice was given that the county highways would be accepted, and on January 8, 1913, they were so accepted. The general tax levy made on December 15, 1912, as required by law, included no tax for maintenance and repair for the year 1913, nor has any tax for that year been included in subsequent levies. Held, that under the provisions of section 134 of the Highway Law, that "upon the proper completion of such highway or section thereof and after filing the notice above given it shall be deemed to have been accepted by the board of supervisors of such county and thereafter it shall be maintained as provided in this chapter," a writ of mandamus would issue to compel the board of supervisors pursuant to said section 172 to provide funds for the maintenance and repair of county highways, the duty under said section being merely ministerial. *Matter of Carlisle v. Board of Supervisors of Onondaga* (1914), 84 Misc. 511, 146 N. Y. Supp. 665.

Levy of tax; duty of supervisors.—Upon the receipt of the notice of the State Commissioner of Highways transmitted pursuant to this section of the Highway Law a mandatory statutory duty, ministerial in character, devolves upon the board of

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supervisors, and under this duty the board is required to take such action as shall result in the levying of a tax by the towns to raise their respective proportion of the fund applicable to the maintenance of such highways. This duty is not dependent upon the acceptance of the highways by the proper officials. *People ex rel. Carlisle v. Supervisors of Onondaga* (1916), 217 N. Y. 424, 111 N. E. 1057, affg. (1914), 164 App. Div. 922, 149 N. Y. Supp. 1103.

Mandamus may be brought by the Highway Commission to compel the board of supervisors to raise money for the maintenance of county highways. *Rept. of Atty. Genl.* (1909) 610.

Duty of abutting owners to construct and keep in repair approaches or driveways from highways.—On examination of the provisions of articles 4, 6 and 7 of the Highway Law as they stood on July 21, 1909, *held*, that the statute required abutting owners under the direction of the district or county superintendent, to construct and keep in repair approaches or driveways from the highway, but that the duty of maintenance did not rest on the town unless the town board decided to assume it, and only in that event was the town superintendent under any duty of inspection, which is but an incident to the duty of maintenance and repair. *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

Effect of Orange county act.—The special law providing a highway system for Orange county (L. 1901, ch. 83) was not repealed by the subsequent amendment to the general law for the construction and maintenance of highways (L. 1906, ch. 468); and an application for a peremptory mandamus to compel the board of supervisors of Orange county to provide for the levy of the respective amounts which each of the towns of said county was required by a notice from the State Comptroller to raise for the maintenance of highways and to require the payment of such amounts by the several town collectors to the county treasurer as provided by the general law will be denied. *Matter of Business Men's Assn.* (1907), 54 Misc. 13, 103 N. Y. Supp. 843.

§ 172-a. Saving clause; temporary provisions.—Whenever any city has deposited certain moneys with a county treasurer for the maintenance of streets within such city in accordance with the provisions of section one hundred and seventy-two of this chapter as it existed prior to April first, nineteen hundred and sixteen, and there remains an unexpended balance of such moneys in the hands of the county treasurer, such unexpended balance shall, when such section as hereby amended takes effect, revert to such city and the county treasurer is hereby authorized, empowered and directed to return such expended balance to the treasurer of such city. The moneys returned by a county treasurer to a city in accordance with the provisions of this section shall be expended by the city in the maintenance and repair of the streets within such city which have been constructed or improved by state aid. The highway commission shall retain jurisdiction and authority over any city street heretofore improved as a state or county highway, until the expiration of the period of time covered by the bond guaranteeing the maintenance and repair of such street, and may take such proceedings as may be necessary to enforce the provisions of such guaranty bond and in case of the failure of the contractor or the surety company on the bond to perform such work as may be lawfully required of them, the highway commission is authorized to perform such work in the first instance, charging the expense incurred thereby to

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the contractor and the surety company in the manner provided by the contract and bond. Upon the termination of the guaranty period covered by such bond, the highway commission shall notify the city clerk thereof and upon service of such notice the authority and responsibility of the state over such street shall cease and thereafter such street shall be maintained in the manner provided by law for the maintenance and repair of city streets. (*Added by L. 1916, ch. 578, and amended by L. 1917, ch. 261, in effect Apr. 25, 1917.*)

Source.—New.

Construction with section 93 of the General Construction Law, relating to effect of repealing statute upon existing rights. Opinion of Atty. Genl. (1916), 8 State Dept. Rep. 526, 532.

§ 173. **Disbursement of maintenance funds.**—The amount apportioned by the commission for the maintenance and repair of state and county highways in each county shall be expended for the repair and maintenance of such highways in such county, but the amount paid by each town, or incorporated village, as provided by section one hundred and seventy-two shall be expended for the repair and maintenance of such highways in such town or incorporated village. The county treasurer shall pay out the moneys received by him as provided in this article upon the written order of the representative of the commission, who, before drawing any such orders shall give a bond in an amount to be specified by the commission, and with such sureties as shall be approved by the commission; such bond shall be filed in the office of the state comptroller and certified copy thereof filed in the office of the state highway commission and in the office of the county treasurer. Such orders shall be issued upon vouchers duly presented to the representative of the commission in the form to be prescribed by it. The commission may adopt rules and regulations providing for the presentation and payment of accounts for maintenance and repair. (*Amended by L. 1912, ch. 83, and L. 1916, ch. 578.*)

Source.—New.

§ 174. **Reports of county treasurer.**—The county treasurer shall report to the commission annually and at such other times as required by the commission, the amount received by him on account of the maintenance and repair of improved state and county highways in the several towns and incorporated villages in his county and the expenditures made by him out of such moneys. The form and contents of such report shall be prescribed by the commission. (*Amended by L. 1912, ch. 83, and L. 1916, ch. 578.*)

Source.—New.

§ 175. **Compensation of town superintendents.**—If a town superintendent shall be directed by the commission to perform services in respect to the maintenance and repair of improved state and county highways within his town his compensation therefor shall be paid out of the moneys set apart as provided in this article for such maintenance and repair. Such com-

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pensation shall be fixed by the commission but shall in no case exceed the amount fixed by the town board as compensation for his services performed for the town under this chapter, and in rendering his monthly bill to the supervisor, and his annual bill to the town board, no charge shall be made against the town for an expense or per diem charge upon any date for which an audit shall have been allowed by the state commission. And said state commission shall make proper rules and regulations to carry into effect this provision and to furnish to the town board prior to the annual audit day due information as to the dates, compensation and expenses allowed by them to said town superintendent from the state repair fund. (*Amended by L. 1912, ch. 83.*)

Source.—New.

§ 176. **Liability of state for damages.**—The state shall not be liable for damages suffered by any person from defects in state and county highways, except such highways as are maintained by the state by the patrol system, but the liability for such damages shall otherwise remain as now provided by law, notwithstanding the construction or improvement and maintenance of such highways by the state under this chapter; but nothing herein contained shall be construed to impose on the state any liability for defects in bridges over which the state has no control. Within the limits of incorporated villages the state shall maintain a width of pavement equal to the width of pavement constructed or improved at the expense of the state, if a state highway, or of the state and county, if a county highway, the location of the state's portion of such roadway within said incorporated limits to be determined by the center line of the roadway as shown on the plans on file with the state highway department, and the state shall be liable for damages to persons or property only when such damages shall occur as a result of the defective condition of the portion of improved highway as above described. (*Amended by L. 1910, ch. 570, L. 1912, ch. 83, and L. 1916, ch. 578.*)

Source.—L. 1898, ch. 115, § 8, in part, as amended by L. 1907, ch. 717. This section provided in effect that the state should not be liable for damages suffered by the construction or improvement of a highway under that act.

Reference.—Liability of town for defects in highways, Highway Law, § 74.

Amendment of 1900 excepted "such highways as are maintained by the state by the patrol system." *Ferguson v. Town of Lewisboro* (1914), 213 N. Y. 141, 107 N. E. 53.

§ 177. **Additional width or different type of construction under repair contracts.**—Whenever in the maintenance and repair of state and county highways the commission shall have determined upon the necessity of resurfacing such highway, the town or village wherein the highway is located may petition the commission to provide an additional width or a different type of pavement, or both, in the plans providing for such resurfacing. The additional expense of such widening or different type of construction shall be borne wholly by such town or village and the provisions of sections

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one hundred and thirty-seven and one hundred and thirty-eight-a shall apply to such additional width or different type of construction under such repair contract in the same manner as under a construction contract as provided in those sections. (*Added by L. 1916, ch. 578; former § 177 as amended by L. 1911, ch. 646, repealed by L. 1912, ch. 83.*)

Source.—L. 1898, ch. 115, § 15, as amended by L. 1907, ch. 717, last sentence.

References.—Construction of state and county highways in villages, Highway Law, §§ 137, 138.

§ 178. State to share expense of maintaining county roads.—(*Amended by L. 1910, chs. 165, 567, L. 1911, ch. 362, and repealed by L. 1916, ch. 459, in effect Oct. 1, 1916.*)

Source.—Highway Law, § 53-b, as added by L. 1903, ch. 269, without change, except as to the discretion conferred upon the commission to annex county roads constructed, prior to the taking effect of this chapter, as provided by general or special law, to the county highways of the county; thereafter such highways are to be maintained as other county highways.

Rules and regulations should be prescribed by the highway commission for the improvement and repair of county roads; they should require a uniform system of accounts and as representatives of the state see that all money contributed by the state is honestly and judiciously applied. Rept. of Atty. Genl. (1909) 612.

§ 179. Sprinkling; removal of filth and refuse.—Upon petition signed by a majority of the taxpayers owning property abutting upon an improved state or county highway and filed with the town clerk, the town board may set aside any section of such highway outside of a village and contract for the sprinkling of the roadbed with water and also contract for the removal of filth and refuse therefrom. No such contract shall be entered into unless previously approved by the county superintendent. The amount of any such contract so entered into shall be assessed upon the property abutting upon such section in the proportion which the frontage of each parcel thereof bears to the length of the section exclusive of intersecting highways. Such assessment shall be made, levied and collected in the same general manner, and at the same time and by the same officers as the town taxes of said town are assessed, levied and collected.

Source.—New.

Property along highways owned by street railways cannot be assessed for sprinkling, etc. Rept. of Atty. Genl. (1909) 602.

§ 180. Payment by counties of a portion of the cost of construction under repair contracts.—Whenever in the maintenance and repair of state and county highways under the provisions of article seven of this chapter, the commission shall have determined upon the necessity of resurfacing, reconstructing or repairing such highway, the county wherein the highway is located may by resolution provide that not to exceed thirty-five per centum of the estimated cost of such resurfacing, reconstructing or repairing shall be borne by the county. The provisions of sections one hundred and twenty-five, one hundred and twenty-six, one hundred and twenty-seven, one hundred and twenty-eight, one hundred and thirty, one

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hundred and thirty-two, one hundred and thirty-four, one hundred and thirty-five, one hundred and thirty-six, one hundred and thirty-seven, one hundred and thirty-nine, one hundred and forty-one, one hundred and forty-one-a, one hundred and forty-two, one hundred and forty-two-a, one hundred and forty-eight, one hundred and forty-nine, one hundred and forty-nine-a, one hundred and fifty, one hundred and fifty-one, one hundred and fifty-two, one hundred and fifty-three, one hundred and fifty-four, one hundred and fifty-five and one hundred and fifty-six of this chapter shall apply to such resurfacing, reconstructing and repairing of state and county highways in the same manner as to the original construction thereof in so far as the same may be applicable thereto. (*Added by L. 1917, ch. 91, in effect March 16, 1917.*)

Source.—New.

ARTICLE VIII.

LAYING OUT, ALTERING AND DISCONTINUING HIGHWAYS; PRIVATE ROADS.

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§ 190. Survey for the laying out of a highway.—Whenever the town superintendent shall lay out any highway, either upon application to him or otherwise, he shall notify the district or county superintendent, whose duty it shall be to either make a survey, or cause the same to be made, and the town superintendent shall incorporate the survey in an order to be signed by him, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same.

Source.—Former Highway Law (1890, ch. 568) § 81, rewritten to provide for survey to be made by district or county superintendent; originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 55, 56; L. 1880, ch. 114, §§ 2, 3.

References.—Town superintendent to cause highways to be surveyed and recorded, Highway Law, § 47, subd. 8. Board of supervisors may direct town superintendent to cause survey to be made, County Law, § 71.

Jurisdiction.—A record, purporting to be the record of a highway laid out by the town superintendent, which fails to show that jurisdiction was acquired, cannot be helped out by intentment or presumption. *Miller v. Brown* (1874), 56 N. Y. 383.

Sufficiency of survey.—The survey or description of the highway laid out, included in or made part of the order should be definite and certain. It should clearly specify the highway as to line and width. If there is no width expressed in it, and it is wholly uncertain both as to starting point and terminus, it is insufficient. *People ex rel. Waters v. Diver* (1879), 19 Hun 263. The omission to incorporate a survey in the order, or to make it a part of it, is fatal. *Pratt v. People* (1878), 13 Hun 664. The survey, to be sufficient, should show distinctly the line of the proposed road so that persons through whose lands the road is to be laid out, and others interested, can determine its route; there must be no uncertainty in the description of the property to be taken; the description should be such that from it alone, without resort to other papers, the road could be laid out. *Matter of De Camp* (1897), 19 App. Div. 564, 46 N. Y. Supp. 293; *Pratt v. People* (1878), 13 Hun 664. The objects at each end of the line of the highway, as pointed out in the record, will direct the course of the line, despite the fact that the direction of the compass between them as given in the description, is inaccurate. *Johnson v. Loveless* (1883), 18 Wk. Dig. 49.

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It has been held that it is sufficient to run a single line as the center of the highway, with definite points of starting and ending, since the width being prescribed by statute the boundaries of the highway would be a matter of simple calculation. *People ex rel. Hawver v. Commissioners of Highways of Redhook* (1835), 13 Wend. 310; *People ex rel. McFarland v. Commissioners of Highways of Salem* (1823), 1 Cow. 23; *Tucker v. Rankin* (1853), 15 Barb. 471.

Filing map.—Highway commissioners appointed to determine the necessity for a proposed highway and assess damages need not file a map of the highway with the certificate of their decision. That duty is put upon the commissioners of highways when they make and file the order laying out the highway. *Matter of Wagstaff* (1908), 129 App. Div. 591, 114 N. Y. Supp. 226.

Incorporation of survey in order.—The objection to the order of the commissioners, laying out the road, that it did not incorporate the survey, is of no force, where the survey was attached to the order. *Van Bergen v. Bradley* (1867), 36 N. Y. 316. A substantial compliance with the section requiring incorporation of an order in the survey is sufficient. *Tucker v. Rankin* (1853), 15 Barb. 471. Where the recital of the laying out of the highway and the survey, though dated several months before, are recorded immediately after the order in the book of town records, and the order purports to accord with a survey and both papers describe the same highway, the statute requiring the survey to be incorporated in the order is substantially complied with. *McCarthy v. Whalen* (1880), 19 Hun 503, *affd.* (1881), 87 N. Y. 148.

Recording order.—The clerk's act in recording an order of a town superintendent is ministerial. He has no discretion in its performance. He cannot refuse to file and record the order because it is improperly executed. *People v. Collins* (1811), 7 Johns. 549.

Destruction of records.—Where records of a town have been destroyed by fire the highways thereof may be ascertained, described and recorded as provided by L. 1885, ch. 482, or L. 1890, ch. 568. *Rept. of Atty. Genl.* (1892) 186.

Jurisdiction of town superintendent.—In laying out a highway the superintendent exercises a special and limited jurisdiction; and although it may be presumed until the contrary appears that he has acted legally, his acts may be impeached by showing that he exceeded his powers. *Ex parte Clapper* (1842), 3 Hill 458. Town superintendents of highways may, upon their own motion, and without any application therefor, lay out a highway. *Marble v. Whitney* (1863), 28 N. Y. 297; *People ex rel. Aspinwall v. Supervisors of Richmond* (1859), 20 N. Y. 252; *Gould v. Glass* (1855), 19 Barb. 179. But see *Harrington v. People* (1849), 6 Barb. 608.

§ 191. **Highways by dedication.**—Whenever land is dedicated to a town for highway purposes therein, the town superintendent may with the consent of the town board, either with or without a written application therefor, and without expense to the town, make an order laying out such highway, upon filing and recording in the town clerk's office with such order a release of the land from the owner thereof. A highway so laid out must not be less than two rods in width, except that where such highway is located on a sand beach separated by more than two miles of water from the main body of the town of which it forms a part and is not an extension or continuation of a public highway already in use and has erected thereon a board walk not less than one-third the width of said highway, such highway so laid out may be less than two rods in width and must not be less than ten feet in width. Section two hundred does not apply to a highway by dedication. Such town superintendent may also, upon written appli-

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cation and with the written consent of the town board, make an order laying out or altering a highway, or discontinuing a highway, which has become useless since it was laid out, upon filing and recording in the town clerk's office, with such application, consent and order, a release from all damages from the owners of lands taken or affected thereby, when the consideration for such release, as agreed upon between such town superintendent, and owner or owners, shall not in any one case, from any one claimant, exceed one hundred dollars, and from all claimants five hundred dollars. An order of the town superintendent, as herein provided, shall be final. (*Amended by L. 1915, ch. 322.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 80, as amended by L. 1897, ch. 204, and L. 1904, ch. 387, without change. Originally revised from L. 1880, ch. 114, §§ 2-4.

References.—Legislature cannot pass special law laying out highways, Const., art. 3, § 18. Laying out highways on Indian reservation, Indian Law, § 12. Width of highway, Highway Law, § 200.

Dedication of highway.—Where a map was filed in 1836, laying out a tract of land into blocks of building lots bounded by streets, and subsequent conveyances of portions thereof were made with reference to such map, such acts amounted to a dedication of the land within the lines of the streets as designated on such map for street purposes, and the subsequent adoption in 1910 by the common council of the city in which the lands lay of a resolution approving a petition of adjoining lot-owners to open a portion of one of the streets was an acceptance of it and constituted the same a highway. *Stillman v. City of Olean* (1911), 72 Misc. 196, 129 N. Y. Supp. 515, *affd.* (1912), 148 App. Div. 936, 133 N. Y. Supp. 1145.

To constitute a highway there must not only be a dedication but there must also be an acceptance by the public, accomplished either by an official act by the authorities competent to accept the highway, or by common or public user; and such an acceptance is not established by a sale of lots by reference to a map on which streets are laid down; nor by the enjoyment by the purchasers of such lots or the private easements thereby created; nor by mere public travel without action by the authorities in repairing and maintaining or using the street; nor by the patrolling thereof by police officers. *Matter of Starr Street* (1911), 73 Misc. 381, 131 N. Y. Supp. 71.

Dedication by user.—Dedication may be implied from the use of the land for highway purposes by the public without objection on the part of the owner for a considerable period of time. There is no definite and well established principle governing the period of time required to establish an implied dedication. Authorities differ as to requisite time of user required. *Wiggins v. Tallmadge* (1851), 11 Barb. 457. No specific length of time is sufficient to establish the fact of a dedication to the public. *Carpenter v. Gwynn* (1861), 35 Barb. 395.

The user ought to be for such a length of time that the public accommodation and private rights might be affected by a revocation. *McMannis v. Butler* (1868), 51 Barb. 436. But it is not necessary that the user shall have been long enough to establish a right by prescription. *Ward v. Davis* (1850), 5 Super. (3 Sand.) 502. The public may use as a thoroughfare the land of an individual for a period short of twenty years with the assent of the owner of the soil, and a dedication of the public right of way may be presumed. *Clements v. Village of West Troy* (1854), 10 How. Pr. 199. Twenty years' uninterrupted use will create the presumption of dedication, but a much shorter period will be sufficient where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied or immediately followed by public use. *Denning v. Roome* (1831), 6 Wend.

651; *Colden v. Thurbur* (1807), 2 Johns. 424. A user for twenty years is not requisite to establish a dedication to the public use of a street or highway, and use for six or eight years may, under certain circumstances, be sufficient. *Post v. Pearsall* (1839), 22 Wend. 425, 450. User for a short time, express and unequivocal, treating the strip of land as a street or highway, is sufficient. *Bissell v. N. Y. C. R. R. Co.* (1858), 26 Barb. 630, *revd.* (1861), 23 N. Y. 61. *Chapman v. Swan* (1865), 65 Barb. 210.

If mere user by the public, without any action of town authorities, laying out, recording, improving or accepting a road can make it a highway (as to which *quaere*), such user must continue for at least twenty years. *Matter of Rebuilding Bridge Across the Shawangunk Kill* (1885), 100 N. Y. 642, 3 N. E. 697.

If there be no other evidence of a grant or dedication than the presumption arising from the acquiescence on the part of the owner in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required as being the usual period of limitation. *Gould v. Glas* (1855), 19 Barb. 179; *Vandemark v. Porter* (1896), 40 Hun 397; *Pearsall v. Post* (1838), 20 Wend. 111, *affd.* (1839), 22 Wend. 450. When the twenty years have run the right of the public is perfect without regard to the mode in which the acquiescence of the owner of the land has been manifested. *Chapman v. Swan* (1865), 65 Barb. 210.

Although the owner of land may not dedicate it for a public highway and may not intend or assent that it shall become such, yet if he permits it to be used in that way for twenty years it would be deemed a public highway and he will not be permitted to question the public right. *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 24 N. E. 692.

A strip of land eleven feet wide cannot become a highway by user by mere travel over it without action by the public authorities in repairing or maintaining it. *Ricketson v. Village of Saranac Lake* (1911), 73 Misc. 52, 130 N. Y. Supp. 794, *affd.* (1912), 151 App. Div. 911, 135 N. Y. Supp. 1138.

Formal dedication.—If it is attempted to establish a formal dedication of a highway there must be proof of acceptance by some formal and unambiguous action on the part of the local authorities having the power to accept, and showing unmistakably an intention to accept the land for such purpose. *People v. Underhill* (1895), 144 N. Y. 316, 39 N. E. 333. Where an owner of land conveys a portion thereof under an agreement to open a highway along the same, and such a highway is accordingly opened, such covenant is evidence of an intention to dedicate such highway. *Newman v. Nellis* (1884), 97 N. Y. 285.

Release by owner.—Where the owner of land applied for and consented to the alteration of a highway which was wholly upon his farm, and himself closed a part of the highway which was abandoned, and opened and worked the new part, the failure to record a formal release did not render the order void so as to justify the invasion of the closed highway by persons having no rights except those common to the public. *Engleman v. Longhorst* (1890), 120 N. Y. 332, 24 N. E. 476. Compare *People ex rel. Clark v. Commissioner of Highways of Town of Reading* (1873), 1 T. & C. 193, where it was held that the fact the damages had neither been released nor assessed constituted a complete answer to an application for a writ of mandamus to open and improve a highway.

Where a release of lands by the owner for highway purposes though left with the clerk for filing is lost and there is no evidence of its contents, mandamus will not issue to compel the commissioners to open the highway. *People ex rel. Eastman v. Scott* (1902), 70 App. Div. 618, 75 N. Y. Supp. 410.

Assent of owner.—An absolute and final dedication of lands to a public use, can only be made by the owner of an absolute fee. *Ward v. Davis*, 3 Sand. 502 (1850). Assent of the owner to the dedication must be a free and voluntary act. If it be

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extorted by force, or made under a mistake or misapprehension of facts, it is not a free and voluntary act, and cannot be tortured into an express dedication. *Gould v. Glass* (1855), 19 Barb. 179; *Badeau v. Mead* (1852), 14 Barb. 328. Intention to dedicate must be clear. *Wiggins v. Tallmadge* (1851) 11 Barb. 457.

Evidence of dedication.—No deed or writing is necessary to constitute the dedication; neither is any particular form or ceremony to be observed. All that is required is the assent of the owner and the use of the land by the public for the purposes intended. *Gould v. Glass* (1855), 19 Barb. 179. A valid dedication may be made by a single act if positive and unequivocal in its nature. *Ward v. Davis* (1850), 5 Super. (3 Sand.) 502. The question as to whether a public highway has been created by dedication and acceptance is one of fact and a question for the jury. *Flack v. Village of Green Island* (1890), 122 N. Y. 107, 25 N. E. 267; *Matter of Hunter* (1900), 163 N. Y. 542, 57 N. E. 735; *Newton v. City of Dunkirk* (1907), 121 App. Div. 296, 106 N. Y. Supp. 125; *Porter v. Village of Attica* (1884), 33 Hun 605; *Matter of Freeholders of Montezuma* (1891), 38 N. Y. St. Rep. 970, 14 N. Y. Supp. 845.

As to sufficiency of evidence to support a dedication or an acceptance, see *Iselin v. Starin* (1895), 144 N. Y. 453, 39 N. E. 488; *Rozell v. Andrews* (1886), 103 N. Y. 150, 8 N. E. 513; *Cook v. Harris* (1875), 61 N. Y. 448; *Eckerson v. Village of Haverstraw* (1896), 6 App. Div. 102, 39 N. Y. Supp. 635, *affd.* (1900), 162 N. Y. 652, 57 N. E. 1109; *Wiggins v. Tallmadge* (1851), 11 Barb. 457; *Bridges v. Wyckoff* (1876), 67 N. Y. 130; *Clements v. Village of West Troy* (1853), 16 Barb. 251; *McVee v. City of Watertown* (1895), 92 Hun 306, 36 N. Y. Supp. 870; *Carpenter v. Gwynn* (1861), 35 Barb. 395.

Acceptance by user.—To constitute a public highway by dedication there must not only be an absolute dedication, that is, a setting apart and surrender to the use of the public, but there must also be an acceptance by user. *People v. Underhill* (1895), 144 N. Y. 316, 39 N. E. 333; *Niagara Falls Susp. Bridge Co. v. Bachman* (1876), 66 N. Y. 261; *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 24 N. E. 692; *Holdane v. Village of Cold Spring* (1860), 21 N. Y. 474; *Badeau v. Mead* (1852), 14 Barb. 328; *Matter of Fox Street* (1900), 54 App. Div. 479, 67 N. Y. Supp. 57. The acceptance by user must be shown by more than an occasional use by part of the public; the use must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 24 N. E. 692.

A way opened by the owners of private lands, for the accommodation of the lands through which and to which it leads, and never laid out as a public road, must be deemed a private way, even if the public are permitted to travel over it, if it is not shown to have been ever dedicated to, and accepted and adopted by, the public as a public highway. *Palmer v. Palmer* (1896), 150 N. Y. 139, 44 N. E. 966; *Hamilton v. Village of Owego* (1899) 42 App. Div. 312, 59 N. Y. Supp. 103, *affd.* (1902), 171 N. Y. 698, 64 N. E. 1121. To constitute such a public use as to show an acceptance it is not necessary that the public at large shall be entitled to it; it suffices if its advantages are meant to be and may be shared by the inhabitants, or a portion of them of the same locality. *Ward v. Davis* (1850), 5 Super. (3 Sand.) 502.

Acceptance by municipality.—*Raynor v. Syracuse University* (1901), 35 Misc. 83, 71 N. Y. Supp. 293; *Rudolph v. Ackerman* (1900), 30 Misc. 698, 64 N. Y. Supp. 460, *revd.* (1901), 58 App. Div. 596, 69 N. Y. Supp. 68; *Clements v. Village of West Troy* (1853), 16 Barb. 251; *Oswego v. Oswego Canal Co.* (1852), 6 N. Y. 357. As to acceptance of dedication by legislative act, see *Rudolph v. Ackerman* (1901), 58 App. Div. 596, 69 N. Y. Supp. 68, *revg.* (1900), 30 Misc. 698, 64 N. Y. Supp. 460.

A public street or highway cannot be created by mere dedication. There must

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also be something amounting to an acceptance of the street as such either by the public authorities or directly by the public. *People ex rel. Washburn v. Common Council* (1908), 128 App. Div. 44, 47, 112 N. Y. Supp. 387.

A dedication must be accepted by the public authorities or by user to create a highway and vest in the public a right of passage thereon, and mere travel by the public upon a road, without action by the public authorities in repairing or maintaining it, is insufficient for that purpose. *Smith v. Smythe* (1910), 197 N. Y. 457, 90 N. E. 1121, 35 L. R. A. (N. S.) 524.

To constitute a highway there must be not only a dedication but there must also be an acceptance by the public, accomplished either by an official act by the authorities competent to accept the highway, or by common or public user; and such an acceptance is not established by a sale of lots by reference to a map on which streets are laid down; nor by the enjoyment by the purchasers of such lots of the private easements thereby created; nor by mere public travel, without action by the authorities in repairing and maintaining or using the street; nor by the patrolling thereof by police officers. *Matter of Starr Street* (1911), 73 Misc. 380, 131 N. Y. Supp. 71.

Proof of acceptance.—The intent of the owner to give must be followed by an abandonment of his exclusive right to the enjoyment of the land, and the intent to accept, in the absence of any formal act of acceptance, must be shown by the use and appropriation of the land as a highway. *Flack v. Village of Green Island* (1890), 122 N. Y. 107, 25 N. E. 267. A formal resolution of the local authorities is unnecessary, but any official act on their part which treats it as a highway and shows an intention to adopt it as such is sufficient. *Matter of Hunter* (1900), 163 N. Y. 542, 57 N. E. 735. The mere surveying, mapping and laying out of the tract, opening the street and selling lots upon it, do not make it a public highway; they merely import an incipient dedication. *Bissell v. N. Y. C. R. R. Co* (1858), 26 Barb. 630; *Matter of Oakley Avenue* (1895), 85 Hun 446, 32 N. Y. Supp. 1146.

The acceptance may be proved by long public use, and where such is the case no formal laying out is necessary; it becomes a question of fact for the jury as to whether there has been an acceptance. *People v. Loehfelm* (1886), 102 N. Y. 1, 5 N. E. 783; *Pomfrey v. Village of Saratoga Springs* (1887), 104 N. Y. 459, 466, 11 N. E. 43; *Cook v. Harris* (1875), 61 N. Y. 448; *People v. Lambier* (1847), 5 Den. 9; *Gould v. Glass* (1855), 19 Barb. 179; *Eckerson v. Village of Haverstraw* (1896), 6 App. Div. 102, 39 N. Y. Supp. 635, *affd.* (1900), 162 N. Y. 652, 57 N. E. 1109; *McVee v. City of Watertown* (1895), 92 Hun 306, 36 N. Y. Supp. 870. An immediate acceptance and use of the thing dedicated is not necessary in order to secure the rights of the public in it. The only question arising where there has been no immediate public use is as to the necessity of showing an acceptance, for the purpose of securing a protection of the public rights. *Clements v. Village of West Troy* (1854) 10 How. Pr. 199.

Dedication of lands of residence park association for highways.—The leasing for a long term of years of lots laid out on a map or plan of lands of a camp meeting and summer residence park association showing such lots, and roads and streets to be used for access thereto, constitutes a dedication of land in such streets and roads to the use of the lessees, and the association cannot maintain an action of trespass against a person using a road for access to the premises of a lessee for the purpose of delivering merchandise and supplies. *Thousand Island Park Association v. Tucker* (1903), 173 N. Y. 203, 65 N. E. 975, 60 L. R. A. 786, *revg.* (1903), 59 App. Div. 627, 69 N. Y. Supp. 1149.

Lands adjoining a public highway, lying between it and a fence, are apparently dedicated to the public use; any other construction would convert it into a trap to catch trespassers. *Cleveland v. Cleveland* (1834), 12 Wend. 172.

Revocation of dedication.—Where a highway has been once dedicated and ac-

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cepted, the dedication may not be revoked by the owner of the land. *Cook v. Harris* (1875), 61 N. Y. 448. But a dedication of land for use as a public highway may be revoked at any time before it has been accepted and the rights of third parties have become vested. *City of Buffalo v. D., L. & W. R. R. Co.* (1902), 68 App. Div. 488, 74 N. Y. Supp. 343, *affd.* (1904), 178 N. Y. 561, 70 N. E. 1097.

Where a road is laid out and dedicated to public use and has been used as a highway for less than five years, and the authorities have neither accepted, opened nor worked the same, the dedication may be revoked by the owner and the land does not become a public highway. *Lee v. Village of Sandy Hill* (1869), 40 N. Y. 442; *Eckerson v. Village of Haverstraw* (1896), 6 App. Div. 102, 39 N. Y. Supp. 635, *affd.* (1900), 162 N. Y. 652, 57 N. E. 1109. If the dedication be not accepted within a reasonable time the owner may recall it at any time before the rights of the public have attached. What is a reasonable time must depend upon the particular facts and circumstances of each case. *Matter of Fox Street* (1900), 54 App. Div. 479, 67 N. Y. Supp. 57; *McMannis v. Butler* (1868), 51 Barb. 436; *Bissell v. N. Y. C. R. R. Co.* (1858), 26 Barb. 630.

An offer to dedicate may be made subject to a certain condition, and if it is accepted *cum onere*, the land becomes a highway subject to the burden; but the owner may not thereafter increase the burden or revoke the dedication, and the burden is upon him to show that the condition has not been complied with. *City of Cohoes v. D. & H. C. Co.* (1892), 134 N. Y. 397, 31 N. E. 887; *Story v. N. Y. Elevated R. R. Co.* (1882), 90 N. Y. 122.

The town superintendent may act upon the verbal consent of the owner in laying out a highway across his lands, and though consent is revocable, it must be revoked before the road is laid out; subsequently the owner will be estopped from denying the legality of the act. If such consent has been given under a mistake of law, the party can have no relief in equity. *Marble v. Whitney* (1863), 28 N. Y. 297.

Power of town superintendent in respect to laying out, etc., highway.—It is not necessary to the valid laying out of a highway that there should be a written application therefor. *McCarthy v. Whaley* (1880), 19 Hun 503, *affd.* (1881), 87 N. Y. 148; *Gould v. Glass* (1855), 19 Barb. 179; *People ex rel. Aspinwall v. Supervisors of Richmond* (1859), 20 N. Y. 252. But in *Harrington v. People* (1849), 6 Barb. 607, it is asserted that to give commissioners of highways jurisdiction of proceedings to lay out a highway, an application must be made to them in writing, by a person liable to be assessed for highway taxes.

Highway officers in laying out a highway, exercise a special and limited jurisdiction. *Beardslee v. Dolge* (1894), 143 N. Y. 160, 38 N. E. 205; *Ex parte Clapper* (1842), 3 Hill 458. Whether *quasi-judicial* officers have jurisdiction to make a decision in any case is always open to inquiry, and their decision in any case can be attacked collaterally for want of jurisdiction. *Cagwin v. Town of Hancock* (1881), 84 N. Y. 532. In laying out highways superintendents act under a special and statutory authority; and it must appear, upon the face of their proceedings or by proof *alunde*, that they have acquired jurisdiction. *Miller v. Brown* (1874), 56 N. Y. 383; *People ex rel. Bodine v. Goodwin* (1851), 5 N. Y. 568. In opening new roads, and altering and shutting up old ones, the superintendent acts judicially; but in describing and recording a road which has become public by twenty years' use he performs little more than a ministerial duty. *People ex rel. Commissioners of Highways of Cortlandville v. Judges of Cortland County* (1840), 24 Wend. 491; *Woolsey v. Tompkins* (1840), 23 Wend. 324.

The proceeding by mandamus, to compel a town superintendent of highways to open a road, should not be restored to where its necessary effect would be to subject the superintendent to an action for trespass. If the facts show a want of jurisdiction, so as to make the proceedings entirely void, this is a sufficient ground for not awarding a peremptory mandamus. Town superintendents are not

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estopped, by the fact that they have assumed an unlawful authority and acted under it, from asserting their want of jurisdiction and refusing to proceed further, whenever they discover their error. *People ex rel. Ottman v. Commissioners of Highways of Seward* (1858), 27 Barb. 94; *Ex parte Clapper* (1842), 3 Hill 453.

A new road may be laid out partly over a highway already existing; what is a suitable distance for occupation of the old road will depend upon the facts in each case by itself. *People ex rel. Thomas v. Commissioners of Milford* (1867), 37 N. Y. 360. The widening of a highway is the "alteration" not the "laying out." *People ex rel. Lasher v. McNeil* (1873), 2 T. & C. 140.

The power to alter and the power to record are not only given by distinct clauses of the statute, but they are conferred for different purposes; the former is given for the purpose of making the road better by changing its site, the latter for preserving a written memorial of the road as it already exists. "Laying out" is used in reference to establishing a road where none existed before and cannot apply to an old road. *People ex rel. Commissioners of Highways of Cortlandville v. Judges of Cortland County* (1840), 24 Wend 491.

Abandonment of highway.—Mere lapse of time does not effect an abandonment or revocation of dedication of a highway. *Stillman v. City of Olean* (1911), 72 Misc. 196, 129 N. Y. Supp. 515, *affd.* (1912), 148 App. Div. 936, 133 N. Y. Supp. 1145.

Discontinuance of and closing highway.—Where an order of a town superintendent closing a portion of a highway, is filed in the town clerk's office, but is not recorded by him as required by the above section, the failure to record the order does not invalidate the proceedings of the superintendent. *People ex rel. Dinsmore v. Vanderwater* (1903), 83 App. Div. 60, 82 N. Y. Supp. 626.

Highways are laid out and discontinued by the commissioners under the regulations contained in the statute. *People ex rel. Van Keuren v. Town Auditors* (1878), 74 N. Y. 310. Once established a highway does not cease to be such until it has been discontinued by the proper authorities. *Driggs v. Phillips* (1886), 103 N. Y. 77, 8 N. E. 514. Where a highway is once shown to exist it is presumed to continue until it is shown to exist no longer. *City of Cohoes v. D. & H. C. Co.* (1892), 134 N. Y. 397, 31 N. E. 887; *Beckwith v. Whalen* (1875), 65 N. Y. 322. Where a new road has been regularly laid out, it cannot be discontinued as an old one before it has been opened and used. *People ex rel. Miller v. Griswold* (1876), 67 N. Y. 59.

A highway is subject to discontinuance though never opened where the original occasion for it has ceased, for example where another road has been opened. *People ex rel. Clark v. Town of Reading* (1873), 1 T. & C. 193.

Consent to close a highway must be by a majority of the town board. Subsequent signature of one member of the town board, procured after the board had adjourned, is ineffective to make a majority. *Greene v. Goodwin Sand & Gravel Co.* (1911), 72 Misc. 192, 129 N. Y. Supp. 709.

A town meeting has no power to discontinue a highway once established; that can be done only by the intervention of the authorities and according to the procedure prescribed by statute. *Hughes v. Bingham* (1892), 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454. A town cannot lay out a highway nor discontinue one. *Monk v. Town of New Utrecht* (1887), 104 N. Y. 552, 11 N. E. 268.

A highway opened and worked for a short part of the distance only, and not opened or worked as described in the survey or in any manner on a particular portion thereof, until after the lapse of nearly fourteen years, from the time of its being laid out, ceases to be a highway for any purpose at the place it is not opened or worked. *Christy v. Newton* (1871), 60 Barb. 332.

Discontinuance of road; insufficiency of objection of complaining abutting owner; application by highway commissioner owning lands affected.—An order discontinuing a highway should not be reversed because the discontinuance changes the

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route from the place of residence of a complaining resident to his lands, and requires him to travel a shortly lengthened distance in going from one point to another, because that reason might be assigned by any person who travels on the highway, going in either direction, and might prevent, in many cases, the discontinuance of a highway when sufficient and substantial reasons existed therefor. But an order for the discontinuance of a highway will be reversed where it is shown that the applicant for discontinuance was one of the three highway commissioners of the town, that he owns land on both sides of the highway which he asks to be discontinued, and on discontinuance the absolute title of the lands used for highway purposes will revert to him. *People ex rel. Thompson v. Belden* (1909), 132 App. Div. 558, 116 N. Y. Supp. 929.

Power of the Appellate Division to review a proceeding discontinuing a highway.—The Appellate Division is precluded from reviewing a determination of fact by the town superintendent as to whether the highway has become useless. The order of the town superintendent discontinuing a highway being declared by the act to be final, a writ of certiorari brings up the record of the proceedings resulting in the order only for the purpose of enabling the Appellate Division to determine whether the superintendent acted within his authority in making the order. *People ex rel. Bushnell v. Newell* (1909), 131 App. Div. 555, 115 N. Y. Supp. 399.

Writ of certiorari to review proceedings to discontinue a highway.—Only those whose lands are affected by the discontinuance of a highway are entitled to damages for such discontinuance; for it is only from such owners that releases of damages are required by the statute. Where the line of the south end of a discontinued highway is a part of the north line of a highway adjacent to relator's premises, but no part of the discontinued highway adjoins them, the relator is not the owner of lands so affected by the discontinuance of the highway as to entitle him to damages for discontinuing it; and for this reason he is not entitled to a writ of certiorari to review the action of the town authorities in discontinuing the highway. The inconvenience he suffers by reason of the discontinuance comes to him in common with the general public whose business or pleasure might lead them to continue to use the highway if it had not been discontinued; and his special injury not common to the general public is that he, perhaps, might have more frequent occasion for its use than persons living at a greater distance from it. *People ex rel. Bushnell v. Newell* (1909), 131 App. Div. 555, 115 N. Y. Supp. 399.

Injunction to restrain change of highway.—Those living upon a highway that affords them access to other places may maintain an action to prevent the demolition of a section of the highway, though that portion threatened with destruction is not the part upon which their lands abut and the abutting owners at the point of demolition consent thereto. *Greene v. Goodwin Sand & Gravel Co.* (1911), 72 Misc. 192, 129 N. Y. Supp. 709.

Reopening of an abandoned highway.—A town superintendent of highways has power in conjunction with the town board to issue an order to reopen a qualifiedly abandoned highway. *Opinion of Atty. Genl.* (1913), 14.

Filing order laying out highway.—The provision of this section requiring an order laying out a highway to be filed and recorded in the town clerk's office, is not mandatory and failure to comply therewith does not make the town a trespasser. *Tomlinson v. Town of Southampton* (1911), 143 App. Div. 487, 127 N. Y. Supp. 965.

Where there has been a user of a road by the public for twenty years, and it has been kept in repair or taken in charge by the public authorities, the fact that they have failed to perform their duty to record it does not change the mandate of the statute that it shall be deemed a public highway. *Lewis v. N. Y., L. E. & W. R. R. Co.* (1890), 123 N. Y. 496, 26 N. E. 357.

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Failure to record order closing town highway.—An order closing a town highway not recorded as required by this section is not final and though made and filed in November, 1912, constitutes no ground for quashing a writ of certiorari served in October, 1913, to review the determination made in the proceeding to close the highway, as section 2125 of the Code of Civil Procedure provides that said writ must be served within four calendar months "after the determination to be reviewed becomes final and binding," etc., nor should the writ be quashed on the ground of relator's laches because at the time of the filing of the order sought to be reviewed he knew of the action which had been taken. *People ex rel. Simons v. Dowling* (1914), 84 Misc. 201, 146 N. Y. Supp. 919, *affd.* (1914), 164 App. Div. 911, 148 N. Y. Supp. 1137.

All the papers in a proceeding taken by town officers to close highways, consisting of the application and consent of the town board, a release from all damages from the owners of lands taken or affected thereby and the order of the town superintendent closing the highway, must under this section of the Highway Law, be filed and recorded in the town clerk's office; recording the release and merely filing the other papers are not a compliance with the statute. *People ex rel. Simons v. Dowling* (1914), 84 Misc. 201, 146 N. Y. Supp. 919, *affd.* (1914), 164 App. Div. 911, 148 N. Y. Supp. 1137.

Section cited.—*McCutcheon v. Terminal Station Commission* (1915), 88 Misc. 601, 151 N. Y. Supp. 451, *affd.* (1915), 168 App. Div. 301, 154 N. Y. Supp. 711, *affd.* (1916), 217 N. Y. 127.

§ 192. **Application.**—Any person or corporation assessable for highway taxes may make written application to the town superintendent of the town in which he or it shall reside, or is assessable, to alter or discontinue a highway, or to lay out a new highway. Such application must be approved by the written consent, indorsed thereon or attached thereto, of a majority of the members of the town board. (*Amended by L. 1913, ch. 472.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 82, without change in substance. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 2, 54, 83; L. 1836, ch. 122; L. 1857, ch. 491; L. 1880, ch. 114, §§ 2-4.

Who may make application.—Under the former law a taxpayer of a village not assessable for highway labor was not competent to make application to lay out, alter or discontinue a highway. *Commissioners of Highways of Town of Bushwick v. Meserole* (1833), 10 Wend. 123.

A nonresident, owning real estate in the town, may make application; and he is not restricted to roads running through his own lands. *People ex rel. Wait v. Eggleston* (1856), 13 How. Pr. 123. A person liable to be assessed in one town may institute proceedings to lay out a highway partly in his own town and partly in another. *People ex rel. Knapp v. Keck* (1895), 90 Hun 499, 36 N. Y. Supp. 51; *N. Y., N. H. & H. R. R. Co. v. New Rochelle* (1899), 29 Misc. 195, 60 N. Y. Supp. 904; *Harrington v. People* (1849), 6 Barb. 607.

A municipal corporation assessable for highway taxes in a town may make application. *N. Y., N. H. & H. R. R. Co. v. Village of New Rochelle* (1899), 29 Misc. 195, 60 N. Y. Supp. 904.

Town superintendents of highways, as such, may not make application to lay out a highway. *People ex rel. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248. But they may lay out a road of their own motion without any application therefor. *Marble v. Whitney* (1863), 28 N. Y. 297.

Application by a person liable to assessment is not necessary to confer jurisdiction upon the town superintendent of highways to discontinue a road; they have

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power to discontinue on their own motion, and therefore, a defective application does not invalidate such proceedings. *People ex rel. Bristol v. Nichols* (1873), 51 N. Y. 470.

Proceeding by owner of farm to alter a highway.—See *Matter of Morse* (1910), 69 Misc. 29, 125 N. Y. Supp. 739, *affd.* (1911), 145 App. Div. 936, 129 N. Y. Supp. 1136, *affd.* (1911), 203 N. Y. 563, 96 N. E. 1122.

Jurisdiction of county court.—Compliance with sections 192 and 193 of the Highway Law are initial steps in the jurisdiction of the county court to maintain a proceeding for the improvement of a highway. *Matter of Laidlaw* (1912), 153 App. Div. 343, 137 N. Y. Supp. 1076.

Consent of town board.—The requirement that an application to alter, discontinue or lay out a highway "must be approved by the written consent, indorsed thereon or attached thereto, of a majority of the members of the town board," is jurisdictional and cannot be waived by said board. Hence, where such consent has not been obtained, the proceeding should be dismissed. *Matter of Fenton* (1916), 173 App. Div. 284, 160 N. Y. Supp. 1129.

The appearance of the attorney for the town superintendent of highways as attorney for the applicants in a proceeding for the improvement of a highway is not necessarily a sufficient ground to invalidate the proceeding. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56, *affd.* (1914), 213 N. Y. 653, 107 N. E. 1080.

Description of a proposed highway is a necessary part of the application to the highway commissioners and the petition to the county court for the appointment of commissioners to determine the necessity of the highway. *Matter of Wagstaff* (1908), 129 App. Div. 591, 114 N. Y. Supp. 226.

§ 193. **Application for condemnation commissioners.**—Whenever the land is not dedicated to the town for highway purposes, and not released as herein provided, the applicant shall, within thirty days after presenting the application to the town superintendent, and after at least five days' notice to said town superintendent of the time and place of the application to the county court, in this section provided for, by verified petition showing the applicant's right to so present the same, and that such application has been in good faith presented, and if the county judge require on such notice to such parties interested as he shall direct, apply to the county court of the county where such highway shall be, for the appointment of three commissioners to determine upon the necessity of such highway proposed to be laid out or altered, or to the uselessness of the highway proposed to be discontinued and to assess the damages by reason of laying out, opening, altering or discontinuing such highway. Such application shall be accompanied by the written undertaking of the applicant executed by one or more sureties, approved by the county judge, to the effect that if the commissioners appointed determine that the proposed highway or alteration is not necessary or that the highway proposed to be discontinued is not useless, the sureties will pay to the commissioners their compensation at the rate of four dollars for each day necessarily spent and all costs and expenses necessarily incurred in the performance of their duties, which amount shall not exceed the sum of one hundred dollars. Whenever the town superintendent of highways of any

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township shall determine that public necessity requires the laying out of a new or additional highway, and the land therefor cannot be obtained by the dedication of the owners thereof, he may apply to the town board of his town for permission to institute a proceeding to acquire so much land as may be necessary to lay out such new or additional highway, and when such consent shall have been given by the town board of such town, the said town superintendent of highways may apply to the county court of the county in which such proposed highway is situated, for the appointment of commissioners in like manner as is provided by this section where such application is made by any person or corporation assessable for highway taxes, except that when such application shall be made by the town superintendent of highways, that at least five days' notice of the time and place of the application shall be given to the owners of the lands sought to be acquired, providing such owners can be ascertained by such town superintendent, or if the owners thereof are not known to the town superintendent, by the serving of a copy of the notice of such application upon the occupants of said premises. When such application is made by the town superintendent of highways, no undertaking shall be required of the applicant. (*Amended by L. 1910, ch. 344.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 83, as amended by L. 1894, ch. 334; L. 1897, ch. 344; L. 1904, ch. 353; L. 1906, ch. 67, and L. 1907, ch. 50, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 60, 61, 65, 85; L. 1880, ch. 114, §§ 2-4.

References.—Damages must be ascertained by a jury or by commissioners appointed by court, Const., art. 1, § 7. County court always open for transaction of business, Code Civ. Pro. § 355.

Commencement of proceedings.—The statute contemplates that an application shall first be made to the town superintendent and that within thirty days thereafter application shall be made to the court for the appointment of commissioners. *People ex rel. Smith v. Allen* (1899), 37 App. Div. 248, 55 N. Y. Supp. 1057, *affd.* (1900), 162 N. Y. 615, 57 N. E. 1122; *People ex rel. Knapp v. Keck* (1895), 90 Hun 497, 36 N. Y. Supp. 51.

This and the following section of the law are designed to point out the initiatory steps in all proceedings to lay out, alter or discontinue a highway. *Matter of Taylor & Allen* (1896), 8 App. Div. 395, 40 N. Y. Supp. 839. The statute must be strictly complied with. *People ex rel. Scrafford v. Stedman* (1890), 57 Hun 280, 10 N. Y. Supp. 787.

Order appointing commissioners; filing *nunc pro tunc*.—An order appointing commissioners in proceedings to lay out, alter and extend a highway may be filed *nunc pro tunc* after the commissioners have acted. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56, *affd.* (1914), 213 N. Y. 653, 107 N. E. 1080.

Application within thirty days; waiver.—The provision of this section of the Highway Law that an application to the county court for an order appointing commissioners to determine the necessity for proposed highways and to assess the damages for the improvement shall be made within thirty days after presenting the application to the town superintendent, cannot be waived by the superintendent. Where no step has been taken in the county court within thirty days after the presentation of the application to the town superintendent, an order appointing commissioners, granted upon the town superintendent's admission of

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service of the application as of a later date, should be vacated. *Matter of Laidlaw* (1912), 153 App. Div. 343, 137 N. Y. Supp. 1076.

When proceedings will lie.—The statute does not impose upon the town any liability for damages sustained by an abutting owner by reason of a change of grade of a highway. *Smith v. Boston & Albany R. R. Co.* (1904), 99 App. Div. 94, 91 N. Y. Supp. 412, *affd.* (1905), 181 N. Y. 132, 73 N. E. 679.

A land owner from whose town a private road leads into another town and there ends in a *cul-de-sac*, may properly apply to have this road which has been used for more than twenty years laid out as a public road to the boundary line between the towns. *Matter of Burdick* (1889), 27 Misc. 298, 58 N. Y. Supp. 759.

Public highway laid out to benefit an individual.—Where the main object of a proceeding, taken ostensibly to lay out a public highway, is to furnish access to the lot of an individual, not reached at present by any highway and which is the terminus of the one proposed, the report of the commissioners should be set aside and the individual be remitted to her right to apply for a private road, under sections 106 et seq. of the Highway Law. *Matter of Lawton* (1898), 22 Misc. 426, 50 N. Y. Supp. 408.

Sufficiency of application.—The application need not contain affirmative allegations that the land proposed to be taken has not been dedicated to the town for highway purposes, or has not been released by the owner for that purpose, or that it has been made within thirty days after its presentation to the town superintendent, and the failure of the applicant to allege such facts does not deprive the court of jurisdiction to entertain the proceeding. *Matter of Buel* (1901), 168 N. Y. 423, 61 N. E. 700. The petition must show that the petitioner was assessable in the town and that the land to be taken for the new highway was not dedicated to the town for highway purposes or released by the owners. *Matter of Pugh* (1899), 46 App. Div. 634, 61 N. Y. Supp. 1145, *revd.* (1897), 22 Misc. 43, 49 N. Y. Supp. 398.

A petition for the discontinuance of a highway need not set forth any facts except such as are required by this section; it need not allege that the portion of the highway proposed to be discontinued is useless. *Matter of Rushmore* (1907), 57 Misc. 555, 109 N. Y. Supp. 1099, *affd.* (1909), 131 App. Div. 917, 115 N. Y. Supp. 1143.

Proceedings for discontinuance.—A proceeding for the appointment of commissioners to determine whether a highway has become useless and should be abandoned, may be maintained although the highway in question has not yet been opened nor the damages been paid for the same. *Matter of McFadden* (1904), 96 App. Div. 58, 89 N. Y. Supp. 104.

Uselessness must be shown.—The term "useless," as used in this section, means "practically useless," and not "absolutely useless." *Matter of Trask* (1904), 45 Misc. 244, 92 N. Y. Supp. 156. The uselessness of a highway proposed to be discontinued, refers to that of a road for a time opened, but by change of circumstances losing its usefulness; not to a uselessness existing at the time it was laid out. *People ex rel. Miller v. Griswold* (1876), 67 N. Y. 59. Any change of conditions rendering a highway useless is as effective as if its usefulness had arisen from age and use. *Matter of McFadden* (1904), 96 App. Div. 58, 89 N. Y. Supp. 104. To authorize the discontinuance of a highway, the weight of evidence must show and the commissioners must find that it is useless; a finding that it is not necessary, or that a proposed new road would be better, is insufficient. *Matter of Coe* (1897), 19 Misc. 549, 44 N. Y. Supp. 910.

Notice.—Omission to give the required notice to persons entitled thereto is fatal. *People ex rel. Willis v. Smith* (1876), 7 Hun 17. Notice served upon the afternoon of June sixth of an application to be made in the morning of June eleventh for the appointment of commissioners pursuant to this section is five

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days notice within the meaning of the statute. *Matter of Niel* (1907), 55 Misc. 317, 106 N. Y. Supp. 479.

Waiver of notice.—Although town superintendents are entitled by this section to five days' notice of the application to lay out a new highway, they waive such notice by appearing before the county court without objection. *Matter of Wood* (1906), 111 App. Div. 781, 97 N. Y. Supp. 871. The town superintendent, who is the only person entitled as a matter of right to notice of the application, has the power to waive such notice and appear without notice. *Matter of Wood* (1905), 107 App. Div. 514, 95 N. Y. Supp. 260, *affd.* on rearg. (1906), 111 App. 781, 97 N. Y. Supp. 871.

Employment of attorneys.—Town superintendents upon receiving notice of an application for the appointment of commissioners to lay out a highway may employ attorneys to oppose such application, and the expense thereof may be paid by them and thereafter audited by the town board. *McCoy v. McClarty* (1907), 53 Misc. 69, 104 N. Y. Supp. 80. But compare *People ex rel. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248.

Liability for costs.—It is improper to assess the fees of the commissioners upon the town where the proceeding has failed, even though such failure is due not to an adverse report by the commissioners, but because a private individual withholds his consent to have the highway pass through his yard, and the town superintendent does not certify that the public interests would be promoted by the opening of the highway. *Matter of Miller* (1896), 9 App. Div. 260, 41 N. Y. Supp. 581.

Where the applicant has already paid costs of parties opposing the application, as fixed by the order of the county court, amounting to the sum herein prescribed as the limit of liability, the commissioners appointed to determine upon the necessity of the highway are not entitled to recover their fees from him; the commissioners must be deemed to accept their appointments with knowledge of this fact. *Patton v. Miller* (1898), 28 App. Div. 517, 51 N. Y. Supp. 202.

The necessity for the employment and the reasonableness of the charges of a stenographer appointed to lay out a new highway is to be determined by the board of town auditors. *Opinion of State Comptroller* (1916), 9 State Dept. Rep. 487.

Undertaking.—The undertaking is not sufficient unless approved by the county judge before whom the proceeding is instituted. *Matter of Fanning* (1898), 26 App. Div. 627, 50 N. Y. Supp. 1126.

An omission to file the undertaking of commissioners under section 193 of the Highway Law may be corrected under section 721 of the Code of Civil Procedure. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56, *affd.* (1914), 213 N. Y. 653, 107 N. E. 1080.

Where the undertaking accompanying an application for the appointment of commissioners in a proceeding to lay out a highway is defective in fixing the liability of the sureties at too small a sum, the County Court, under the authority given by section 730 of the Code of Civil Procedure, may allow a proper undertaking to be substituted, and when filed the defect is cured. *Matter of Fenn* (1908), 128 App. Div. 10, 112 N. Y. Supp. 431.

§ 194. Appointment of condemnation commissioners and their duties.—Upon the presentation of such petition, the county court must appoint three disinterested freeholders, who shall not be named by any person interested in the proceedings, who shall be residents of the county, but not of the town wherein the highway is located, and who shall not be related by consanguinity or affinity within the sixth degree to the applicant or to any

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person interested in the proceeding or to the owner of any lands to be taken or affected by the laying out, alteration or discontinuance of a highway, as commissioners to determine the questions mentioned in the last section. They shall take the constitutional oath of office, and appoint a time and place at which they shall all meet to hear the town superintendent and supervisor of the town where such highway is situated, and other interested therein. They shall personally examine the highway described in the application, hear any reason that may be offered for or against the laying out, altering or discontinuing of the highway, and assess all damages by reason thereof. They may adjourn the proceedings before them from time to time, issue subpoenas and administer oaths in such proceedings, and they shall keep minutes of their proceedings, and shall reduce to writing all oral evidence given before them upon the subject of the assessment of damages. They shall make duplicate certificates of their decision, and shall file one in the town clerk's office of the town, and the other, with such minutes and evidence, in the county clerk's office of the county in which the highway or proposed highway is located.

Source.—Former Highway L. (L. 1890, ch. 568) § 84, as amended by L. 1904, ch. 353, and L. 1907, ch. 50, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 60 (as amended by L. 1881, ch. 696) §§ 66-69; L. 1845, ch. 180, § 5, as amended by L. 1872, ch. 315, and L. 1888, ch. 428.

References.—Constitutional oath of office, Const., art. 13, § 1. Majority of commissioners may act, General Construction Law, § 34. Compelling attendance of witnesses and the giving of testimony, Code Civ. Pro. §§ 854-862.

Order appointing commissioners.—If the petition has been presented in good faith, it is the duty of the county court to appoint the commissioners asked for; the provisions of this section are explicit in this respect. *Matter of McFadden* (1904), 96 App. Div. 58, 89 N. Y. Supp. 104.

An order appointing commissioners in proceedings to lay out, alter and extend a highway may be filed *nunc pro tunc* after the commissioners have acted. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56, *affd.* (1914), 213 N. Y. 653, 107 N. E. 1080.

Where a town superintendent, served with notice of an application for the appointment of commissioners under this section, fails to appear upon such application but afterwards appears before the commissioners then appointed and opposes the opening of a highway, he waives all irregularities in the appointment of the commissioners. *Matter of Niel* (1907), 55 Misc. 317, 106 N. Y. Supp. 479.

Qualifications of commissioners.—Commissioners appointed to determine as to the uselessness of a highway must be freeholders at the time of their appointment. *Matter of Trask* (1903), 81 App. Div. 318, 81 N. Y. Supp. 53.

Where a notice and petition in proceedings instituted to lay out a highway state all the facts required by the statute the county court may make an order appointing commissioners, the effect of which is an adjudication that the persons appointed are eligible. The fact that it does not appear in the order that such commissioners were "disinterested freeholders" residing in the county is not a defect affecting the court's jurisdiction. *Matter of Baker* (1903), 173 N. Y. 249, 65 N. E. 1100. Statement that commissioners were freeholders allowed to stand in return to certiorari although not appearing in the record. *People ex rel. Lovell v. Mellville* (1894), 7 Misc. 214, 27 N. Y. Supp. 1101.

The constitutional oath of office required of commissioners appointed under this
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section means the oath prescribed in art. 13, § 1, of the Constitution, requiring among other things, an oath to support the federal and state Constitutions; this requirement is mandatory, and where it is not embodied in the oath taken the proceeding is void and objections may be taken on the motion to confirm their decision. *Matter of David* (1904), 44 Misc. 192, 89 N. Y. Supp. 812. The taking of such oath is necessary to give the commissioners jurisdiction, and the parties to the proceedings have no right to waive an omission. *People ex rel. Highways Comrs. v. Connor* (1866), 46 Barb. 333.

Failure of commissioners to take the constitutional oath of office renders their proceedings ineffectual and void. *Matter of Thompson* (1911), 70 Misc. 285, 128 N. Y. Supp. 604.

Conduct of hearing.—Owners of lands which will be affected by the discontinuance of the highway, although not abutting thereon, are entitled to be heard in opposition to the proceedings to discontinue; such landowners cannot be made by the commissioners to pay a sum of money as a condition of being heard. *Matter of Coe* (1897), 19 Misc. 549, 44 N. Y. Supp. 910.

The commissioners appointed by the county court are not bound to follow the route of the petition for the road with precision, and an extension of one of the corners further than described in the petition is not erroneous if thereby a better road is obtained. *People ex rel. Cecil v. Carman* (1893), 69 Hun 118, 23 N. Y. Supp. 386.

The commissioners cannot be compelled to have the hearings at any particular place in the town where the highways are located. *Matter of Coe* (1897), 19 Misc. 549, 44 N. Y. Supp. 910.

The appearance of the attorney for the town superintendent of highways as attorney for the applicants in a proceeding for the improvement of a highway is not necessarily a sufficient ground to invalidate the proceeding. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56, *affd.* (1914), 213 N. Y. 653, 107 N. E. 1080.

An adjournment by two of the commissioners in the absence of the third, who had been duly notified of the first meeting is valid, the power of adjournment being in the majority. *In re Newland Ave.* (1891), 38 N. Y., St. Rep. 796, 15 N. Y. Supp. 63.

Filing map.—Highway commissioners appointed under this section to determine the necessity for a proposed highway and assess damages need not file a map of the highway with the certificate of their decision. That duty is put upon the commissioners of highways when they make and file the order laying out the highway. Nor are they required to incorporate the description of the highway in such certificate; such description is a necessary part of the application to the highway commissioners and the petition to the County Court for the appointment of commissioners to determine the necessity of the highway. *Matter of Wagstaff* (1908), 129 App. Div. 591, 114 N. Y. Supp. 226.

Evidence.—Error in the admission and exclusion of evidence relating to damages which would be sustained by reason of the construction of the proposed road, will authorize the reversal of order based upon the decision of the commissioners. *Matter of Pugh* (1899), 46 App. Div. 634, 61 N. Y. Supp. 1145, *revd.* (1897), 22 Misc. 43, 49 N. Y. Supp. 398.

§ 195. **Notice of meeting.**—The applicant shall cause, at least eight days previous, written or printed notice to be posted up in not less than three public places in the town specifying, as near as may be, the highway proposed to be laid out, altered or discontinued, the tracts or parcels of land through which it runs, and the time and place of the meeting of the com-

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missioners appointed by the county court to examine the highway as mentioned in the last section. Such notice shall also, in like time, be personally served on the owner and occupant of the land, if they reside in the town, or by leaving the same at their residence with a person of mature age; if they do not reside in the same town, or service can not be made, a copy of such notice shall be mailed to such owner and occupant, if their post-office address is known to the applicant or ascertainable by him upon reasonable inquiry. If the highway proposed to be laid out shall cross a railroad the applicant shall also cause notice of the time and place of the meeting of the commissioners to be given to the railroad company as required by section ninety of the railroad law. (*Amended by L. 1912, ch. 246.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 85, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 59, 62; L. 1845, ch. 180, § 5, as amended by L. 1872, ch. 315, and L. 1888, ch. 428; L. 1873, ch. 69.

Failure to serve notice fatal.—A failure to serve notice upon an owner or occupant of land through which the proposed highway is to be laid out is fatal to the proceedings so far as the property of such owner or occupant is concerned; objection on this score may be interposed by the town superintendent on hearing of an application for mandamus to compel him to lay out the highway. *People ex rel. Smith v. Allen* (1899), 37 App. Div. 248, 55 N. Y. Supp. 1057, *affd.* (1900), 162 N. Y. 615, 57 N. E. 1122; *People ex rel. Edick v. Osborn* (1838), 20 Wend. 186.

Required notice to party interested cannot be dispensed with. *Terpening v. Smith* (1863), 46 Barb. 208; *People ex rel. Dana v. Robertson* (1858), 17 How. Pr. 74. No jurisdiction of the owner or occupant is required until proper notice has been given. *People ex rel. Willis v. Smith* (1876), 7 Hun 17; *People ex rel. Wells v. Brown* (1888), 47 Hun 459. Want or defect of notice is an irregularity which may be made the ground of a motion to vacate; the proceedings and determination of the commissioners cannot otherwise be adequately reviewed by an appeal to a court. *People ex rel. Scrafford v. Stedman* (1890), 57 Hun 280, 10 N. Y. Supp. 787.

Sufficiency of notice.—Such notice must specify, as nearly as possible, the highway proposed to be laid out, altered or discontinued, and the tracts or parcels through which it runs, and the time and place of the meeting of the commissioners. It need not specify courses and distances. It should give the termini and general route of the proposed highway. The notice is not vitiated because erroneously stating that some of the lands were unimproved. *Snyder v. Trumpbour* (1868), 38 N. Y. 355.

Where the notice to the landowner states the frontage of his land at less than it actually is, the validity of the proceeding is not affected, but no more land is acquired for the purposes of the street than is described in the notice as "proposed to be taken." *In re Newland Ave.* (1891), 15 N. Y. Supp. 63, 38 N. Y. St. Rep. 796. Order of commissioners reversed because notice served failed to properly describe proposed new road. *Matter of Pugh* (1899), 46 App. Div. 634, 61 N. Y. Supp. 1145, *revd.* (1897), 22 Misc. 43, 49 N. Y. Supp. 398.

Service of notice.—It is not requisite that the town superintendent be personally served with the notice; the posted notices are sufficient notice to him. *Matter of David* (1904), 44 Misc. 192, 89 N. Y. Supp. 812. Personal service is required to be made upon the owner and occupant of the land, if they reside in the town. Where prior order is reversed new notices must be served for subsequent proceedings. *People ex rel. Odle v. Kniskern* (1873), 54 N. Y. 52.

Waiver of notice.—The attendance of the occupant of the land as a witness will not be deemed a waiver of notice. *People ex rel. Edick v. Osborn* (1838), 20 Wend.

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186. An owner who appears and is heard without objecting to the jurisdiction because of failure to serve upon him, cannot raise the objection on appeal. *People ex rel. Becker v. Burton* (1875), 65 N. Y. 452; *Cooper v. Bean* (1871), 5 Lana. 318. As to waiver of notice, see *People ex rel. Scrafford v. Stedman* (1890), 57 Hun 280, 10 N. Y. Supp. 787.

§ 196. **Decision of condemnation commissioners in favor of application.**—If a majority of the commissioners appointed by the county court shall determine that the highway or alteration applied for is necessary, or that the highway proposed to be discontinued is useless, they shall assess all damages which may be required to be assessed by reason thereof and make duplicate certificates to that effect. If the petition is for the laying out of a highway, the commissioners shall also include in their certificates what the probable cost would be of laying out and completing the proposed highway, in their opinion, based upon the evidence given before them on the hearings.

Source.—Former Highway L. (L. 1890, ch. 568) § 86, as amended by L. 1901, ch. 441, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 63, 64, 70; L. 1845, ch. 180, § 5, as amended by L. 1872, ch. 315, and L. 1888, ch. 428.

Determination as to necessity.—To constitute a public necessity, it is not required that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the property taken. *Matter of Town of Whitestown* (1898), 24 Misc. 150, 53 N. Y. Supp. 397. The statute contemplates that the question of necessity shall be decided by the commissioners, not by the court. *Kelsey v. King* (1860), 32 Barb. 410.

Where the main object of a proceeding taken ostensibly to lay out a public highway, is to furnish access to the lot of an individual, there is no public necessity. In such a case the decision of the commissioners in favor of laying out the highway should be set aside, and the individual remitted to her right to apply for a private road. *Matter of Lawton* (1898), 22 Misc. 426, 50 N. Y. Supp. 408.

Determination as to uselessness.—To authorize the discontinuance of a highway, the weight of evidence must show and the commissioners must find that it is useless; a finding that it is not necessary, or that a proposed new road would be better, is insufficient. *Matter of Coe* (1897), 19 Misc. 549, 44 N. Y. Supp. 910. Part of a highway may be discontinued as useless, and may be left ending at private property. *People ex rel. Bristol v. Nichols* (1873), 51 N. Y. 470.

Determination as to damages; evidence.—In determining the award of damages, commissioners may inspect and examine the claims for themselves, and obtain the opinions and judgments of others, and then base their determination upon what they deem to be the best result of all these sources of information. *Matter of Commissioners of Central Park* (1873), 54 How. Pr. 313. Where the commissioners hear no testimony as to the compensation to be paid to the landowner, but act on a view of the premises and their knowledge of it, their determination that the benefits equal the damages, in the absence of bad faith, will not be disturbed. *In re Newland Ave.* (1891), 38 N. Y. St. Rep. 796, 15 N. Y. Supp. 63.

The measure of damages is the present market value of the property. All covenants in a lease must be considered and if they enhance the value of the leasehold estate, an award in addition to the present value of the term to the tenant should be made. *Matter of William St.* (1839), 19 Wend. 678. The abutting owners are not limited to nominal damages, but compensation should be based on the effect a deprivation of the fee will have on the value of abutting property. *In re City of Buffalo* (1891), 39 N. Y. St. Rep. 270, 15 N. Y. Supp. 775.

Use of premises as determining value.—The use to which the owner has applied the property can be taken into consideration only for the purpose of ascertaining its present value; his intention in relation to its future enjoyment cannot be regarded. He cannot, for instance, claim damages sufficient to build a wall to retain his ground in the condition in which he occupied them. *Matter of Furman St.* (1836), 17 Wend. 649. The damages assessed to the owner, through whose lands a highway has been laid out, must be presumed to be coextensive with the use to which such road may by law be devoted. *Griffin v. Martin* (1849), 7 Barb. 297.

Effect on market value.—In assessing the damages the commissioners should determine the effect of the proposed change upon the market value of the premises; they should ascertain the difference between the market value of the premises before the change, and the market value thereof after the change. *Matter of Furman St.* (1836), 17 Wend. 649. In estimating the damages to be assessed the value of the land taken is not restricted to its agricultural or productive qualities. Commissioners are not confined in making their appraisal to the actual value of the land to be taken, but may consider how the laying out and opening of the road will affect the remainder of the owner's land. If the remainder is left in an inconvenient and unmarketable shape, that fact may be considered in determining the compensation. *Albany N. R. R. Co. v. Lansing* (1852), 16 Barb. 68.

Nominal damages only may be awarded where a public highway is laid out over lands which are already burdened with a private right of way, and the burden will not be appreciably increased by the new highway. *Matter of Eleventh St.* (1901), 64 App. Div. 609, 71 N. Y. Supp. 824, *affd.* (1902), 169 N. Y. 607, 62 N. E. 1098; *Matter of North Fifth St.* (1901), 64 App. Div. 611, 71 N. Y. Supp. 644; *In re Village of Olean v. Steyner* (1892), 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640; *Matter of Adams* (1894), 141 N. Y. 297, 36 N. E. 318.

Reversal of determination.—The court will not interfere with the report as to the amount of damages, unless from proofs exhibited there be a plain and decided preponderance of evidence against the conclusion of the commissioners. *Matter of Furman St.* (1836), 17 Wend. 649. The judgment of the commissioners enters into the amount of the award for damages, and this will not be set aside as against the evidence. They are not bound to adopt a valuation which an owner puts upon his property, he having in view a special use to which he means to apply his property at some future time. *Matter of Pugh* (1897), 22 Misc. 43, 49 N. Y. Supp. 398, *revd.* on other grounds (1899), 46 App. Div. 634, 61 N. Y. Supp. 1145. The findings of commissioners in respect to the amount of damages to be awarded is like the findings of a jury and should only be disturbed by the court in like cases. *Matter of Town of Whitestown* (1898), 24 Misc. 150, 53 N. Y. Supp. 397; *Matter of Opening Eleventh Ave.* (1875), 49 How. Pr. 208; *Matter of Commissioners of Central Park* (1873), 54 How. Pr. 313.

Where there is evidence to support the determination of duly appointed commissioners to the effect that the laying out of the private road as a public highway is a public necessity their determination will be permitted to stand. *Matter of Burdick* (1899), 27 Misc. 298, 58 N. Y. Supp. 759.

To whom damages awarded.—The persons entitled to the award are those having an interest in such lands; they may be the owners of the fee, lessees, life tenants, or other parties in interest. The commissioners are not bound to pass upon conflicting claims of title, but may in such cases report without specifying the names or interests of the owners, and say generally that the land belongs to unknown owners. *Matter of William St.* (1839), 19 Wend. 678. Widow's dower must be awarded to her for the value of her life estate in the premises; it is erroneous to award it to the estate of her husband and not to her in her own name. *Matter of William St.* (1839), 19 Wend. 678. An award to the wrong person does

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not invalidate the proceedings to open the highway; the right person is still entitled thereto. *Mitchell v. Village of White Plains* (1891), 62 Hun 231, 16 N. Y. Supp. 828, *affd.* (1893), 138 N. Y. 627, 33 N. E. 1083. Where the property is leased, separate awards may be made to both lessor and lessee, but if the lessor is awarded the entire sum, the lessee may recover of the lessor his proportionate share. *Countant v. Catlin* (1845), 2 Sandf. Ch. 485. Value of leasehold of a tenant must be valued over and above the rent reserved in the lease, but is subject to no arbitrary rule, and must depend very much upon location, business facilities and state of trade. *Matter of Commissioners of Central Park* (1873), 54 How. Pr. 313.

Certificates of award.—It is not necessary to the validity of the action of the commissioners that the plaintiff should be named in their report. It is sufficient if it appear that his right to compensation had been considered and adjudicated by them. *Granger v. City of Syracuse* (1869), 38 How. Pr. 308. The certificate should show that all the commissioners met and deliberated, or were duly notified, though a majority may decide the issue and sign the certificate. *Chapman v. Swan* (1865), 65 Barb. 210; *People v. Commissioners of Highways of Seward* (1858), 27 Barb. 94. Where damages have been assessed and laid before the board of supervisors, who have audited the same, the landowners have a vested right to the sum awarded, and are entitled to mandamus to compel the board to cause the same to be raised and paid to them. *People ex rel. Fountain v. Supervisors of Westchester* (1848), 4 Barb. 64; *People ex rel. Aspinwall v. Supervisors of Richmond* (1863), 28 N. Y. 112.

§ 197. **Damages in certain cases; how estimated.**—The owner of lands within the bounds of a highway discontinued may inclose the same and have the exclusive use thereof, and the benefits resulting therefrom may be deducted in the assessment of damages caused by the laying out of highway through his other lands in place of the discontinued highway.

Source.—Former Highway L. (L. 1890, ch. 568) § 87, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 71; L. 1880, ch. 114, § 3.

Statement as to damages.—Where the same individual will both suffer damage and derive a benefit, the amounts of damage and benefit need not be stated separately, but merely the surplus of one over the other. *Matter of William St.* (1839), 19 Wend. 678.

§ 198. **Decision of condemnation commissioners denying application.**—If a majority of the commissioners appointed by the county court shall determine that the proposed highway or alteration is not necessary, or that the highway proposed to be discontinued is not useless, they shall make duplicate certificates to that effect. The costs and expenses necessarily incurred by such commissioners in the proceedings shall be indorsed upon such duplicate certificates, and upon a confirmation of such decision and of the amount of such costs and expenses by the county court, such costs and expenses not exceeding one hundred dollars shall be payable by the applicants.

Source.—Former Highway L. (L. 1890, ch. 568) § 88, as amended by L. 1894, ch. 344, and L. 1906, ch. 67, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 82.

§ 199. **Motion to confirm, vacate or modify.**—Within thirty days after the decision of the commissioners shall have been filed in the town clerk's

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office, any person interested in the proceeding may apply to the court appointing the commissioners for an order confirming, vacating or modifying their decision, and such court may confirm, vacate or modify such decision. If the decision be vacated, the court may order another hearing of the matter before the same or other commissioners. If no such motion is made, the decision of the commissioners shall be deemed final. Such motion shall be brought on upon the service of papers upon adverse parties in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein; and the decision of the county court shall be final, excepting that a new hearing may be ordered as herein provided, and excepting that any such decision may be reviewed on appeal upon questions affecting jurisdiction, and rulings and exceptions made and taken upon the hearing before the commissioners. If the final decision be adverse to the applicant, no other application for laying out, altering or discontinuing the same highway shall be made within two years.

Source.—Former Highway L. (L. 1890, ch. 568) § 89, as amended by L. 1895, ch. 716; L. 1899, ch. 703; L. 1904, ch. 353, and L. 1907, ch. 50, without change. Substitute for practice under R. S., pt. 1, ch. 16, tit. 1, §§ 84-90; L. 1845, ch. 180, §§ 6, 9-13; L. 1847, ch. 455, § 3.

References.—Motion to vacate, etc., service of notice, Code Civ. Pro. §§ 780, 796. Motion to be made before county court, *Id.* § 355.

Certiorari to review decision of commissioners.—In the absence of a statutory provision to review the decision of commissioners to lay out, alter or discontinue highways such decision could be reviewed by certiorari. *People ex rel. Dexter v. Mosier* (1890), 56 Hun 64, 8 N. Y. 621. The statute provides a method of reviewing such a decision, and excludes the remedy by certiorari. *Beardslee v. Dolge* (1894), 143 N. Y. 160, 38 N. E. 205. The section empowers the county court, upon a motion to confirm or vacate the report of the commissioners, to review all the proceedings; whether such proceedings relate to the merits of the application or otherwise. The action of the county court is an appeal such as is contemplated by the Code, and hence certiorari will not lie. *People ex rel. Hanford v. Thayer* (1895), 88 Hun 136, 34 N. Y. Supp. 592; *Matter of Lawton* (1898), 22 Misc. 426, 50 N. Y. Supp. 408. Certiorari to review irregularities in laying out a highway. *People ex rel. Scrafford v. Stedman* (1890), 57 Hun 280, 10 N. Y. Supp. 787.

There is no authority for striking out any part of a return to a certiorari issued to review the proceedings of commissioners appointed to determine the necessity of a proposed highway, but if the return contains irrelevant or improper statements the General Term will disregard them in making its decision. Where the return states that the commissioners reached their conclusion from the evidence and their inspection of the land, and there is no claim that any part of the record has been omitted, a further return under section 2135 of the Code should not be ordered, as the section does not apply to such a case. *People ex rel. Lovell v. Melville* (1894), 7 Misc. 214, 27 N. Y. Supp. 1101.

Modification of decision as to compensation.—The provisions of the Constitution, art. 1, § 7, require that the compensation for property taken for public use shall be ascertained by a jury, or by three commissioners appointed by a court of record. This precludes the court from modifying the decision of the commissioners as to the amount of damages awarded for land taken. *Matter of Village of Middletown* (1880), 82 N. Y. 196. The county court has no power or authority to interfere with the findings or decision of the commissioners upon the question of damages. *Matter of Feeney* (1897), 20 Misc. 272, 45 N. Y. Supp. 830; *Matter of*

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Carpenter (1895), 11 Misc. 690, 32 N. Y. Supp. 826; *Matter of Furman St.* (1836), 17 Wend. 649.

The act gives the landowner two opportunities to be heard, first before the commissioners, and second (if the decision be adverse), before the county court, on an application to vacate or modify the proceeding. The application to the county court is in the nature of a rehearing upon which new proofs may be presented bearing upon the questions in controversy. *Matter of De Camp* (1897), 151 N. Y. 557, 45 N. E. 1039; *Rector v. Clark* (1879), 78 N. Y. 21.

Time for making application.—The application for an order to confirm, vacate or modify the decision of the commissioners must be made within thirty days after the decision is filed in the office of the town clerk. It is not the purpose of the section to require the application or motion to be actually made or heard in court within that time. *Matter of Glenside Woolen Mills* (1895), 92 Hun 188, 36 N. Y. Supp. 593. A service of the notice of motion within thirty days after the filing of the decision is sufficient, under the above section, although the motion is not returnable until after the expiration of such thirty days. *Matter of Thomson* (1903), 85 App. Div. 221, 83 N. Y. Supp. 209.

Parties to proceedings.—The right to appeal from an order of the commissioners may be exercised not only by those through whose land the road proposed to be built or discontinued runs, but by every resident taxpayer of the town. *Matter of Coe* (1897), 19 Misc. 549, 44 N. Y. Supp. 910; *People ex rel. Ridgeway v. Cortel-you* (1862), 36 Barb. 164.

It is proper that the petitioner, an owner of land through which the road is to pass, be made a party defendant as a person specially interested; the town superintendent of the town has no more interest than any other taxpayer and is not properly made a party; the town may be made a party, but it must be done by the court before the certiorari is brought to a hearing, and not by the appellate court. *People ex rel. D. L. & W. R. R. Co. v. County Court* (1895), 92 Hun 13, 37 N. Y. Supp. 869, *affd.* (1897), 152 N. Y. 214, 46 N. E. 325. The right of the owner of land through which the highway is to be laid out to make the application is personal to such owner. His private rights cannot be affected by an application in behalf of any other person through whose land the same road may also have been laid. If there be several owners, each owner may apply for himself. *Clark v. Phelps* (1825), 4 Cow. 190.

Notice must be given to the occupant of the land through which the road is to pass; and his attendance as a witness before the judge will not be deemed a waiver of the notice. *People ex rel. Edick v. Judge of Herkimer* (1838), 20 Wend. 186.

Grounds of motion.—This section does not in terms provide that the court may modify any award of damages, and the construction of the general terms used as to the right to modify the decision of the commissioners would be that the county court could modify the decision only to the extent which the Constitution would permit and not make a modification that would violate the Constitution which provides that the assessment be made by the commissioners. *People ex rel. Hanford v. Thayer* (1895), 88 Hun 136, 34 N. Y. Supp. 592. The commissioners have no authority to so depart from the route stated in the petition as to warrant the assumption that the preliminary proceedings have been totally disregarded. *Matter of Feeney* (1897), 20 Misc. 272, 45 N. Y. Supp. 830.

The county court, in reviewing the decision of the commissioners, should determine the question on the certificate and upon such evidence as may be taken by the court, or, in other words, there must be a retrial of the question before the court if the matter is there contested. *Matter of James* (1887), 43 Hun 67.

An owner who appears and is heard before the commissioners without objecting to their jurisdiction because of the omission to serve notice upon him cannot raise

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the objection on appeal from the decision of the commissioners. *People ex rel. Becker v. Burton* (1875), 65 N. Y. 452.

Effect of decision of commissioners.—Proof that a proposed highway will benefit three farms, the occupants of at least two of which have no present means of egress other than private roads or the towpath of the Erie canal, sufficiently presents to commissioners, appointed to determine the necessity of the proposed highway and to assess the damages, the question of fact where the proposed highway is for a public use, required by the public necessity, and their determination that it is for such use will not, in the absence of some error of law, be reversed by the county court. *Matter of Town of Whitestown* (1898), 24 Misc. 150, 53 N. Y. Supp. 397.

Where there is evidence to support the determination of duly appointed commissioners to the effect that the laying out of the private road as a public highway is a public necessity, their determination will be permitted to stand, and particularly where it appears that the private road was very narrow, became impassable in winter for teams, and that the owner of abutting property had sued the petitioner for driving over his lands at such times—the doctrine of a way of necessity applying to a public highway only and not to a private road. *Matter of Burdick* (1899), 27 Misc. 299, 58 N. Y. Supp. 759.

Power of county court to vacate or modify.—The county court has no power to modify the report of the commissioners in regard to the width of the highway. *Matter of Feeney* (1897), 20 Misc. 272, 45 N. Y. Supp. 830. Where a county court modifies the decision of the commissioners in a manner not asked for by either party, and affirms the decision as thus modified, the modification of the county court should be stricken out. *Matter of Sly* (1904), 177 N. Y. 465, 69 N. E. 1104.

The county court may appoint successive commissions until it is satisfied that the statute has been complied with, and thereby no provision of the Constitution is violated if the commissioners are of the right number and appointed by the proper authority. *Schneider v. City of Rochester* (1895), 90 Hun 171, 35 N. Y. Supp. 786.

Appeal from order of county court.—Prior to the revision of 1890 the order of the county judge confirming the report of the commissioners was not a final determination that could be adequately reviewed by appeal and hence certiorari would lie. *People ex rel. Hanford v. Thayer* (1895), 88 Hun 136, 34 N. Y. Supp. 592; *People ex rel. Titsworth v. Nash* (1891), 15 N. Y. Supp. 29, 38 N. Y. St. Rep. 730. Although the section as it now stands makes the decision of the county court final as to the question of the necessity of the proposed highway and the compensation of the landowner, yet its decision may be reviewed on questions affecting the power and jurisdiction of the county court. *People ex rel. D. L. & W. R. R. Co. v. County Court* (1897), 152 N. Y. 214, 46 N. E. 325; *Matter of De Camp* (1897), 151 N. Y. 557, 45 N. E. 1039; *Matter of Barrett* (1896), 7 App. Div. 482, 40 N. Y. Supp. 266.

This section makes the decision of the county court, as to the necessity of a proposed highway and the compensation of landowners, made upon an application to confirm the decision of the commissioner, final and conclusive. *Matter of Fenn* (1908), 128 App. Div. 10, 112 N. Y. Supp. 431. It was clearly the intention to make the review of proceedings by the county court final, without respect to the question whether such highway was located in one or more towns, provided it did not extend into an adjoining county. *Matter of Taylor* (1896), 8 App. Div. 395, 40 N. Y. Supp. 839. An order of the county court confirming the decision of the commissioners will be affirmed, though another route proposed by contestant would be somewhat less expensive. *In re Union Ave* (1890), 30 N. Y. St. Rep. 366, 8 N. Y. Supp. 718.

An order confirming the decision and certificate of highway commissioners is

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not reviewable by the appellate division in respect to the necessity of the proposed highway or the amount of damages. *Matter of Wagstaff* (1908), 129 App. Div. 591, 114 N. Y. Supp. 226.

The decision of the county court confirming the decision of commissioners that the proposed highway is a public necessity, is final and cannot be reviewed by the appellate division. *Matter of Mitchell* (1903), 85 App. Div. 277, 83 N. Y. Supp. 211, *affd.* (1904), 177 N. Y. 560, 69 N. E. 1127; *People ex rel. Miller v. Griswold* (1876), 67 N. Y. 59; *People ex rel. Bristol v. Nichols* (1873), 51 N. Y. 474; *Citizens' Savings Bank v. Town of Greenburgh* (1903), 173 N. Y. 215, 229, 65 N. E. 978; *People ex rel. D. & W. R. R. Co. v. County Court* (1896), 4 App. Div. 542, 38 N. Y. Supp. 920, *affd.* (1897), 152 N. Y. 214, 46 N. E. 325.

Decision of the county court, if a new hearing is not ordered, is final, and there can be no appeal therefrom. *Matter of De Camp* (1894), 77 Hun 478, 29 N. Y. Supp. 99, *revd.* (1897), 151 N. Y. 557, 45 N. E. 1039.

Where an appeal from an order of a county court, confirming the report of the commissioners, is pending undetermined in the appellate division, the county court has no power to compel such commissioners to make a further return of the evidence taken before them. *Matter of Baker* (1900), 54 App. Div. 21, 66 N. Y. Supp. 242.

On appeal by a landowner from an order of the county court, confirming an order of commissioners directing the laying out of a highway, there can be raised and considered such questions as whether the order of the commissioners contained a sufficient description of the proposed highway, and whether it was competent for the county court, after having reached the conclusion that the damages awarded were inadequate to determine the amount by which they should be increased, or whether the landowner was not then entitled to have the case sent back for reassessment. *Matter of De Camp* (1897), 151 N. Y. 557, 5 N. E. 1039.

A reversal of a decision not to lay out a highway is not an order to do so; and the commissioners cannot be compelled to by mandamus. *People ex rel. Babcock v. Commissioners of Cherry Valley* (1853), 8 N. Y. 476.

Effect of final order.—The road cannot be opened until the appeal is determined, although the court refuses to proceed to decide the same, under the supposition that they have not jurisdiction of the case. *Lansing v. Caswell* (1834), 4 Paige 519; *Clark v. Phelps* (1825), 4 Cow. 190. A property owner acquires no vested rights in an award for property condemned for a street until final confirmation of the report of the commissioners of appraisal. So where proceedings are discontinued before such confirmation. *Schneider v. City of Rochester* (1895), 90 Hun 171, 35 N. Y. Supp. 786.

"Final decision" precluding new application within two years.—Failure of a county court to appoint commissioners within thirty days after the service of the application on the town superintendent of highways is not a "final decision" adverse to the applicant, within the meaning of this section, so as to preclude another application within two years. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56, *affd.* (1914), 213 N. Y. 653, 107 N. E. 1080.

Section cited.—*Matter of Munger* (1896), 10 App. Div. 347, 41 N. Y. Supp. 882.

§ 200. Limitations upon laying out highways.—No highway shall be laid out less than three rods in width nor through an orchard of the growth of four years or more, or any garden cultivated as such for four years or more, or grape vineyards of one or more years' growth, and used in good faith for vineyard purposes, or buildings or any fixtures or erections for the purpose of trade or manufactures, or any yard or enclosure necessary to the use and enjoyment thereof, without the consent of the owner or owners

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thereof, unless so ordered by the county court of the county in which the proposed highway is situated; such order shall be made on the certificate of the town superintendent of the town or towns in which the proposed highway is situated, showing that the public interest will be greatly promoted by the laying out and opening of such highway, and that commissioners appointed by the court have certified that it is necessary; a copy of the certificate with eight days' notice of the time and place of the hearing before the county court shall be served on the owners of the land, or if they are not residents of the county upon the occupants; the county court upon such certificates, and the proofs and other proceedings therein, may order the highway to be laid out and opened, if it deems it necessary and proper. The town superintendent shall then present the order of the county court, with the certificate and proofs upon which it was granted, certified by such court, to the appellate division of the supreme court in the judicial department in which the land is situated, upon the usual notice of motion, served upon the owner or occupant, or the attorney who appeared for them in the county court. If such appellate division of the supreme court shall confirm the order of the county court, the town superintendent shall then lay out and open such highway as in other cases. The provisions of this section shall not apply to vineyards planted or to buildings, fixtures, erections, yards or inclosures, made or placed on such land after an application for the laying out and opening the highways shall have been made. In case the highway to be laid out shall constitute an extension or continuation of a public highway already in use, and shall not as to such new portion exceed half a mile in length, the town superintendent may lay out such extension or continuation of a width of not less than three rods, provided, however, that it be not less than the widest part of the highway of which it is an extension or continuation. In such case the town superintendent shall specify in his certificate the precise width of the new portion of such highway, and shall certify that such width is as great at least as the widest part of the highway of which it is a continuation or extension. No highway shall be laid out which shall be identical or substantially so with a highway previously discontinued or abandoned for public purposes within seven years of such discontinuance or abandonment, nor where other land or property has been conveyed to the town at the time of such discontinuance or abandonment in counties adjoining cities with upward of one million inhabitants. (*Amended by L. 1911, ch. 624.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 90, as amended by L. 1895, ch. 508, and L. 1906, ch. 265, without change. Originally revised R. S., pt. 1, ch. 16, tit. 1, §§ 57, 58, 80; L. 1869, ch. 24, as amended by L. 1890, ch. 268; L. 1875, ch. 482, § 1, subd. 10.

Width of highway.—Under this section the commissioners may not lay out a highway less than three rods in width, without the approval of the county court and the appellate division, except in the case of the extension of a highway already in use, in which case the highway to be laid out must come within the

terms of the exception. *Matter of Adolph* (1905), 102 App. Div. 371, 92 N. Y. Supp. 841, *affd.* (1906), 186 N. Y. 547, 79 N. E. 1100. The failure of the commissioners to comply with § 200 of the statute by designating the width of the highway is a defect which the county court has no power under § 199 to correct. *Matter of Feeney* (1897), 20 Misc. 272, 45 N. Y. Supp. 830. Where the order of the commissioners appointed by the court omits to state the width of the road, it is too indefinite to be of any force, although when the starting point, courses, distances and terminus have been given as a center line, perhaps the width, to-wit, three rods may be inferred. *People ex rel. Waters v. Diver* (1879), 19 Hun 263; *Lawton v. The Commissioners* (1804), 2 Cai. 178; *People ex rel. McFarland v. The Commissioners* (1823), 1 Cow. 23; *Hallock v. Woolsey* (1840), 23 Wend. 328. An order to lay out a road, for a part of the distance, three rods in width, and the residue over the bed of an old road, which is but two rods wide, is valid. *Snyder v. Plass* (1864), 28 N. Y. 465; *Snyder v. Trumpbour* (1868), 38 N. Y. 355.

Width of highway laid out by village trustees over land acquired by purchase or condemnation.—The provision requiring highways to be not less than three rods in width, does not apply to those laid out by the board of trustees of a village over land acquired by purchase or condemnation. The board of trustees of a village, upon a proper petition and after a suitable notice and public hearing, may determine to lay out, alter, or widen a street over land acquired by purchase or condemnation, without limit or restriction as to the width of the same. *Allen v. Kebler* (1912), 76 Misc. 40, 134 N. Y. Supp. 369, *affd.* (1912), 151 App. Div. 920, 136 N. Y. Supp. 1130.

Taxpayer's action to enjoin town officials from proceeding with the widening of a highway.—Where in a taxpayer's action to enjoin town officials from proceeding with the widening of a highway the claim is made that the improvement involved a taking of yards or inclosures in two out of many pieces of property along the highway, and therefore confirmation by the court is required by section 200 of the Highway Law, but only a small diminution of country door yards or lawns is ordered in the course of the widening proceeding on due compensation to the owners, defendants are entitled to judgment for a dismissal of the complaint. *Kubak v. Halsey* (1914), 86 Misc. 281, 148 N. Y. Supp. 384.

Consent of owners of lands.—If the owner of lands used as an orchard, garden, vineyard or for trade purposes, consents to the laying out of a highway through the same, an order of the court is not necessary for such purpose. The oral consent of the owner of lands used for such purpose has been held sufficient, provided the highway officer acts upon it immediately, and the road is laid out before the consent is revoked. *People ex rel. Bodine v. Goodwin* (1851), 5 N. Y. 568; *Noyes v. Chapin* (1831), 6 Wend. 461; *People ex rel. Martin v. Albright* (1862), 14 Abb. Pr. 305. A sale and conveyance of the land in good faith before the road is laid out would operate as a revocation. If the commissioners had acted upon the faith of the verbal consent the owner would be estopped from denying the legality of the act. *Marble v. Whitney* (1863), 28 N. Y. 298.

Either the consent of the owner or the certificate of the town superintendent is essential to the laying out of a highway through buildings. *People ex rel. Sammis v. Supervisors of Queens* (1890), 58 Hun 371, 12 N. Y. Supp. 21. The consent of the owner must be free and voluntary, with intent to dedicate. *Gould v. Glass* (1855), 19 Barb. 179.

It is the duty of a highway commissioner (now town superintendent) to lay out a road as described in the report of commissioners, except that he cannot lay it out through a building unless permit is given by the court. *Beck v. Gibbard* (1910), 140 App. Div. 745, 126 N. Y. Supp. 296.

Where the owner of the land consents to the taking of the same and files a release of damages in the town clerk's office, it is unnecessary that the necessity

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of the alteration of the road be certified to by commissioners appointed by the county court. *People ex rel. Dorn v. Jones* (1873), 2 T. & C. 360; *People ex rel. Wolford v. Strevell* (1882), 27 Hun 218. A release for damages signed by the owners is sufficient evidence of the giving of their consent to the laying out of the highway through their inclosed grounds. *McCarthy v. Whalen* (1880), 19 Hun 503, *affd.* (1881), 87 N. Y. 148.

Gardens and orchards.—A garden is a piece of ground appropriated to the cultivation of herbs or plants, fruits and flowers. To have the protection of the statute it must have been cultivated for four years. It is not sufficient that the land through which the road is to pass be inclosed with a garden, but it must be part of the cultivated garden or essential to its use. *People ex rel. Cooke v. Commissioners of Highways of Greenburgh* (1874), 57 N. Y. 549; *People ex rel. Stanton v. Horton* (1876), 8 Hun 357. Whether the land over which the road is to extend is a garden is a question of fact to be decided by the commissioners appointed by the court; such finding is final and will not be reviewed on certiorari. *People ex rel. Clinch v. Moore* (1891), 15 N. Y. Supp. 504, 39 N. Y. St. Rep. 8811, *affd.* (1891), 129 N. Y. 639, 29 N. E. 1031.

Proposal to establish highway through house and garden of owner without his consent denied. *Matter of Field* (1901), 61 App. Div. 618, 70 N. Y. Supp. 677.

There is no invasion of an orchard when none of the trees come within the survey and the owner is not deprived of the beneficial use and enjoyment of any of his trees by the opening of the highway. *Snyder v. Plass* (1864), 28 N. Y. 465; *Snyder v. Trumpbour* (1868), 38 N. Y. 355. It does not follow that the whole field is an orchard, because there are fruit trees in some part of it; the trees must be so near as to be harmed by the opening of the road. *People x rel. Seward v. Judges of Dutchess* (1840), 23 Wend. 360.

Fruit trees planted with the evident purpose of raising difficulties to the laying out of a highway do not constitute an "orchard" within the meaning of the Highway Law. *Matter of Fenn* (1912), 151 App. Div. 797, 136 N. Y. Supp. 262.

Trade fixtures and erections.—Neither a public nor a private road or way can be laid out across the fixtures and erections upon the inclined plane of a railroad which were used for the drawing up or letting down of cars. *Mohawk & Hudson Railroad Co. v. Artcher* (1836), 6 Paige 83.

The ditch or canal by which water is conducted to a mill is not a building, fixture or erection within the meaning of the statute; a highway may be laid along it, comprehending it in whole or in part within the limits of the highway; but if necessary to work the road to its entire width, it must be by so constructing a roadway over the channel as not to obstruct the flow of water. *People ex rel. Williams v. Kingman* (1862), 24 N. Y. 559. The fact that after a highway has been laid out by the town superintendent, the owner or occupant of the land placed buildings upon the route of the road, furnishes no obstacle to opening the road and presents no question upon appeal from the decision of the commissioners appointed by the county court. *People ex rel. Hubbard v. Harris* (1875), 63 N. Y. 391; *Carris v. Commissioners of Highways of Waterloo* (1842), 2 Hill 443.

Railroad property.—A highway cannot be laid over grounds acquired by a railroad for depots and engine houses and for railroad purposes generally. *Pros. Park & C. I. R. R. Co. v. Williamson* (1883), 91 N. Y. 552; *Albany Northern R. Co. v. Brownell* (1862), 24 N. Y. 345.

Yards and inclosures.—The provision of the statute prohibiting the laying out of a road through yards or inclosures, extends as well to yards and inclosures necessary to the use and enjoyment of a dwelling-house as to those connected with "fixtures or erections for the purpose of trade or manufacture." *Ex parte Clapper* (1842), 3 Hill 458. Commissioners laying out a highway through a yard, etc., are

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liable to the owner in trespass. *Beardslee v. Dolge* (1894), 143 N. Y. 160, 39 N. E. 205; *Clark v. Phelps* (1825), 4 Cow. 190; *Harrington v. People* (1849), 6 Barb. 607. So where they have not acquired jurisdiction through some defect in appointment, qualifications, etc. *People ex rel. Ottman v. Commissioners of Highways of Seward* (1858), 27 Barb. 94. It is only such yards or inclosures as are necessary to the use and enjoyment of the dwelling-house of the manufacturing establishment through which the town superintendents are prohibited from laying out a highway. *Lansing v. Caswell* (1834), 4 Paige 519; *Clark v. Phelps* (1825), 4 Cow. 190; *People ex rel. Miller v. Comes* (1874), 1 Hun 530. The statute expressly deprives the town superintendent of jurisdiction where the road passes through a yard, and provides for a proceeding before the county judge to be confirmed by the appellate division. *Beardslee v. Dolge* (1894), 143 N. Y. 160, 39 N. E. 205.

Ground adjoining a sawmill and used for piling logs, but whose limits are not fixed by fences or other visible marks, nor by definite occupation, is not within the statute; it is the duty of the town superintendents in laying out a highway over such ground to leave a sufficient area for the use of the mill owner, and their discretion as to the quantum is not reviewable. *People ex rel. Williams v. Kingman* (1862), 24 N. Y. 559.

Procedure in court; parties.—This section does not prescribe that the evidence and the proceedings had before the county court shall be presented to the appellate division with the order, but without the evidence the appellate division is without means of determining the rights of the parties. It not being the practice of the latter court to retry question of fact it is intended that the hearing in that court should be upon the evidence taken and the proceedings had before the county court. *Matter of James* (1887), 43 Hun 67.

Where the necessity of the highway is not contested, the report of the commissioners in favor of a route which will make a direct line with another existing highway will be confirmed, although another route making a zigzag course would be cheaper. *Matter of Union Ave.* (1890), 30 N. Y. St. Rep. 366, 8 N. Y. Supp. 718. The commissioners making an award under this section view the premises and see the witnesses and can better judge of the amount of damages sustained than the appellate division, and unless some error in law is manifest their award will not be disturbed. *Matter of Main St.* (1893), 54 N. Y. St. Rep. 936, 25 N. Y. Supp. 267; *People ex rel. Cook v. Hildreth* (1889), 24 N. Y. St. Rep. 458, 5 N. Y. Supp. 308, *affd.* (1891), 126 N. Y. 360, 27 N. E. 558.

Commissioners cannot be compelled to state the facts upon which they base their conclusion that the road does not run through premises exempt by the statute. *People ex rel. Lovell v. Melville* (1894), 7 Misc. 214, 27 N. Y. Supp. 1101.

This proceeding before the county court and appellate division is between the town superintendent and the owner of the land; the public have no notice of it and take no part in it. Its purpose is to remove, if it shall be right to do so, the obstacle of the owner's nonconsent. This removed, the town superintendent proceeds as if he had that consent. *People ex rel. Banner v. Temple* (1882), 27 Hun 128. As to whether land owners whose buildings, enclosures, etc., are not affected by the proposed highway can oppose the granting of an order by the county court, see *Matter of Oakley Ave.* (1895), 85 Hun 446, 32 N. Y. Supp. 1146.

Evidence as to damages.—In a proceeding for the alteration of a highway, evidence as to the value of the land with the highway as originally laid out and as to its value with the proposed altered highway is incompetent where the original highway has not been laid out; but its admission is harmless where it did not enter into the decision of the commissioners and where the witness swore on cross-examination that independently of the original highway, the proposed highway would not diminish the value of the property. *Matter of Fenn* (1912), 151 App. Div. 797, 136 N. Y. Supp. 262.

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The town superintendent can make no order laying out a road until after the decision of the appellate division upon the county court's order affirming the commissioner's certificate. *People ex rel. Banner v. Temple* (1882), 27 Hun 128.

Proceeding to correct laying out of highway through buildings.—Where through some error a highway has been laid out so as to pass through two houses, a proceeding to correct the error may be properly entitled "A Proceeding to Alter an Existing Highway." *Matter of Fenn* (1912), 151 App. Div. 797, 136 N. Y. Supp. 262.

§ 201. **Laying out highways through burying-grounds.**—No private road or highway shall be laid out or constructed upon or through any burying-ground, unless the remains therein contained are first carefully removed, and properly reinterred in some other burying-ground, at the expense of the persons desiring such road or highway, and pursuant to an order of the county court of the county in which the same is situated, obtained upon notice to such persons as the court may direct.

Source.—Former Highway L. (L. 1890, ch. 568) § 91, without change. Originally revised from L. 1868, ch. 843.

§ 202. **Costs; by whom paid.**—In all cases of assessments of damages by commissioners appointed by the county court, the costs thereof shall be paid by the town thereof, except that when reassessment of damages shall be had on the application of the party for whom the damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment; and when application shall be made by two or more persons for the reassessment of damages, all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to the first assessment, and may be recovered by action in favor of any person entitled to the same. Each commissioner appointed by the court, for each day necessarily employed as such, shall be entitled to four dollars and his necessary expenses.

Source.—Former Highway L. (L. 1890, ch. 568) § 92, as amended by L. 1897, ch. 344; L. 1904, ch. 353, and L. 1907, ch. 50, without change. Originally revised from L. 1845, ch. 180, § 14; L. 1847, ch. 455, § 7.

What are costs.—The word "costs thereof," as used in this section, do not apply to a bill for legal services rendered by an attorney employed by the town superintendent. The word "costs" does not apply to a personal debt incurred by the town superintendent. *People ex rel. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248.

Payment of costs.—Where the proceeding is declared void, an owner who had obtained damages for land proposed to be taken, cannot recover from the town costs incurred by him in the proceeding. *Matter of David* (1904), 44 Misc. 192, 89 N. Y. Supp. 812.

The town is not responsible for the fees of the commissioners except in the case where there is a valid assessment of damages and there is no responsibility in a case where the proposed improvement fails. *Matter of Miller* (1896), 9 App. Div. 260, 41 N. Y. Supp. 581.

Amount of costs.—A proceeding under the Highway Law to lay out a highway is a special proceeding within the meaning of § 3334 of the Code of Civil Procedure and the costs and disbursements are to be allowed at the rate prescribed in § 3240 of the Code, which provides that the costs in a special proceeding may be

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awarded at rates allowed for similar services in an action. *Matter of Peterson* (1904), 94 App. Div. 143, 87 N. Y. Supp. 1014.

§ 203. Damages assessed, and costs to be audited.—All damages to be agreed upon, or which may be finally assessed, and costs against the town, as herein provided, shall be laid before the board of town auditors, or in towns not having a board of town auditors, before the town board, to be audited with the charges of the commissioners, justices, surveyors or other persons or officers employed in making the assessment, and for whose services the town shall be liable, and the amount shall be placed upon the town abstract and levied and collected in the town in which the highway is situated, and the money so collected shall be paid to the supervisor of such town, who shall pay to the owner the sum assessed to him, and appropriate the residue to satisfy the charges aforesaid. If the whole amount of damages and costs to be paid by the town be less than five hundred dollars, the town board may borrow the amount thereof, in anticipation of taxes, levied or to be levied therefor, at a rate of interest not exceeding the legal rate. (*Amended by L. 1911, ch. 498.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 93, as amended by L. 1898, ch. 106, without change. Originally revised from L. 1845, ch. 180, § 7; L. 1847, ch. 455, § 23.

"Charges of the commissioners" as used in this section are not to be construed to include the fees of an attorney employed by a petitioner. *Eppig v. City of New York* (1901), 57 App. Div. 114, 68 N. Y. Supp. 41. As to meaning of word "costs," see *Matter of Peterson* (1904), 94 App. Div. 143, 87 N. Y. Supp. 1014.

Audit of damages.—Where there is in fact no assessment of damages the supervisors have no duty to perform in relation to the alleged claim of the relator. *People ex rel. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248. For audit of damages upon reassessment, see *Clark v. Miller* (1864), 42 Barb. 255, 266, *affd.* (1874), 54 N. Y. 528.

Where the supervisors have considered the bill and acted upon it their action was judicial. If they err the proper way to correct the error is by certiorari and not by mandamus. *People ex el. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248. A claim presented to the board of supervisors, who permit their session to expire without taking any action upon it, is to be regarded as rejected for the purpose of a mandamus to compel its allowance. *People ex rel. Aspinwall v. Supervisors of Richmond* (1859), 20 N. Y. 252.

The damages to land owners and costs incident to the laying out of a new highway are not subject to the limitations of section 94, *ante*. *Rept. of Atty. Genl.* (1910) 723.

Contract for construction.—Where, on a petition for the laying out of a highway, commissioners appointed by the court have reported in favor of the highway and that the probable cost would be about \$1,000, which report has been duly confirmed, a contractor who constructed a highway at a cost of \$6,000 under a contract made by the highway commissioner cannot compel the audit of his claim. *Matter of Niland* (1906), 113 App. Div. 661, 99 N. Y. Supp. 914, *affd.* (1908), 193 N. Y. 180, 85 N. E. 1012.

Villages are not excepted by any general provision from the provision of this section that damages assessed for laying out highways shall be a charge against the town. *Rept. of Atty. Genl.* (1911), (1913) 22.

§ 204. When officers of different towns disagree upon highway.—When the town superintendent of any town or officers of any village or city having the powers of town superintendents shall differ with the town superintendent or superintendents of any other town or with the officers of such a village or city having the powers of town superintendents in the same county, relating to the laying out of a new highway or altering an old highway, extending into both towns, or a town and a village or city, or upon the boundary line between such towns or such town and a village or city, or when a town superintendent of a town in one county shall differ with the town superintendent of a town or the officers of a village or city having the powers of town superintendents in another county, relating to the laying out of a new highway, or the altering of an old highway, which shall extend into both counties, or be upon the boundary line between such counties, the town superintendents of both towns or the officers of the village or city having such powers shall meet on five days' written notice, specifying the time and place, within some one of such towns, villages or cities, given by either of such town superintendents, or officers having powers of town superintendents, to make their determination in writing, upon the subject of their differences. If they can not agree, they or either of them may certify the fact of their disagreement to the county court of that county, if the proposed highway is all in one county, or if in different counties, or if the county judge is disqualified or unable to act, to the supreme court; such court shall thereupon appoint three commissioners, freeholders of the county, not residents of the same town, village or city, where the highway is located; or if between two counties, then freeholders of another county, who shall take the constitutional oath of office, and upon due notice to all persons interested view the proposed highway, or proposed alteration of a highway, administer all necessary oaths, and take such evidence as they deem proper, and shall decide all questions that shall arise on the hearing, as to the laying out or altering of such highway, its location, width, grade and character of roadbed, or any point that may arise relating thereto; and if they decide to open or alter any highway, they shall ascertain and appraise the damages, if any, to the individual owners and occupants of the land through which such new or altered highway is proposed to pass, and shall report such evidence and decision to such court, with their assessment of damages, if any, with all convenient speed. On the coming in of such report, the court may, by order, confirm, modify or set aside the report in whole or in part and may order a new appraisal by the same or by other commissioners, and shall decide all questions that may arise before it. And all orders and decisions in the matter shall be filed in the county clerk's office of each county where the highway is located, and shall be duly recorded therein. This section shall not be so construed as to compel any town or towns to construct, repair or maintain a bridge upon a boundary between towns, where previous to May seventh, nineteen hundred and three, an application had been made to any court, to compel the

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construction, repair and maintenance of a bridge upon such a boundary line, and such application had been denied.

Source.—Former Highway L. (L. 1890, ch. 568) § 94, as amended by L. 1901, ch. 162, and L. 1903, ch. 460, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 72, as amended by L. 1881, ch. 513.

This section applies where town superintendents fail to agree in the laying out of a road on the town line between two towns and not extending longitudinally into either. *People ex rel. Titsworth v. Nash* (1891), 38 N. Y. St. Rep. 730, 15 N. Y. Supp. 29.

Appointment of commissioners to determine differences.—Where two or more towns are interested in the laying out or altering of a highway, which extends into both towns or is upon the boundary line between such towns, the town superintendents are required to meet, upon five days' written notice given by either one or the other of such town superintendents at a time and place specified in such notice. The intention of the statute is to require a meeting of the town superintendents and a certificate of their disagreement, as a condition precedent to the exercise of jurisdiction by the supreme court in the appointment of commissioners to settle the differences between the towns. *Matter of Barrett* (1896), 7 App. Div. 482, 40 N. Y. Supp. 266.

A petition for the appointment of commissioners in proceedings to lay out a highway extending into two towns in different counties, which does not show that the town superintendents of both towns have met on five days' written notice and have been unable to agree and have duly certified thereto, confers no jurisdiction on the court to appoint such commissioners. *Matter of Donley* (1910), 69 Misc. 196, 125 N. Y. Supp. 274.

§ 205. Difference about improvements.—When the town superintendent or the officers of a village or city having the powers of town superintendents therein, shall desire to make a new or altered highway extending beyond the bounds of such town, village or city, a better highway than is usually made for a common highway, with a special grade or roadbed, drainage or improved plan, and are willing to bear the whole or a part of the expense thereof beyond such bounds, but can not agree in regard to the same, upon written application of either of the superintendents or officers, and notice to all parties interested, such court shall make an equitable adjustment of the matters, and may direct that in consideration of the payment of such portion of the additional expense by the town, village or city that desires the improved and better highway, as shall be equitable, its officers, contractors, servants and agents may go into such town, village or city, and make the grade and roadbed, and do whatever may be necessary and proper for the completion of such better highway, advancing the money to do it; the amount of damages to each owner or occupant shall be ascertained and determined by commissioners, who shall be appointed, and whose proceedings shall be conducted in the manner provided by the last preceding section; and upon the coming in of their report of damages, and of the expenses paid, such court shall, on notice to all parties interested, direct that the amount of damages assessed each owner or occupant, if any, and all such expenses be paid by each, any or all of such towns, villages or cities as shall be just and equitable, and the damages and expenses assessed and

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allowed, as in this and the last preceding sections, shall be paid and collected as if fixed by the town superintendents of the towns or the officers of such villages or cities having the powers of such superintendents. Every commissioner appointed as herein provided shall be paid six dollars for each day actually and necessarily employed in such service and necessary expenses.

Source.—Former Highway L. (L. 1890, ch. 568) § 95, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 72, as amended by L. 1881, ch. 513.

§ 206. **Highway in two or more towns.**—When application is made to lay out, alter or discontinue a highway located in two or more towns, all notices or proceedings required to be served upon the town superintendents shall be served upon the town superintendent of each town; and the commissioners appointed by the court shall determine the amount of damages to be paid by each town, and when the towns are in different counties, the application for the appointment of commissioners shall be made to a special term of the supreme court held in the district where the highway or some part of it is located; and the same proceedings shall thereafter be had in the supreme court of such district as are authorized by this chapter to be had in the county court.

Source.—Former Highway L. (L. 1890, ch. 568) § 96, without change.

Application of section.—This section should be construed in connection with the provisions of § 204. It is intended as a supplement to the former section and was enacted for the purpose of carrying out in detail the requirements thereof. *Matter of Barrett* (1896), 7 App. Div. 482, 40 N. Y. Supp. 266; *Matter of Donley* (1910), 69 Misc. 196, 125 N. Y. Supp. 274.

The person liable to be assessed in one town may institute proceedings to lay out a highway which is located partly in his own town and partly in another town, and where he has complied with all the statutory requirements, and the towns are in the same county, the county court is authorized to appoint commissioners in the matter. *People ex rel. Knapp v. Keck* (1895), 90 Hun 497, 36 N. Y. Supp. 51.

Proceedings before a special term of the supreme court where the highways lie in more than one county are to be governed by § 193, ante, and the immediately following sections, as though the highway were entirely within one county and the proceedings were had before the county court. *Matter of Taylor* (1896), 8 App. Div. 395, 40 N. Y. Supp. 839.

§ 207. **Laying out, dividing and maintaining highway upon town line.**—An application to lay out a highway upon the line between two or more towns shall be made to the town superintendents of each town, who shall act together in the matter; and, upon laying out any such highway, the expense of opening, working and keeping the same in repair shall be borne equally by such towns. The town superintendents shall cause a map and survey of the highway to be recorded in the office of the town clerk in each of the respective towns. If such highway be upon a line between one or more towns and a city or incorporated village, such application shall also be made to the officers of such city or village having the powers of the town superintendents and such officers may agree with the town superin-

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tendents of such towns as to division of such expense. Whenever such officers shall disagree, the question shall be submitted to the district or county superintendent or superintendents representing the county or counties, district or districts in which such highway is located and their decision shall be final when approved by the state commission. All highways heretofore laid out upon the line between any two towns or between a town and a city or an incorporated village shall be divided and allotted or redivided and reallocated, recorded and kept in repair in the manner above directed; and all bridges upon such highways shall be built and maintained jointly by the towns whether wholly located within one of them or otherwise.

Source.—Former Highway L. (L. 1890, ch. 568) § 97, as amended by L. 1894, ch. 727, and L. 1895, ch. 181, with such changes as were required because of the change in the system of working the highways. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 73–76.

The proceedings outlined in § 204 are applicable to the rights designated in this section. *People ex rel. Titsworth v. Nash* (1891), 38 N. Y. St. Rep. 730, 15 N. Y. Supp. 29. It seems that in the absence of any provision of the statute for review in such a case, the determination of the joint board of town superintendents may be considered final and cannot be reviewed on appeal. *People ex rel. Clarkson v. Nelson* (1863), 26 How. Pr. 346.

Allotment of highway.—The portion of the highway allotted is to be considered as belonging wholly to the town to which it shall be allotted; and the town superintendent of the town to which the allotment is made can only maintain an action for an encroachment upon that portion of the highway. *Bradley v. Blair* (1854), 17 Barb. 480. The fact that the partition and allotment of the part of the highway assigned to one town was not recorded in the office of the town clerk in each of the towns, will not render the other town liable for injuries caused by a defect of the highway in that portion allotted to the first town. *Jones v. City of Utica* (1879), 16 Hun 441.

The provision for the opening, improving and keeping in repair by one town of the part of the highway allotted to it does not compel such town to stand the expense of building and maintaining bridges; and a bridge upon such a highway is to be maintained at the joint expense of both towns. *Day v. Day* (1883), 94 N. Y. 153; *Bartlett v. Crozier* (1820), 17 Johns. 439. But see *Tift v. Alley* (1874), 3 T. & C. 784.

§ 208. Final determination, how carried out.—The final determination of commissioners appointed by any court, relating to laying out, altering or discontinuing a highway, and all orders and other papers filed or entered in the proceedings, or certified copies thereof from the court where such determination, order and papers are filed and entered, shall be forthwith filed and recorded in the town clerk's office of the town where the highway is located; and every such decision shall be carried out by the town superintendent of the town, the same as if they had made an order to that effect. The said town superintendent shall thereupon proceed to construct the highway so laid out, and construct any alteration so provided for, and put same in good condition for public travel. The expense of such construction of such new highway or alteration of an existing highway, shall be a charge upon and against the town in which such highway is constructed or any

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existing highway is altered, and when same is completed the town board of such town may issue certificates of indebtedness for such expense, to draw interest at the rate of not to exceed five per centum per annum until paid, and shall at the next annual meeting for auditing accounts, after such work is done, and after such certificates may have been issued, audit such claims against the town, including interest, if any, and include same in the annual tax budget to be collected from the taxpayers of said town to pay said indebtedness; such money to be paid over to the supervisor of the town and by him paid and applied to the purposes aforesaid. This amendment is made subject to the provisions of section forty-eight, relating to contracts for construction. (*Amended by L. 1913, ch. 318.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 98, without change.

Duty of town superintendent upon final determination.—When commissioners appointed as provided in this article have decided that a highway should be laid out, altered or discontinued it becomes the duty of the town superintendent to carry into effect such determination. *People ex rel. D., L. & W. R. R. Co. v. County Court* (1895), 92 Hun 13, 37 N. Y. Supp. 869.

The duty of the town superintendent to carry into effect the decision of the commissioners is a positive one. He can exercise no discretion in the matter. If he refuses to act mandamus will lie to compel him to make an order laying out, altering or discontinuing the highway as directed in the decision. *People v. Champion* (1819), 16 Johns. 61. But where it appears that the proceedings were void because of jurisdictional defects mandamus will not lie. *People ex rel. Johnson v. Whitney's Point* (1884), 32 Hun 508, *affd.* (1886), 102 N. Y. 81, 6 N. E. 895; *Miller v. Brown* (1874), 56 N. Y. 383; *People ex rel. Smith v. Allen* (1899), 37 App. Div. 248, 55 N. Y. Supp. 1057, *affd.* (1900), 162 N. Y. 615, 57 N. E. 1122. Nor will it lie where it appears that the public will derive no benefit from the opening of the highway. *People ex rel. Ashley v. Commissioners of Highways* (1886), 42 Hun 463. And it has been held that the fact that the damages have not been released or assessed was a good defense. *People ex rel. Clark v. Comm'rs of Highways* (1873), 1 Thomp. & C. 193.

Construction of highway.—A town superintendent is not authorized by this section to pave and macadamize a newly opened highway. A contract for such a purpose is void and cannot be ratified by the town board. *Matter of Niland* (1906), 113 App. Div. 661, 99 N. Y. Supp. 914, *affd.* (1908) 193 N. Y. 180, 85 N. E. 1012.

A highway commissioner has no power to expend town money or impose liability upon a town except by direct statutory authority. He has no power to bind a town by his contracts, and a person dealing with a commissioner is chargeable with knowledge of this limitation on his authority. *Matter of Niland v. Bowron* (1908), 193 N. Y. 180, 85 N. E. 1012.

Section cited. *People ex rel. Slosson v. Supervisors of Westchester* (1907), 116 App. Div. 844, 848, 102 N. Y. Supp. 402.

§ 209. Highways by use.—All lands which shall have been used by the public as a highway for the period of twenty years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least two rods.

Source.—Former Highway L. (L. 1890, ch. 568) § 100, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 100, 101.

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References.—What constitutes a highway, *Highway Law*, § 2 and notes thereunder. Highways by dedication, *Id.* § 191. Survey required, *Id.* § 190.

Object of section.—This section declares the common law rule as to the implied dedication of land as a public highway by an uninterrupted use thereof by the public with the knowledge, but without the consent of the owner for a period of twenty years. The period of twenty years is probably laid down as analogous to the period of limitation applicable to incorporeal rights in real property as between persons. *James v. Sammis* (1892), 132 N. Y. 239, 30 N. E. 502. The presumption of a grant of a public right of way springs from the mere lapse of the period of twenty years in connection with the adverse user by the public. *City of Cohoes v. D. & H. C. Co.* (1892), 134 N. Y. 397, 31 N. E. 887.

Construction.—This section should be read in connection with section 2 of chapter 186 of the Laws of 1826 and effect given to both, and when so read this section should be construed to mean that land used as a highway by the public for twenty years shall become a highway provided it complies with the law as to width, and under such construction Front street, so called, in the city of Buffalo, never legally became a street. *McCutcheon v. Terminal Station Commission* (1915), 88 Misc. 601, 151 N. Y. Supp. 451, *affd.* (1915), 168 App. Div. 301, 154 N. Y. Supp. 711, *affd.* (1916), 217 N. Y. 127, 111 N. E. 661.

Use for twenty years.—Public use for twenty years is proof of the existence of a highway. *Chapman v. Swan* (1865), 65 Barb. 210; *Miller v. Garlock* (1850), 8 Barb. 153. User for twenty years will make a road a highway with or without dedication. *Town of Corning v. Head* (1895), 86 Hun 12, 33 N. Y. Supp. 360; *Wiggins v. Tallmadge* (1851), 11 Barb. 457; *Chapman v. Swan* (1865), 65 Barb. 210. If mere user by the public without any action of the town authorities in laying out or recording, or improving or accepting the road, can make a highway, such user must continue at least twenty years. *Matter of Shawangunk Kill Bridge* (1885), 100 N. Y. 642, 3 N. E. 679. User alone is sufficient to establish a dedication; but if there be no other evidence of the fact, it must have continued twenty years. *Gould v. Glass* (1855), 19 Barb. 179.

A road or way laid out and opened by a milk company from a public highway to its plant, a distance of about thirty rods, for the accommodation of the company and its patrons and used for over twenty years, does not become a public highway by prescription, without any formal dedication thereof, unless it has been accepted and adopted by the town authorities, or its repairs and maintenance assumed by such town. *Rept. of Atty. Genl.* (1915), p. 136.

Proof of user.—It is a question of fact for the jury to say whether a way has become by long continued use a public highway, or whether there has been any dedication by the owner and acceptance thereof by the public. *Porter v. Village of Attica* (1884), 33 Hun 605; *McCarthy v. L. S. & M. S. R. Co.* (1879), 76 N. Y. 592; *Kelsey v. Burgess* (1890), 12 N. Y. Supp. 169, 35 N. Y. St. Rep. 368. Where successive owners of land have permitted the public to use the same as a public highway for twenty years or more, without interruption or objection, an intention is immaterial and it is no matter that the owner be a lunatic, infant or married woman. *Devenpeck v. Lambert* (1865), 44 Barb. 596; *People ex rel. Rensselaer v. Van Alstyne* (1866), 3 Abb. Ct. App. Dec. 575.

A general user by the public at large of any street as a highway, accompanied by official acts of the municipality in repairing, using or maintaining it, constitutes an acceptance by common or public user. *Matter of Starr Street* (1911), 73 Misc. 380, 389, 131 N. Y. Supp. 71.

Character and extent of use.—Both at common law and under our statute before lands can become a public highway by prescription they must have been used by the general public as a highway, under claim of right, without interruption or substantial change for at least twenty years, and must have been kept in repair,

taken in charge of and adopted by the public authorities, so that the town has become responsible for their condition; and so that persons obstructing the same may be subject to a fine under the statute. *Riley v. Brodie* (1898), 22 Misc. 374, 278, 50 N. Y. Supp. 347. The use must be like that of highways generally. *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 24 N. E. 692. Where the premises in dispute have been dedicated as a highway and used as such by the public for more than twenty years, and have been accepted and worked by the authorities as a highway they become a legal highway. *Town of Corning v. Head* (1895), 86 Hun 12, 33 N. Y. Supp. 360; *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 431, 24 N. E. 692; *City of Cohoes v. D. & H. Co.* (1892), 134 N. Y. 397, 31 N. E. 887; *Gidney v. Earl* (1834), 12 Wend. 98.

The user which will impose a street servitude upon a private wharf must be that to which the ordinary highway or street is subject. *City of Buffalo v. Delaware, Lackawanna and Western R. R. Co.* (1902), 68 App. Div. 488, 74 N. Y. Supp. 343, *affd.* (1904), 178 N. Y. 561, 70 N. E. 1097.

The words "used by the public as a highway" contained in this section are of the same purport as the phraseology "used as public highways," contained in the corresponding section of the Revised Statutes. *People ex rel. Cunningham v. Osborn* (1895), 84 Hun 441, 32 N. Y. Supp. 358, *affd.* (1898), 155 N. Y. 685, 50 N. E. 1120.

Where a road originally passes through woodland mere use is insufficient to constitute it a public road. The ground for the distinction is that where the land is inclosed and cultivated the mere use is an invasion and a trespass, but where it is woodland those who travel it subject the owner to no loss or inconvenience and commit no trespass until after notice to desist. To prohibit such use would be considered churlish and would be ineffective unless constant watch were kept. *Harriman v. Howe* (1894), 78 Hun 280, 28 N. Y. Supp. 858, *affd.* (1898), 155 N. Y. 683, 50 N. E. 1117.

Where no record may be found as to the width, boundaries, etc., of an old established road, the town superintendent may remove obstructions, cause survey to be made, removing fences and encroachments, and opening up road to width of at least two rods according to statute. *Rept. of Atty. Genl.* (1910) 706.

The existence of a railroad upon the highway during a portion of the twenty years does not defeat the claim of a highway by user, if it still remains a road and is used for public travel. If the user is otherwise sufficient to constitute the road a highway, the presence of the railroad tracks is an immaterial circumstance. *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 431, 24 N. E. 692. Where a highway has become a public highway by user it does not cease to be such even though it originally was let to a dock and ferry and the ferry has since been changed and though part of the highway has been appropriated and built upon, provided the passage continues open to the same dock and landing. *Galatian v. Gardner* (1810), 7 Johns. 106.

The use of land as a private road for a period of twenty years does not bring such road within the statutory provision that lands which have been used by the public as a highway for twenty years shall be a highway. *Culver v. City of Yonkers* (1903), 80 App. Div. 309, 80 N. Y. Supp. 1034, *affd.* (1904), 180 N. Y. 524, 72 N. E. 1141. A private way open to the owners of land through which it passed for their own use does not become a public highway merely because the public are permitted for many years to travel over it. *People ex rel. Cunningham v. Osborn* (1895), 84 Hun 441, 32 N. Y. Supp. 358, *affd.* (1898), 155 N. Y. 685, 50 N. E. 1120; *Speir v. The Town of New Utrecht* (1890), 121 N. Y. 420, 24 N. E. 692; *Palmer v. Palmer* (1896), 150 N. Y. 139, 44 N. E. 966; *Harriman v. Howe* (1894), 78 Hun 280, 28 N. Y. Supp. 858, *affd.* (1898), 155 N. Y. 683, 50 N. E. 1117. The fact that the road has been recorded as a private road will prevent its becoming a public

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highway by prescription. *Devenpeck v. Lambert* (1865), 44 Barb. 596; *In re Howland Bridge* (1891), 14 N. Y. Supp. 845, 30 N. Y. St. Rep. 970; *Matter of Freeholders of Montezuma* (1891), 38 N. Y. St. Rep. 970, 14 N. Y. Supp. 845.

Acceptance need not be proved.—When the fact of twenty years of such user is found the importance of the question of dedication and acceptance substantially disappears. The statute then declares that it is a public highway. *Porter v. Village of Attica* (1884), 33 Hun 605; *Devenpeck v. Lambert* (1865), 44 Barb. 596. A highway dedicated by the owner of the land but not accepted by the authorities, does not become a public highway unless used by the public as such for the full period of twenty years. *Trustees of Jordan v. Otis* (1862), 37 Barb. 50; *Rozell v. Andrews* (1886), 103 N. Y. 150, 8 N. E. 513. But proof of acceptance by the public is unimportant. It is the user itself which controls and constitutes an acceptance. *Porter v. Village of Attica* (1884), 33 Hun 605; *Vandemark v. Porter* (1886), 40 Hun 397. A user by the public for more than twenty years constitutes an acceptance and establishes a highway. *Vandemark v. Porter* (1886), 40 Hun 397; *Wiggins v. Tallmadge* (1851), 11 Barb. 457.

Width or location of highway by use.—An order of the town superintendent describing a road which has been used as a highway for more than twenty years will not have the effect to change the width or location of the highway; such order is effective only as a description of the way as manifested by the permitted twenty years' use. *Ivory v. Town of Deerpark* (1889), 116 N. Y. 476, 22 N. E. 1080. *Kerr v. Hammer* (1891), 39 N. Y. St. Rep. 708, 15 N. Y. Supp. 605; *People ex rel. Commissioners of Highways v. The County Judges* (1840), 24 Wend. 491. Nor has the town superintendent power to remove obstructions or encroachments upon that part of the highway which extends beyond the actual user; the existence of the highway must be based upon the extent of the user. *Alpaugh v. Bennett* (1891), 59 Hun 45, 12 N. Y. Supp. 398; *Talmadge v. Huntting* (1864), 29 N. E. 447.

A highway laid out by user need not necessarily be of the statutory width; the exact bounds of such a highway is a question of fact for the jury. *Harlow v. Humiston* (1826), 6 Cow. 189. As to duty of town superintendent to open the road to a width of two rods, see *Snyder v. Trumpbour* (1868), 38 N. Y. 355; *Snyder v. Plass* (1864), 28 N. Y. 465; *Alpaugh v. Bennett* (1891), 59 Hun 45, 12 N. Y. Supp. 398; *Devenpeck v. Lambert* (1865), 44 Barb. 596.

A highway which has become such by user may not be obstructed even though the town superintendent failed to have it opened to a width of two rods and duly recorded with the town clerk. *Devenpeck v. Lambert* (1865), 44 Barb. 596. An action to recover a penalty for encroaching upon public highway will lie as well in the case of a highway by prescription as for one laid out by proceedings under the statute or one established by dedication. *Town of West Union v. Richey* (1901), 64 App. Div. 156, 71 N. Y. Supp. 871.

The easement of the public in a highway by use only extends to the way which has been acquired by public use for the prescribed period. The town superintendent can only determine questions as to the boundary of the highway according to its actual use for such period. If a way be established by prescription or user the public use defines the extent of the easement. *Walker v. Caywood* (1865), 31 N. Y. 51.

Reduction of width; when alley laid out on map cannot be dedicated for highway purposes.—Chapter 204 of the Laws of 1897, amending the Highway Law of 1890 by which the width of highways was reduced from three to two rods, superseded and is a substitute for chapter 198 of the Laws of 1826 under which it was lawful to lay out public roads not less than three rods in width, and an alley only eight feet wide as laid out on a map and as it existed prior to 1905 cannot be laid out or dedicated for highway purposes. The public authorities having neither adopted nor kept such strip in repair and its use not having been an uninterrupted one, it

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did not become a highway by prescription under this section which declares all land a highway which shall have been used by the public as such for twenty years. *Farmers and Mechanics' Savings Bank v. City of Lockport* (1915), 89 Misc. 157, 151 N. Y. Supp. 865.

Record of highway by use.—The record of the highway by the town superintendent is not conclusive on the point that the road is a public highway. *Cole v. Van Keuren* (1875), 6 T. & C. 480; *Kelsey v. Burgess* (1890), 12 N. Y. Supp. 169, 35 N. Y. St. Rep. 368. Where there has been such user of a road by the public for twenty years, as would justify a record of it as a public highway, and it has either been kept in repair or taken in charge by the authorities, the fact that they have failed to record it, does not change the mandate of the statute that it shall be a public highway. *Lewis v. N. Y., L. E. & W. R. R. Co.* (1890), 123 N. Y. 496, 26 N. E. 357. Such a road is a highway if in fact it has been used for twenty years, independent of any action of the town superintendent. *Snyder v. Plass* (1864), 28 N. Y. 465.

Where a highway had not been used as a public highway for twenty years its use as such is not sufficiently ancient to supersede the necessity of its being recorded. *People v. Lawson* (1820), 17 Johns. 277.

Right of way by prescription.—See *City of Buffalo v. Erie R. R. Co.* (1913), 83 Misc. 144, 144 N. Y. Supp. 578.

The fact that the owners of land opened a way through it for their own use, and permitted people generally to travel over the way for various purposes, does not constitute the way a highway by prescription. *Hamilton v. Village of Owego* (1899), 42 App. Div. 312, 59 N. Y. Supp. 103, *affd.* (1902), 171 N. Y. 698, 64 N. E. 1121.

Section cited.—*City of Niagara Falls v. New York Central and Hudson River R. Co.* (1901), 168 N. Y. 610, 625, 61 N. E. 185.

§ 210. Fences to be removed.—Whenever a highway shall have been laid out through any inclosed, cultivated, or improved lands, in conformity to the provisions of this chapter, the town superintendent shall give to the owner or occupant of the land through which such highway shall have been laid, sixty days' notice in writing to remove his fences; if such owner shall not remove his fences within sixty days, the town superintendent shall cause them to be removed, and shall direct the highway to be opened and worked.

Source.—Former Highway L. (L. 1890, ch. 568) § 101, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 96, 97, 109.

References.—Fences erected within the bounds of a highway to be removed, Highway Law, § 52. Expenses assessed against owner of lands when fences removed by town superintendent, *Id.* § 55.

Necessity of notice to remove.—It is intended that notice to remove fence be given in all cases of highways laid out through inclosed lands, whether laid out directly or indirectly by the town superintendent. *Case v. Thompson* (1831), 6 Wend. 634. If there is an appeal from the order of the town superintendent, the notice cannot be given until it is determined; and pending the appeal the fence does not become a public nuisance. *Drake v. Rogers* (1842), 3 Hill 604; *Case v. Thompson* (1834), 6 Wend. 634.

In an action for obstructing a highway the defendant, over whose land the way passes, may show failure to notify him to remove his fences, to prove that the alleged highway does not legally exist. *Cooper v. Bean* (1871), 5 Lans. 318. If the town superintendent has no right to open a road without giving notice to the

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party to remove his fences, then he is bound to prove that such notice has been given in order to entitle himself to the protection afforded by the section. It is not incumbent on the owner of the land to prove that such notice had not been given. *Case v. Thompson* (1831), 6 Wend. 634.

§ 211. **Private road.**—An application for a private road shall be made in writing to the town superintendent of the town in which it is to be located, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which it is proposed to be laid out.

Source.—Former Highway L. (L. 1890, ch. 568) § 106, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 77; L. 1853, ch. 174, § 1.

Reference.—Necessity of private road and amount of damages to be determined by jury, Const., art. 1, § 7.

Constitutional provision.—Art. 1, § 7, of the Constitution has been held not to apply to a way by necessity nor to a way used by the owner for his own convenience, and which crosses land afterwards subdivided and sold. *Wheeler v. Gilsey* (1867), 35 How. Pr. 139. A taking of land for a private way is the taking of private property for private use, and is unlawful without express constitutional authority. *Taylor v. Porter* (1843), 4 Hill 140.

Application for private road.—A substantial compliance with the requirements of this section is sufficient. *People ex rel. Smith v. Taylor* (1860), 34 Barb. 481. A description by reference to a pre-existing private way by permission, well marked by user and known as a road, though never legally laid out, is sufficiently certain. The statute is substantially complied with when the application gives the general course by points of the compass only, without degrees and minutes, where the exact course and distance can be determined from other particulars in the application or by natural monuments referred to therein. *Satterly v. Winne* (1886), 101 N. Y. 218, 4 N. E. 185; *People ex rel. Smith v. Taylor* (1860), 34 Barb. 481.

Use of private road.—The grantee of a private right of way, which has become impassable cannot, without becoming a trespasser, go on the adjoining close to pass around the obstruction. *Williams v. Safford* (1849), 7 Barb. 309. Where one person has a private right of way over the lands of another, the manner of its enjoyment being undefined, nothing passes as an incident to such grant but what is requisite to its fair enjoyment. The fee of the land still remains in the grantor of such a privilege and he may use such land as he pleases in a manner consistent with the grant. Facilities for passage are to be regulated by the nature of the case. And the grantee is bound to keep the private way in repair, nor may he deviate from it and go upon the lands of the grantor. *Bakeman v. Talbot* (1865), 31 N. Y. 366.

The owner of land through which a private road passes must so build his fences as to leave full two rods in width in every part of the road; but the owner of the road will be deemed to have assented to such fences projecting into the road, if damages were assessed in reference to such location or if he permits fences to be so built without objection. *Herrick v. Stover* (1830), 5 Wend. 580.

An obstruction placed in a private road by the owner of the land over which it is laid out, cannot be lawfully removed by one having no right to use the road. *Drake v. Rogers* (1842), 3 Hill 604. Penalties for obstructing roads apply only to public highways, and not to private roads. *Fowler v. Lansing* (1812), 9 Johns. 349.

§ 212. **Jury to determine necessity and assess damages.**—The town su-

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perintendent to whom the application shall be made shall appoint as early a day as the convenience of the parties interested will allow, when, at a place designated in the town, a jury will be selected for the purpose of determining upon the necessity of such road, and to assess the damages by reason of the opening thereof.

Source.—Former Highway L. (L. 1890, ch. 568) § 107, without change. Originally revised from L. 1853, ch. 174, § 2.

§ 213. **Copy application and notice delivered to applicant.**—Such town superintendent shall deliver to the applicant a copy of the application, to which shall be added a notice of the time and place appointed for the selection of the jury, addressed to the owners and occupants of the land.

Source.—Former Highway L. (L. 1890, ch. 568) § 108, without change. Originally revised from L. 1853, ch. 174, § 3.

§ 214. **Copy and notice to be served.**—The applicant on receiving the copy and notice shall, on the same day, or the next day thereafter, excluding Sunday and holidays, cause such copy and notice to be served upon the persons to whom it is addressed, by delivering to each of them who reside in the same town a copy thereof, or in case of his absence, by leaving the same at his residence and upon such as reside elsewhere, by depositing in the post-office a copy thereof to each, properly inclosed in an envelope, addressed to them respectively at their post-office address, and paying the postage thereon, or, in case of infant owners, by like service upon their parent or guardian.

Source.—Former Highway L. (L. 1890, ch. 568) § 105, without change. Originally revised from L. 1853, ch. 174, § 4.

Necessity of notice.—The owners of land through which the private road is to be laid out are entitled to written notice of the time and place of the meeting of the jury to determine its necessity. But where an owner upon verbal notice merely appears and contests the matter before the jury, without making an objection on the ground of want of sufficient notice, he will be deemed to have waived the irregularity. *Mohawk and Hudson Co. v. Artcher* (1836), 6 Paige 83.

§ 215. **List of jurors.**—At such time and place, on due proof of the service of the notice, the town superintendent shall present a list of the names of thirty-six resident freeholders of the town, in no wise of kin to the applicant, owner or occupant, or either of them, and not interested in such lands.

Source.—Former Highway L. (L. 1890, ch. 568) § 110, as amended by L. 1904, ch. 109, without change. Originally revised from L. 1853, ch. 174, § 5, as amended by L. 1860, ch. 468.

Jury of freeholders.—It will be assumed that the jury is composed of reputable freeholders unless the contrary be shown. *Clark v. Phelps* (1825), 4 Cow. 190. Although it does not expressly appear that the jurors were freeholders, and no objection was made on that ground and the parties agreed on the jury, it will be considered that they have the necessary requirements. *People ex rel. Smith v. Taylor* (1860), 34 Barb. 481.

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§ 216. **Names struck off.**—The owners or occupants of the land may strike from the list not more than twelve names, and the applicant a like number, and of the number which remain, the twelve names standing first on the list shall be the jury.

Source.—Former Highway L. (L. 1890, ch. 568) § 111, as amended by L. 1904, ch. 109, without change. Originally revised from L. 1853, ch. 174, § 6.

Constitutionality.—The amendments of 1904 to § 111 of the former Highway Law increased the number of the jury from six to twelve. Prior to this amendment it had been held that a jury of six drawn in the manner prescribed by this section did not comply with the constitutional requirement that the necessity of the road and the damages should be determined by a jury of freeholders. *Berridge v. Shults* (1900), 32 Misc. 444, 66 N. Y. Supp. 204.

§ 217. **Place of meeting.**—The town superintendent shall then appoint some convenient time and place for the jury to meet, and shall summon them accordingly.

Source.—Former Highway L. (L. 1890, ch. 568) § 112, without change. Originally revised from L. 1853, ch. 174, § 7.

Summoning jury.—The town superintendent must summon the jurors personally and may not delegate the duty to another. But where a jury, summoned by a constable, when assembled are requested by the town superintendent to act, the summoning is sufficient. *People ex rel. Elliott v. Commissioners of Greenbush* (1840), 24 Wend. 367.

§ 218. **Jury to determine and assess damages.**—The town superintendent and all the persons named and summoned on such jury, shall meet at the time and place appointed; but if one or more of the twelve jurors shall not appear, the town superintendent shall summon so many qualified to serve as such jurors as will be sufficient to make the number present twelve to forthwith appear and act as such; and when twelve shall have so appeared, they shall constitute the jury and shall be sworn well and truly to determine as to the necessity of the road, and to assess the damages by reason of the opening thereof.

Source.—Former Highway L. (L. 1890, ch. 568) § 113, as amended by L. 1853, ch. 174, §§ 8, 9.

§ 219. **Their verdict.**—The jury shall view the premises, hear the allegations of the parties, and such witnesses as they may produce, and if they shall determine that the proposed road is necessary, they shall assess the damages to the person or persons through whose land it is to pass, and deliver their verdict in writing to the town superintendent.

Source.—Former Highway L. (L. 1890, ch. 568) § 114, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 78; L. 1853, ch. 174, § 10.

Review of assessment.—In the case of a private road, the damages being paid by a private person and not by a levy and collection of a tax, the board of supervisors has no right to revise an assessment of damages by the jury. *Craig v. Supervisors of Orange* (1833), 10 Wend. 585.

Duty of town superintendent as to verdict.—If the jury find in favor of laying out the road, the town superintendent is bound to lay it out as described in the application, and has no discretion either to refuse to lay out the road, or to change

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its location. He has no power to decide anything but performs simply ministerial functions. *Satterly v. Winne* (1886), 101 N. Y. 218, 4 N. E. 185; *People ex rel. Keenholts v. Robinson* (1858), 29 Barb. 77.

§ 220. **Value of highway discontinued.**—If the necessity of such private road has been occasioned by the alteration or discontinuance of a public highway running through the lands belonging to a person through whose lands the private road is proposed to be opened, the jury shall take into consideration the value of the highway so discontinued, and the benefit resulting to the person by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening and laying out of such private road.

Source.—Former Highway L. (L. 1890, ch. 568) § 115, without change. Originally revised from L. 1853, ch. 174, § 11.

§ 221. **Papers to be recorded in the town clerk's office.**—The town superintendent shall annex to such verdict the application, and their certificate that the road is laid out, and the same shall be filed and recorded in the town clerk's office.

Source.—Former Highway L. (L. 1890, ch. 568) § 116, without change. Originally revised from L. 1853, ch. 174, § 12.

§ 222. **Damages to be paid before opening the road.**—The damages assessed by the jury shall be paid by the party for whose benefit the road is laid out, before the road is opened or used; but if the jury shall certify that the necessity of such private road was occasioned by the alteration or discontinuance of a public highway, such damages shall be paid by the town and refunded to the applicant.

Source.—Former Highway L. (L. 1890, ch. 568) § 117, without change. Originally revised from L. 1853, ch. 174, § 14.

Payment of damages.—A private road cannot be opened until the damages have been assessed and paid. *Mohawk & Hudson River R. R. Co. v. Artcher* (1836), 6 Paige 83. The damages are to be paid by the person for whose benefit the road is laid out; when so paid the road belongs to the applicant so long as it is used as a road. *Taylor v. Porter* (1843), 4 Hill 140. See *Matter of Lawton* (1898), 22 Misc. 426, 50 N. Y. Supp. 408.

§ 223. **Fees of officers.**—Every juror, in proceedings for a private road, shall be entitled to receive for his services one dollar and fifty cents; and town superintendents their per diem compensation to be paid by the applicant.

Source.—Former Highway L. (L. 1890, ch. 568) § 118, without change. Originally revised from L. 1880, ch. 114, § 4.

§ 224. **Motion to confirm, vacate or modify.**—Within thirty days after the decision of the jury shall have been filed in the town clerk's office, the owner, occupant or applicant may apply to the county court of the county wherein such private road is situated, for an order confirming, vacating or modifying their decision; and such court may confirm, vacate or modify

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such decision as it shall deem just and legal. If the decision is vacated, the court may order another hearing of the matter before another jury, and remit the proceedings to the town superintendent of the same town for that purpose. If no such motion is made, the decision of the jury shall be deemed final. The motion shall be brought on, upon the service of papers on the adverse party in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein, and the decision of the county court shall be final, except that a new hearing may be had, as herein provided. If the final decision shall be adverse to the applicant, no other application for the same road shall be made within one year. (*Amended by L. 1915, ch. 192.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 119, without change. Originally revised from L. 1853, ch. 174, § 5, as amended by L. 1860, ch. 468.

References.—Practice on motion to confirm, vacate or modify decision of jury is similar to that upon a motion to confirm, vacate or modify the decision of commissioners appointed to lay out, alter or discontinue a highway, Highway Law, § 199 and note thereunder.

For procedure under acts of 1853 and 1860 from which former § 119 was derived, see *West v. McGurn* (1864), 43 Barb. 198.

Appeal from verdict.—The county court has no power to appoint commissioners to hear an appeal from the decision of a jury laying out a private road. *People ex rel. Keenholts v. Robinson* (1858), 29 Barb. 77. It will be presumed that the jury found for the necessity of the private road where the contrary does not appear by the record. *People ex rel. Cashman v. Heddon* (1884), 32 Hun 299.

§ 225. **Costs of new hearing.**—If upon a new hearing, the damages assessed are increased, the applicant shall pay the costs and expenses thereof, otherwise the owner shall pay the same.

Source.—Former Highway L. (L. 1890, ch. 568) § 120, without change.

§ 226. **For what purpose private road may be used.**—Every such private road, when so laid out, shall be for the use of such applicant, his heirs and assigns; but not to be converted to any other use or purpose than that of a road; nor shall the occupant or owner of the land through which said road shall be laid out be permitted to use the same as a road, unless he shall have signified such intention to the jury who assessed the damages for laying out such road, and before such damages were assessed.

Source.—Former Highway L. (L. 1890, ch. 568) § 121, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 79.

Nature of use of private road.—A private road is paid for and owned by the applicant. The public has no title to nor interest in it nor right to use it. *Taylor v. Porter* (1843), 4 Hill 140; *Lamber v. Hoke* (1817), 14 Johns. 383; *Herrick v. Stover* (1830), 5 Wend. 580; *Drake v. Rogers* (1842), 3 Hill 604.

§ 227. **Highways or roads along division lines.**—Whenever a highway or private road shall be laid along the division line between lands of two or more persons, and wholly upon one side of the line, and the land upon both sides is cultivated or improved, the persons owning or occupying the lands adjoining such highway or road shall be paid for building and main-

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taining such additional fence as they may be required to build or maintain, by reason of the laying out and opening such highway or road; which damages shall be ascertained and determined in the same manner that other damages are ascertained and determined in the laying out of highways or private roads.

Source.—Former Highway L. (L. 1890, ch. 568) § 122, without change. Originally revised from L. 1853, ch. 174, § 16.

Application of section.—This section is to be taken in connection with the statute requiring adjacent owners of land to maintain division fences, but has no application to lands adjoining railroads, as the latter are required to maintain all the fences along their line. *Matter of Pugh* (1897), 22 Misc. 43, 49 N. Y. Supp. 398, revd. on other grounds (1897), 46 App. Div. 634, 61 N. Y. 1145.

§ 228. **Adjournments.**—If any accident shall prevent any of the proceedings required by this chapter relating to the laying out, altering or discontinuing of a highway, or the laying out of a private road, to be done on the day assigned, the proceedings may be adjourned to some other day, and the town superintendent shall publicly announce such adjournment.

Source.—Former Highway L. (L. 1890, ch. 568) § 123, without change. Originally revised from L. 1853, ch. 174.

§ 229. **Widening roads; petition.**—When any part of highway in any town of this state, not in an incorporated village or city, running between two or more villages or cities, has, because of the wearing away by a river or stream or any other natural cause, become narrower than the width required by statute, and is dangerous to the users of such highway, twelve or more resident taxpayers of such town may present a petition to the county court of the county within which such town is situated. The petition shall describe the part of the highway proposed to be widened and state that such highway has become lessened in width by the action of a river or stream or other cause, that it is dangerous to the traveling public, that the widening and improvement of such highway is necessary for the public convenience and welfare, that the highway is an important leading road between two or more cities or villages, that the cost of such widening and improvement would exceed the sum of two thousand five hundred dollars and would be too burdensome on the town or towns otherwise liable therefor. Such petition shall be verified by at least three of the petitioners. On receipt of the petition the county court shall forthwith appoint three commissioners who shall not be named by any person interested in the proceedings and who shall be taxpayers of such county, but who shall not reside in the town or towns in which the highway, proposed to be widened and improved is situated.

Source.—L. 1893, ch. 607, § 1.

Application of section.—Rept. of Atty. Genl. (1909) 637.

§ 230. **Powers and duties of commissioners.**—The commissioners shall take the constitutional oath of office and appoint a time and place for a meeting to hear all persons interested in the proposed widening of the

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highway. They shall personally examine the part of the highway proposed to be widened, hear any reasons for or against such widening and ascertain the probable cost of the work. They shall have power to issue subpoenas, administer oaths and examine witnesses; they shall keep the minutes of their proceedings and reduce to writing all oral evidence given before them. They shall make duplicate certificates of their decision, filing one in the town clerk's office of the town in which the said highway is located, and the other, with such minutes and evidence, in the county clerk's office of the county where the highway is located. Such commissioners shall have the same power as to the assessment of damages caused by the widening of such highway as commissioners appointed under this article for the discontinuance, alteration or laying out of a highway, and as to such assessment the same proceeding may be had for the confirmation, vacating or modifying of such decision, as provided in and by this article. The commissioners shall receive a compensation of five dollars for each day necessarily spent in the performance of their duties under this section, and the amount so paid to the said commissioners shall be a charge upon the town or towns in which the highway, proposed to be widened as aforesaid, is located.

Source.—L. 1893, ch. 607, § 2.

§ 231. Notice of decision to supervisors.—If a majority of the commissioners shall determine that the proposed widening of the highway is necessary and that the cost thereof would be too burdensome for the town, exceeding in probable cost two thousand five hundred dollars, they shall notify the board of supervisors of the county of such decision. The board of supervisors shall thereupon cause one-half of the amount of the estimated cost to be raised by the county and paid to the supervisor of the town or towns in which that part of the highway proposed to be widened as aforesaid is located, and said supervisor shall apply the sum so received by him towards the payment of the cost of such widening. The balance of the expense shall be raised in the manner provided by law, by the town or towns in which that part of the highway proposed to be widened as aforesaid is located.

Source.—L. 1893, ch. 607, § 3, with slight changes.

§ 232. Widening, how constructed.—The town superintendent shall construct such widening of the highway according to plans and specifications adopted by the district or county superintendent and approved by the town board of his town. The bills and expenses incurred in such work shall be audited by the town board and paid by the supervisor upon written order of the town superintendent, after the same shall have been approved by the town board, out of moneys raised for such purpose as provided in the preceding section.

Source.—L. 1893, ch. 607, § 4, rewritten, but without change of substance.

§ 233. Actions to compel widening; how affected by petition.—In case

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an action might lie in any court of this state against the town superintendent of any town or towns to compel such superintendent to widen a part of a highway, the width of which has become less than that required by statute, or in case an action has been brought against such superintendent to compel him to widen a part of a highway, the width of which has become less than that required by statute, the presentation of a verified petition to the county court as provided for in section two hundred and twenty-nine shall prevent the commencing of any such action as aforesaid and cause such an action already commenced, to cease, and shall be a bar to a recovery on the part of the plaintiff of a judgment against such superintendent in any such action instituted or prosecuted to judgment after the passage of this chapter.

Source.—L. 1893, ch. 607, § 5, slightly modified.

§ 234. **Highways abandoned.**—Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public, or laid out, shall cease to be a highway; but the period during which any action or proceeding shall have been, or cash and in part upon credit according to the exigency of the case; and such six years; and every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right of way. The town superintendent * shall file, and cause to be recorded in the town clerk's office of the town, a written description, signed by them, of each highway and public right of way so abandoned, and the same shall thereupon be discontinued. There may also be a qualified abandonment of a highway under the following conditions and for the following purposes, to wit: Where it appears to the town superintendents, at any time, that a highway has not become wholly disused as aforesaid, but that it has not for two years next previous thereto, been usually traveled along the greater part thereof, by more than two vehicles daily, in addition to pedestrians and persons on horseback, they shall file and cause to be recorded in the town clerk's office a certificate containing a description of that portion of the highway partly disused as aforesaid and declaring a qualified abandonment thereof. The effect of such qualified abandonment, with respect to the portion of said highway described in the certificate, shall be as follows: It shall no longer be worked at public expense; it shall not cease to be a highway for purposes of the public easement, by reason of such suspension of work thereon; no person shall impair its use as a highway nor obstruct it, except as hereinafter provided, but no person shall be required to keep any part of it in repair; wherever an owner or lessee of adjoining lands has the right to possession of other lands wholly or partly on the directly opposite side of the highway therefrom, he may construct and maintain across said highway a fence at each end of the area of high-

* So in original.

way which adjoins both of said opposite pieces of land, provided that each said cross fence must have a gate in the middle thereof at least ten feet in length, which gate must at all times be kept unlocked and supplied with a sufficient hasp or latch for keeping the same closed; all persons owning or using opposite lands, connected by such gates and fences, may use the portion of highway thus inclosed for pasturage; any traveler or other person who intentionally, or by wilful neglect, leaves such gate unlatched, shall be guilty of a misdemeanor, and the fact of leaving it unlatched shall be prima facie evidence of such intent or wilful neglect. Excepting as herein abrogated, all other general laws relating to highways shall apply to such partially abandoned highway. This section shall not apply to highways less than two rods in width unless it shall appear to the town superintendent at any time that such a highway has not, during the months of June to September inclusive of the two years next previous thereto, been usually traveled along the greater part thereof by more than ten pedestrians daily. (*Amended by L. 1915, ch. 322.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 99, as amended by L. 1899, ch. 622, and L. 1907, ch. 246, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 99, as amended by L. 1861, ch. 311; L. 1853, ch. 174, § 15.

Abandonment in general.—A highway when once established continues to be such until discontinued according to law. The presumption is in favor of its continuance. *City of Cohoes v. The D. & H. C. Co.* (1892), 134 N. Y. 397, 31 N. E. 887; *Driggs v. Phillips* (1886), 103 N. Y. 77, 8 N. E. 514; *Adams v. S. & W. R. R. Co.* (1851), 11 Barb. 414, revd. (1852), 10 N. Y. 328. The burden of establishing that a highway has ceased to be such rests upon the party making the claim. *Horey v. Village of Haverstraw* (1891), 124 N. Y. 273, 26 N. E. 532; *City of Cohoes v. D. & H. C. Co.* (1892), 134 N. Y. 397, 31 N. E. 887; *Matter of Woolsey* (1884), 95 N. Y. 135. The public alone, not an individual, can work an abandonment of a public highway. *Amsbey v. Hinds* (1866), 46 Barb. 622, *affd.* (1871), 48 N. Y. 57. Where it is established that a highway has been legally laid out, its continuance as such is to be presumed until the contrary appears. *Beckwith v. Whalen* (1875), 65 N. Y. 322.

A town meeting has no power to discontinue a highway once established. That can be done only by the intervention of the authorities and according to the procedure pointed out in the statutes, and a town meeting is no part of these. *Hughes v. Bingham* (1892), 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454.

Failure to open and work.—The time during which proceedings are pending to lay out the highway is not included within the period within which the highway must be laid out and worked. *Bridges v. Wyckoff* (1876), 67 N. Y. 130; *Rathgaber v. Village of Tonawanda* (1891), 37 N. Y. St. Rep. 807, 13 N. Y. Supp. 937.

Where a particular place claimed to be a public highway has never been opened, worked or used as a highway, it cannot be proved by parole that it is a highway; it would amount to defeating owners of title to real estate by parole evidence. *Harrington v. People* (1849), 6 Barb. 607.

The statute applies only where there has been a failure to open or work the highway at all, and not where the highway has been in full use for the whole time, but has not been laid out to its full width or its width has been contracted. *Walker v. Caywood* (1865), 31 N. Y. 51. The whole width of the highway need not be traversable by vehicles, nor are those parts not used by teams considered abandoned. *Mangam v. Village of Sing Sing* (1898), 26 App. Div. 464, 50 N. Y. Supp. 647, *affd.* (1900), 164 N. Y. 560, 58 N. E. 1089.

Extent of opening and working.—The requirement to open and work a highway implies that it must be made passable as a highway for public travel its entire length. It need not be a first-class road, it need not be finished, but it must be sufficient to enable the public to pass over it. *Beckwith v. Whalen* (1877), 70 N. Y. 430; *MacVee v. City of Watertown* (1895), 92 Hun 306, 36 N. Y. Supp. 870; *City of Buffalo v. Hoffeld* (1893), 6 Misc. 197, 27 N. Y. Supp. 869. The statute does not prescribe how much or how well the highway shall be worked; if opened and worked at all, it will not lose its legal existence. *Marble v. Whitney* (1863), 28 N. Y. 297; *McCarthy v. Whalen* (1880), 19 Hun 503, *affd.* (1881), 87 N. Y. 148. A highway may be shifted to one side in such a manner and to such an extent as to create an abandonment of the portion from which the shift is made. *Mangam v. Village of Sing Sing* (1898), 26 App. Div. 464, 50 N. Y. Supp. 647, *affd.* (1900), 164 N. Y. 560, 58 N. E. 1089. The failure to open a portion of a highway will not invalidate so much thereof as is opened and worked in compliance with the statutes. *Vandemark v. Porter* (1886), 40 Hun 397.

Where a highway is opened and worked for a portion of the full distance within the statutory period, but is not so worked as to the remainder, it ceases to be a highway for any purpose at the place where it is not opened and worked. *Christy v. Newton* (1871), 60 Barb. 332. So also as to the portion of a highway which has been fenced off and not used by the public for a period of six years. *Lyon v. Munson* (1823), 2 Cow. 426. The statute requiring highways that have been laid out, to be opened and worked within six years, applies only to those cases where there has been a failure to open and work them at all, and not where the highway has been in full use for the whole time, though not in all places opened to its full width. *Walker v. Caywood* (1865), 31 N. Y. 51.

Use of part of highway abandoned.—If a part of a highway ceases to be traveled and used for a period of six years, such part is no longer a highway; it does not follow that because a portion of that which was originally laid out as a continuous highway remains such, all of it does. *Horey v. Village of Haverstraw* (1891), 124 N. Y. 273, 26 N. E. 532; *Lyon v. Munson* (1823), 2 Cow. 426; *Christy v. Newton* (1871), 60 Barb. 332.

If a highway remains closed for six years with the acquiescence of the public, there is an extinguishment of the public right, but obstructions of a highway across part of its width only, narrowing but not closing the line of travel, are not sufficient, however long continued, to put an end to its existence. To have that effect the obstruction must cover the entire width; it is not, however, necessary to show an abandonment along the entire length. These rules have no application where the fee is vested in the public. *Barnes v. Midland R. R. Terminal Co.* (1916), 218 N. Y. 91, 112 N. E. 926, *revg.* (1899), 161 App. Div. 621, 146 N. Y. Supp. 1033.

The failure by the commissioners of highways to cause a public highway, long in use, to be opened to its full statute width for a period of thirty years, does not operate to extinguish the rights of the public to the parcels not so opened and worked. *Walker v. Caywood* (1865), 31 N. Y. 51.

Where a highway has ceased to be traveled or used as such for six years, it ceases, by virtue of 1 Revised Statutes, 520, section 99, as amended by the Laws of 1861, chapter 311, (from which former § 99 of the Highway Law, L. 1890, ch. 568, was derived) to be a highway for any purpose, and thereupon the abutting owner becomes entitled to recover the premises lying between his lands and the center of the highway. It is not essential, in order to afford such right, that the entire highway should be abandoned; the nonuser of any portion of it for six years operates as a relinquishment by the public of the part thus abandoned; and the use of such land for any other public purpose, as, for example, for that of a reservoir and public pump, cannot prejudice the right of the abutting owner to re-

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cover to the center of the abandoned highway. *Mangam v. Village of Sing Sing* (1896), 11 App. Div. 212, 42 N. Y. Supp. 950.

The mere fact that a portion of a highway has not been worked within six years after it was laid out does not establish that it has been abandoned or has, under the statute, entirely ceased "to be a road for any purpose whatever." *Beckwith v. Whalen* (1875), 65 N. Y. 322.

Abandonment by non-use.—As a road is not declared to be opened and worked, within the meaning of the statute, which is not made passable for teams within six years, so a road which for six years is not only not used and traveled, but is impassable for conveyances of any kind, is fenced off and the public travel by another route, presents the situation upon which the statute must operate to destroy its legal character as a highway, and it matters not that at the beginning the road was rendered impassable and fenced off by a trespasser. Indeed such must always be the case, unless it be done by the public authorities. *Horey v. Village of Haverstraw* (1891), 124 N. Y. 273, 26 N. E. 532; *Mangam v. Village of Sing Sing* (1898), 26 App. Div. 464, 50 N. Y. Supp. 647, *affd.* (1900), 164 N. Y. 560, 58 N. E. 1089.

Where land acquired for the purpose of doubling the width of a highway has never been regulated as a highway and has not been used by the public, even partially, for over forty years, but has remained in private possession and occupancy, such nonuser of the land acquired establishes an "abandonment" within the meaning of this section. *Matter of City of New York* (1914), 164 App. Div. 839, 150 N. Y. Supp. 256.

While there can be no adverse possession of a highway as against the public, the latter may abandon its claim thereto and nonuser is some evidence of such intent. And when in connection with nonuser there is affirmative evidence of a clear intention to abandon, the public interest is extinguished. *Woodruff v. Pad-dock* (1890), 56 Hun 288, 9 N. Y. Supp. 381, *affd.* (1892), 130 N. Y. 618, 29 N. E. 1021. So of a private road. *Crain v. Fox* (1853), 16 Barb. 184; *Corning v. Gould* (1837), 16 Wend. 531.

Temporary interruptions by reason of the weakness or destruction of a bridge, though covering a considerable space of time, will not operate as an abandonment of a public way. *Matter of Town of Rutland* (1910), 70 Misc. 82, 87, 128 N. Y. Supp. 94.

Obstruction as an abandonment.—Use of land formerly a public highway for the construction and maintenance of a private dock for a period of more than sixty years operates to extinguish the public easement therein, both under the rules applicable to adverse possession and under the provisions of the above section. *City of Buffalo v. D. L. & W. R. R. Co.* (1902), 68 App. Div. 488, 74 N. Y. Supp. 343, *affd.* (1904), 178 N. Y. 561, 70 N. E. 1097. A highway cannot be declared abandoned merely because bars and gates have been placed across it for the accommodation of abutting owners. *People ex rel. De Groat v. Marlette* (1903), 41 Misc. 151, 83 N. Y. Supp. 962, *affd.* (1904), 94 App. Div. 592, 88 N. Y. Supp. 379.

Qualified abandonment of highway.—Where a highway has not been traveled for two years by more than two vehicles daily in addition to pedestrians and horse-back riders, it may be declared abandoned without regard to occupancy of premises along its route. *Rept. of Atty. Genl.* (1909) 617.

Filing of certificate by town superintendent of highways declaring a portion of highway abandoned; petition to compel annulment of said certificate.—Where a town superintendent of highways, acting under the authority of this section, makes and files a certificate declaring a portion of a highway qualifiedly abandoned, the presumption is that it sufficiently appeared to him that the highway had not been traveled along the greater part thereof as stated in his certificate, and that he had jurisdiction to act. On the trial of an alternative writ of man-

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damus granted on a petition to compel the annulment of said certificate, the burden is on relator to establish the allegations of the petition, and where neither he nor defendant, who filed a return, offers any evidence, the writ will be dismissed for want of proof. *People ex rel. Melenbacker v. Hubbell* (1913), 82 Misc. 624, 144 N. Y. Supp. 219.

Reopening of qualifiedly abandoned highway.—A town superintendent of highways has power in conjunction with the town board to issue an order to reopen a qualifiedly abandoned highway. *Opinion of Atty. Genl.* (1913) 15.

Period of non-user.—When a highway has been laid out and surveyed, as provided in this article, it must be laid out, opened and worked by the town superintendent within the period of six years. The period begins to run from the date of the entry of the order laying out the highway. The section is not limited in its application by the language of the first sentence to highways "laid out and dedicated," but applies as well to those created by user. *Amsbey v. Hinds* (1871), 48 N. Y. 57.

The period of six years mentioned in the statute is a limitation upon the life of an unused easement. When an easement is acquired by purchase or otherwise, by which a street can be opened and worked across a piece of land, such land does not thereby become a street in fact for public use until it is opened, and it is such an easement, consisting of a right to open and work a highway, which is deemed abandoned if not exercised within six years. *New York Cent. & H. R. R. Co. v. City of Buffalo* (1910), 200 N. Y. 113, 93 N. E. 520, modifg. (1891), 128 App. Div. 373, 112 N. Y. Supp. 997.

Mandamus to compel superintendent to open highway.—The act of a town superintendent in filing and causing to be recorded the description of a highway abandoned pursuant to this section, is not a judicial act involving discretion which can be reviewed only by a writ of certiorari, but may be reviewed upon an application to compel him to open such highway for public use. *People ex rel. De Groat v. Marlette* (1904), 94 App. Div. 592, 88 N. Y. Supp. 379.

Village and city streets.—This section applies to village streets when laid out as highways. *Horey v. Town of Haverstraw* (1891), 124 N. Y. 273, 26 N. E. 532; *E. B. Co. v. Village of Haverstraw* (1894), 142 N. Y. 146, 36 N. E. 819. But has been held not to apply to city streets. *Palmer v. East River Gas Co.* (1906), 115 App. Div. 677, 101 N. Y. Supp. 347; unless it appears that the city has acquired the fee to the lands. *Raynor v. Syracuse Univ.* (1901), 35 Misc. 83, 71 N. Y. Supp. 293. See generally *City of New Rochelle v. New Rochelle Coal and Lumber Co.* (1913), 83 Misc. 194, 144 N. Y. Supp. 852.

The provision of this section that every highway laid out and dedicated to the use of the public, not opened and worked within six years, shall cease to be a road for any purpose, applies to the streets of a city where only an easement has been acquired. An easement acquired for street purposes is abandoned by failure to use for thirty years. *Robins Dry Dock & Repair Co. v. City of New York* (1913), 155 App. Div. 258, 140 N. Y. Supp. 96, affd. (1914), 213 N. Y. 631, 107 N. E. 1085.

Chapter 311 of L. 1861, amending R. S., pt. 1, ch. 16, tit. 1, § 99, from which § 99 of the former Highway Law was in part derived, was held not to be limited in its effect to such highways as were laid out within six years prior to the passage of the act of 1861, but that the act applied to a highway laid out in 1800. *Townsend v. Bishop* (1901), 61 App. Div. 18, 70 N. Y. Supp. 201.

But a city street may be so abandoned where it was acquired by the public originally as a highway; the distinction between highways in towns and the streets of a city is that in the former the public acquires simply a right of way in lands taken from a highway, the fee remaining in the owner, while in the latter the municipality obtains the fee in streets laid out under its charter. *Woodruff v.*

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Paddock (1890), 56 Hun 288, 9 N. Y. Supp. 381, *affd.* (1892), 130 N. Y. 618, 29 N. E. 1021; Vanderbeck v. City of Rochester (1887), 46 Hun 87, *affd.* (1890), 122 N. Y. 285, 25 N. E. 408; Matter of Lexington Ave. (1883), 29 Hun 303, *affd.* (1883), 92 N. Y. 629; City of Buffalo v. Hoffeld (1893), 6 Misc. 197, 27 N. Y. Supp. 869. Section applied generally. People ex rel. Yonkers v. N. Y. C. & H. R. R. Co. (1893), 69 Hun 166, 23 N. Y. Supp. 456; Chapman v. Gates (1866), 46 Barb. 317, *affd.* (1873), 54 N. Y. 132.

This section and the statute from which it is derived, and of which it is a substantial re-enactment, is not applicable where a city obtained the fee of land subject to the easement of a railroad company. N. Y. C. & H. R. R. Co. v. City of Buffalo (1910), 200 N. Y. 113, 119, 93 N. E. 520.

The mere fact that the proposed street was practically impassable and but little used does not warrant a finding of abandonment upon the part of grantees holding under deeds describing their land as bounded thereon. People ex rel. Washburn v. Common Council of Gloversville (1908), 128 App. Div. 44, 112 N. Y. Supp. 387.

Certiorari; review of action of town superintendent in filing certificate of abandonment.—The action of a town superintendent of highways in filing a certificate of qualified abandonment of a town highway does not finally determine the rights of the parties and is not, therefore, reviewable by certiorari. Where a petition alleges that a filing in the town clerk's office by the superintendent of highways of a certificate of qualified abandonment of a highway pursuant to section 234 of the Highway Law is colorable only and part of a wrongful and fraudulent scheme to permanently abandon the road and deprive petitioner and the public of its benefit, relator will be granted an alternative writ of mandamus requiring the superintendent of highways to cancel such certificate and put the highway in a suitable condition for travel. Matter of Marvin (1915), 91 Misc. 287, 155 N. Y. Supp. 28.

Section cited.—City of Niagara Falls v. New York Central and Hudson River R. Co. (1901), 168 N. Y. 610, 625, 61 N. E. 185.

§ 235. Highways in lands acquired by the United States for fortification purposes deemed abandoned.—When land sought to be acquired by the United States of America for the purpose of fortifications includes a highway or portion thereof, the condemnation proceedings may include such highway or portion thereof, and the people of the state of New York, any municipality, county or other party claiming an interest therein may be made a party defendant in such proceeding, and the interest of the state, county, municipality or other claimant be determined, and the award made therefor. Forthwith upon the acquisition by the United States of America of land which includes a highway or portion thereof, there shall be filed in the office of the town clerk of the town, and also in the office of the county clerk of the county, in which such land is located, certified copies of the record or transfer to the United States of such land, together with a map of such land, on which map such highway or portion thereof shall be indicated by metes and bounds, and thereupon such highway or portion thereof shall be deemed discontinued and abandoned for highway purposes, and if proceedings have been taken, pursuant to article six of this chapter for the improvement of such highway by state aid, all such proceedings, together with any appropriation made for the improvement of such highway

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or portion thereof, as indicated on such map, shall be deemed revoked, vacated and set aside.

Source.—L. 1907, ch. 404, § 2, without change.

§ 236. **Discontinuance of highway.**—Whenever the town superintendent of any town, in which during the past ten years there has been expended the sum of three hundred thousand dollars, or more, for the purpose of macadamizing the highways of such town, shall determine that any portion of any highway or street, not within the limits of an incorporated village, which is the terminus of such street or highway, is unnecessary for highway purposes, said town superintendent may, by an order to be duly entered in the town clerk's office, direct such highway to be discontinued and abandoned for public purposes. Provided, however, that no portion of such highway to be discontinued shall be greater than one thousand feet of the terminus thereof and that the owners of the land on both sides of such highway or street, for the distance it is proposed to discontinue the same, shall, by written petition to such town superintendent, have requested the discontinuance thereof.

Source.—L. 1895, ch. 611, § 1, as amended by L. 1903, ch. 643, without change.

§ 237. **Description to be recorded.**—Immediately upon making and entering the order mentioned in section two hundred and thirty-six of this chapter, the said town superintendent shall cause a written description of that portion of the street or highway ordered to be discontinued to be filed and recorded in the office of the town clerk of the town in which the said street or highway is located, and when the same is duly recorded the said portion of the said street or highway shall thereupon be and become duly abandoned and discontinued for highway purposes.

Source.—L. 1895, ch. 611, § 2, without change.

§ 238. **Damages caused by discontinuance.**—Any person or corporation interested as owner or otherwise in any lands and claiming any loss or damage, legal or equitable, by reason of the discontinuance, abandonment or closing of any street or highway, not within the limits of an incorporated village, under or pursuant to the provisions of the last two sections, may, upon ten days' written notice to the town superintendent of the town in which such lands are situated, apply to the supreme court or to the county court of the county within which such lands are situated for the appointment of commissioners to estimate and determine such loss and damage, whereupon the court shall appoint three disinterested commissioners of appraisal to estimate and determine such damage, and the amount of compensation to be paid by said town therefor, who shall make their report thereupon to such court, and which report when finally confirmed shall be final and conclusive in respect thereto, and the legality and equity of any and all such claims shall be determined by such commissioners and by the

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court upon the hearing of their report. Any loss or damage so estimated and determined shall be paid by said town as in case of judgment.

Source.—L. 1896, ch. 464, §§ 1, 2, without change.

Highways do not belong to the town but to the state, which holds them in trust for the people at large; and the town is not entitled to damages by reason of the discontinuance of a highway. *City of Rochester v. Gray* (1909), 133 App. Div 852, 117 N. Y. Supp. 1091.

§ 239. Papers, where filed.—All applications, certificates, appointments and other papers relating to the laying out, altering or discontinuing of any highway shall be filed by the town superintendent as soon as a decision shall have been made thereon in the town clerk's office of the town.

Source.—Former Highway L. (L. 1890, ch. 568) § 150, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 83; L. 1880, ch. 114, § 2.

References.—Certificates, minutes and evidence in proceedings before commissioners to lay out, alter or discontinue highways must be filed in the office of the county clerk, Highway Law, § 194. Certified copies of final determination and orders and papers relating to such proceedings are to be filed in the town clerk's office, Id. § 208. Verdict of jury and application in proceedings to lay out private road are to be filed and recorded, Id. § 221.

Filing and recording papers.—A mere informality in recording should not be deemed fatal where there is a substantial compliance with the requirements. *McCarthy v. Whalen* (1880), 19 Hun 503, *affd.* (1881), 87 N. Y. 148. Where the original order of the commissioners appointed by the court, after being filed and recorded in the office of the town clerk, was lost, it is competent to introduce a sworn copy of the original as evidence tending to show the loss of the original order; the statutory requirement for filing and recording the original does not preclude other secondary evidence than the record of its contents. *Chapman v. Gates* (1873), 54 N. Y. 132.

Papers public records.—All papers filed and recorded with the town clerk as provided in this article become public records and prove themselves; and it is unnecessary that the signatures of the persons, by whom they purport to be signed, be proved. *Van Bergen v. Bradley* (1867), 36 N. Y. 316. An application for laying out a highway is a public document and belongs to the town clerk's office; and if it come into the hands of a stranger the latter may be compelled to put it on file with the clerk for the instruction of a person a party to the suit in which the road is in question. *People ex rel. Palmer v. Vall* (1824), 2 Cow. 623.

§ 240. Costs of motion.—Costs of a motion to confirm, vacate or modify the report of commissioners appointed by the court to lay out, alter or discontinue a highway may be allowed in the discretion of the court not exceeding fifty dollars. On an uncontested motion to confirm the report of the commissioners so appointed, if said report is favorable to the applicant and confirmed by the court, costs may be allowed not exceeding fifty dollars sufficient to compensate the applicant's attorney for his services in the proceedings. Costs of any other motion in a proceeding in a court of record, authorized by this chapter, may be allowed in the discretion of the court not exceeding ten dollars.

Source.—Former Highway L. (L. 1890, ch. 568) § 152, as amended by L. 1904, ch. 192.

Award of costs.—The provisions of this section only relate to the costs of mo-

tions made in a proceeding in respect to highways, as distinguished from the costs of the proceeding itself. Such a proceeding is a special proceeding and the court may award costs in its discretion pursuant to § 3240 of the Code of Civil Procedure. *Matter of Peterson* (1904), 94 App. Div. 143, 87 N. Y. Supp. 1014. The costs referred to in § 202, ante, are costs which may be allowed to one of the parties under the provision of this section. *People ex rel. Bevins v. Supervisors of Warren* (1894), 82 Hun 298, 31 N. Y. Supp. 248.

Construction.—Sections 193 and 198 should be construed together with this section and where the commissioners determine that a proposed highway or alteration is not necessary, or a highway proposed to be discontinued is not useless, the costs and expenses allowed the applicant cannot exceed, in all, the sum of one hundred dollars. *Matter of Terry* (1910), 67 Misc. 514, 12 N. Y. Supp. 258, *affd.* (1911), 142 App. Div. 921, 127 N. Y. Supp. 1147.

ARTICLE IX.

BRIDGES.

- Section 250. When town or county expense.
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 - 254. Joint liabilities of towns and their joint contracts.
 - 255. Refusal to repair.
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§ 250. When town or county expense.—The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public or free bridges constructed over streams or other waters within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries, except between the counties of Westchester and New York; and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses. When such bridges are constructed over streams or other waters forming the boundary line between a city of the third class and a town, such city and town shall be liable each to pay its just and equitable share of the expenses

for the construction, maintenance and repair of such bridges. Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article. Each of the counties of this state shall also be liable to pay for the construction, care, maintenance, preservation and repair of public bridges lawfully constructed over streams or other waters forming its boundary line, not less than one-sixth part of the expense of construction, care, maintenance, preservation and repair, and, except in a county containing a portion of the Adirondack park, the whole of such expenses of public bridges lawfully constructed or to be constructed over streams, or waterways, intersecting county roads. (*Amended by L. 1914, chs. 78, 199, and L. 1915, ch. 589.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 130, as amended by L. 1895, ch. 416, and L. 1902, ch. 321, without change in substance. Originally revised from L. 1853, ch. 346, § 146.

References.—Board of supervisors may aid town in an amount not exceeding two thousand dollars in any one year, County Law, § 63. Board of supervisors may provide for reconstruction of bridge when expense would be too burdensome upon the town or towns liable therefor, Id. § 64. Bridges intersected by town or county lines, Id. § 65. Bridges over county lines, Id. § 68. The amount to be raised by tax for bridges, Highway Law, § 90. Construction or repair of bridge destroyed or injured by the elements, Id. § 93. Proposition to be submitted to town meeting where more than one thousand five hundred dollars is required for construction or repair of a single bridge in any one year, Id. § 94. Money may be borrowed by a town meeting, Id. § 97.

Streams upon boundaries.—Where a boundary line between towns is the bank of a stream, such stream is included within the expression, "streams or other waters upon their boundaries," as contained in this section. *Town of East Fishkill v. Town of Wappinger* (1904), 97 App. Div. 7, 89 N. Y. Supp. 599. The term "streams dividing such towns," used in § 256, post, was intended to be synonymous with the term "streams upon their boundaries," used in § 250, and the remedy afforded by § 256 extends to all cases in which liability is imposed by § 250. *Matter of Freeholders of Madrid* (1904), 44 Misc. 431, 90 N. Y. Supp. 110.

County aid.—Mandamus will lie to compel a board of supervisors to take action with regard to the duty imposed upon the county by this section. But the court cannot control their discretion in determining the manner in which they shall execute the duty, provided they act in good faith. *People ex rel. Keene v. Supervisors of Queens* (1894), 142 N. Y. 271, 36 N. E. 1062.

Under the provisions of this section fixing the liability for the expenses of the construction and repair of public free bridges as between a town and county, the right of a town to demand contribution from the county when the bridge expenditure of the town is in excess of one-sixth of one per cent of the assessed valuation of its taxable property, is not limited to expenditures for bridges which cross streams forming boundaries of the town, but applies as well to bridges erected wholly within the town. *People ex rel. Root v. Supervisors of Steuben* (1895), 146 N. Y. 107, 40 N. E. 738.

The act of 1895, ch. 416, amending § 130 of the former Highway Law, took away the right of a town to compel the county to pay one-third of the excess when in one year the cost of construction and maintenance of bridges in such town exceeded one-sixth of one per cent. of the assessed valuation. *Town of Wirt v. Supervisors of Allegany* (1895), 90 Hun 205, 35 N. Y. Supp. 887. The act of 1895 was held not to apply to bridges completed prior to its taking effect. *Stone v. Supervisors of Broome* (1901), 166 N. Y. 85, 59 N. E. 708.

Power of board of supervisors to compel erection of bridge.—The board of supervisors of a county having within it two towns separated by a stream, may, upon proper application of one of such towns, compel the erection of a bridge over such a stream to connect highways in said towns, and impose a tax upon them to pay the expense thereof, although the officers of one of them, and a majority of its taxpayers were opposed, and expressed their dissent by a vote at a regular town meeting. *Town of Kirkwood v. Newbury* (1890), 122 N. Y. 571, 26 N. E. 10.

Joint liability of towns.—This section makes absolute the liability of the town to construct and maintain bridges over streams within its bounds. Prior to the act of 1841 towns had no statutory authority to build bridges. By that act they could be compelled to, though reluctant. *Phelps v. Hawley* (1873), 52 N. Y. 23. Prior to act of 1890, ch. 568, the burden of supporting bridges was cast upon the towns alone. *Town of Wirt v. Supervisors of Allegany* (1895), 90 Hun 205, 35 N. Y. Supp. 887. For common law rules and history of New York state legislation relating to liability for construction and maintenance of bridges, see *People ex rel. Root v. Supervisors of Steuben* (1894), 81 Hun 216, 30 N. Y. Supp. 729, *affd.* (1895), 146 N. Y. 107, 40 N. E. 738; *Bartlett v. Crozier* (1820), 17 Johns. 439, 452.

The general rule is that the expense of constructing and maintaining bridges over boundary lines of towns must be equally borne by the towns. *People ex rel. Root v. Supervisors of Steuben* (1894), 81 Hun 216, 30 N. Y. Supp. 729, *affd.* (1895), 146 N. Y. 107, 40 N. E. 738; *Beckwith v. Whalen* (1877), 70 N. Y. 430. The cost of a bridge between two towns over a stream, not navigable tide water, should be divided equally between them regardless of their relative wealth and population. *Matter of Speir* (1888), 20 N. Y. St. Rep. 389, 3 N. Y. Supp. 438, *affd.* (1889), 115 N. Y. 665, 22 N. E. 1126.

A bridge may be constructed across a river dividing towns where the highway in each town comes to the river bank, although no such bridge has previously existed. *Matter of Mohawk River Bridge* (1908), 128 App. Div. 54, 112 N. Y. Supp. 428. In order that towns may be jointly liable for the construction of a bridge over a stream forming their boundary, such bridge must connect a lawful highway in each town; but the fact that a highway has been laid out is not sufficient; there must be an existing thoroughfare suitable for travel. *Beckwith v. Whalen* (1877), 70 N. Y. 430; *People ex rel. Keene v. Supervisors of Queens* (1896), 151 N. Y. 190, 36 N. E. 1062. The necessary approaches are part of a free bridge, and both towns are equally and jointly liable for an approach built in either town. *Edwards v. Ford* (1897), 22 App. Div. 277, 47 N. Y. Supp. 995.

The provisions as to joint liability of towns for bridges constructed over streams on their boundary, apply to bridges that connect with land within the boundaries of the town sought to be charged, or with a highway therein, which is accessible therefrom. Accordingly such town is not liable for its share of the construction of a bridge a part of the middle of which passes over a small portion of the boundary thereof, but neither end of which is located therein. *Town of Candor v. Town of Tioga* (1896), 11 App. Div. 502, 42 N. Y. Supp. 911.

The consent of the town superintendent of both towns is necessary where a railroad seeks to cross a bridge constructed and maintained jointly by such towns. *Wheatfield v. Tonawanda St. R. R. Co.* (1895), 92 Hun 460, 36 N. Y. Supp. 744.

A bridge from a town in one county to an unoccupied island, and from this island to another town in an adjoining county on the other side of the river should be jointly maintained by both towns, and, hence, they are jointly liable in an action for damages for injuries sustained by reason of a defect in the bridge connecting the first town with the island. *Lee v. Town of Saratoga* (1914), 160 App. Div. 112, 145 N. Y. Supp. 106, *affd.* (1915), 214 N. Y. 617, 108 N. E. 1099.

Bridge to island in stream forming boundary line; liability of State to rebuild such bridge under Barge Canal Act.—Under the provisions of this section and

section 256 of the Highway Law, a bridge from a town in one county to a small island, and from this island to another town in an adjoining county on the other side of the river which is the boundary, should be constructed and maintained by the towns jointly. Notwithstanding the provisions of section 68 of the County Law, the duty rests upon the towns to rebuild such a bridge, and each town may present its claim to the county for a proportionate share of the expense. Although the State has taken down a part of the bridge between the island and one side of the river for the purpose of the barge canal, it is not required under section 3 of chapter 147 of the Laws of 1903 to rebuild the bridge from the island to the other side of the river, as it is not a bridge over the canal within the meaning of the statute. *Matter of Town of Saratoga* (1914), 160 App. Div. 60, 145 N. Y. Supp. 468, *affd.* (1914), 211 N. Y. 543, 105 N. E. 1100.

Bridges between Westchester and New York; presentment of claims.—The county of Westchester may employ attorney to present claims against the city of New York for county bridges, but said attorney cannot extend his employment to services relating to the question of damages or change of grade of highways by the city of New York. *People ex rel. Slosson v. Supervisors of Westchester* (1907), 116 App. Div. 844, 102 N. Y. Supp. 402.

Apportionment of expense of constructing bridge between counties to replace old structures.—When the bridge which formerly extended from the city of Glens Falls, county of Warren, to an island in the Hudson river and the bridge extending from said island to the village of South Glens Falls in the adjoining county of Saratoga, were replaced by a structure extending from said city to said village situated in the said adjoining counties, the city of Glens Falls and the town of Moreau are jointly liable for the expense of constructing the new bridge, and of a bridge temporarily used, while the county of Warren is liable for not less than one-sixth part of the expense of construction, care, maintenance and repair of the new bridge. The county of Warren is not exempt from sharing in the cost of the southerly portion of said bridge extending from the island in the Hudson river to said village in the adjoining county. *People ex rel. City of Glens Falls v. County of Warren* (1915), 170 App. Div. 144, 155 N. Y. Supp. 642, *affd.* (1916), 218 N. Y. 708, 113 N. E. 1064.

Terminus of bridge in another state.—Town may legally repair highway bridge although terminus is in another state. *Rept. of Atty. Genl.* (1904), 260.

Powers of town superintendents as to bridges.—Town superintendents have implied power to construct bridges; but such bridges cannot be constructed by them at the expense of the town or counties unless connected with and forming part of existing highways. *Mather v. Crawford* (1862), 36 Barb. 564; *Huggans v. Riley* (1890), 125 N. Y. 88, 25 N. E. 993. No other officer than the town superintendent is charged with the erection of a bridge within the town in the absence of other valid provision therefor. Given the means and the necessary authority he can and ought to build a necessary bridge, and he may enter into a valid contract for that purpose in reliance upon there subsequently being raised by tax the amount appropriated therefor. *Berlin Iron Bridge Co. v. Wagner* (1890), 57 Hun 346, 10 N. Y. Supp. 840. But a town superintendent of highways is not an agent of the town with authority to contract for it in real or supposed emergencies and cannot make a contract binding upon the town unless specifically authorized by statute. *People ex rel. Morey v. Town Board* (1903), 175 N. Y. 394, 67 N. E. 620, *revg.* (1903), 80 App. Div. 280, 80 N. Y. Supp. 309.

After a town board has authorized a town superintendent to cause a bridge to be built in the town, the duties of the board, so far as the construction of the bridge is concerned, are at an end. The town board cannot direct him as to the manner of construction of the bridge and after it has been constructed, insist that the bridge is unnecessary. And where such board refuses to audit a claim for the

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full amount of the sum agreed to be paid by the town superintendent, its determination may be amended upon certiorari. *People ex rel. Groton Co. v. Town Board* (1895), 92 Hun 585, 36 N. Y. Supp. 1062.

Although this section refers to public bridges "over streams or other waters" only, it was not intended thereby to exclude public bridges over a railroad or a gorge within a town's limits. *Murphy v. Village of Fort Edward* (1913), 79 Misc. 296, 140 N. Y. Supp. 885, revd. (1913), 158 App. Div. 342, 143 N. Y. Supp. 378, revd. on rearg. (1913), 159 App. Div. 471, 144 N. Y. Supp. 451, affd. (1915), 213 N. Y. 397, 107 N. E. 716.

Method of submitting proposition to build bridge together with memorandum showing the proceedings of a town Board. *Rept. of Atty. Genl.* (1907) 573. See *Matter of Town of Rutland* (1910), 70 Misc. 82, 87, 128 N. Y. Supp. 94.

Section cited.—*People ex rel. Canton Bridge Co. v. Board of Town Auditors* (1909), 136 App. Div. 166, 120 N. Y. Supp. 696, affd. (1912), 204 N. Y. 609, 97 N. E. 1113.

§ 251. **Levy of tax upon county.**—Each supervisor shall present to the board of supervisors of his county at its annual session a statement specifying the amount paid during the preceding year ending on the thirty-first of October for the construction, care, maintenance, preservation and repair of public bridges over streams or other waters forming the boundary of such county. The board of supervisors shall levy upon the taxable property of the county a sum sufficient to pay its proportion of such expense, and the same when collected shall be paid to the supervisor of such town to be applied by him on the order of the town superintendent after audit as provided in this chapter, toward the payment of such expense.

Source.—Former Highway L. (L. 1890, ch. 568) §§ 132, 133; originally revised from L. 1883, ch. 346, §§ 2, 3. Under the former Highway Law, the commissioner of highways was required to make the statement of expenditures for the construction or repair of a bridge over a stream constituting the boundary line of a county. As the law now stands such statement is to be made by the supervisor. This change was evidently made in conformity with the provisions of Highway Law, §§ 104 and 105, making the supervisor the custodian of highway and bridge moneys and requiring expenditures thereof to be made by him.

A statement that is verified and contains a description of the bridge and the whole expense in items incurred by the town during the year preceding for constructing and repairing the same is sufficient. *People ex rel. Root v. Supervisors of Steuben* (1894), 81 Hun 216, 30 N. Y. Supp. 790, affd. (1895), 146 N. Y. 107, 40 N. E. 738.

§ 252. **Penalty, and notice on bridge.**—The town superintendent may fix and prescribe a penalty, not less than one or more than five dollars, for riding or driving faster than a walk on any bridge in his town whose chord is not less than twenty-five feet in length, and put up and maintain in a conspicuous place, at each end of the bridge, a notice in large characters, stating each penalty incurred.

Source.—Former Highway L. (L. 1890, ch. 568) § 143, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 122, in part, as amended by L. 1875, ch. 22; L. 1873, ch. 477, §§ 1, 2.

§ 253. **Offense.**—Whoever shall ride or drive faster than a walk over

any bridge, upon which notice shall have been placed, and shall then be, shall forfeit for every offense, the amount fixed by such town superintendent, and specified in the notice.

Source.—Former Highway L. (L. 1890, ch. 568) § 144, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 122, in part, as amended by L. 1875, ch. 22; L. 1873, ch. 477, § 3.

§ 254. Joint liabilities of towns and their joint contracts.—Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines, except where the board of supervisors has otherwise apportioned such expense as provided in section ninety-seven. The town superintendents of all the towns, or of one or more of such towns, the others refusing to act, may, when directed by their respective town boards, enter into a joint contract for making and repairing such bridges.

Source.—Former Highway L. (L. 1890, ch. 568) § 134, modified so as to provide that the town boards shall control as to joint bridges. Originally revised from L. 1841, ch. 225, §§ 1, 2, as amended by L. 1857, ch. 383.

References.—Where bridge is situated in two or more towns the board of supervisors may apportion the expense of the construction among such towns, in such proportion as it shall deem to be just, Highway Law, § 97. Joint liability of towns when bridges are constructed over streams or other waters forming boundary lines, *Id.* § 250.

Joint liability of towns.—A provision that a bridge shall be built and maintained at the joint expense of towns means that the expense shall be shared equally, regardless of the portion located in each town. *Lapham v. Rice* (1874), 55 N. Y. 472; *Day v. Day* (1883), 94 N. Y. 153; *Marshall v. Hayward* (1902), 74 App. Div. 27, 77 N. Y. Supp. 57. A submission to arbitration of the extent of the amount to be paid by each town for the construction of a joint bridge is void. *Corey v. Rice* (1871), 4 Lans. 141.

Where under an agreement between town superintendents one town paid one-half of the expense of building a bridge over a boundary stream and each of the other two towns paid one-quarter, the town paying half cannot recover from the others on the ground that it is liable for but one-third; the error is one of law and not of fact, and the rule as to voluntary payments applies. *Flynn v. Hurd* (1889), 118 N. Y. 19, 22 N. E. 1109.

The liability for the cost of construction and for the repair of such bridges is joint and several. *Harris v. Houck* (1870), 57 Barb. 619; *Theall v. Yonkers* (1880), 21 Hun 265. A bridge upon a highway laid out on the line between two towns, partly within the two towns, is maintainable at the joint expense of said towns, and is not to be considered as wholly within the town to which the road district in which it is situated has been allotted. *Day v. Day* (1883), 94 N. Y. 153.

Liability to a contractor for the construction of such a bridge is joint. *Corey v. Rice* (1871), 4 Lans. 141.

When a bridge is built between two towns, each town is liable for one-half the cost of its erection or maintenance, without regard to the difference in the assessed valuation of the respective towns. *Rept. of Atty. Genl.* (1899) 353; (1902) 288.

Bridges jointly constructed and maintained.—In order that towns may be jointly liable for the construction of a bridge over a stream forming their boundary, such bridge must connect a lawful highway in each town; but the fact that a highway has been laid out is not sufficient; there must be an existing thoroughfare suitable

for travel. *Beckwith v. Whalen* (1877), 70 N. Y. 430; *People ex rel. Keene v. Supervisors of Queens* (1896), 151 N. Y. 190, 36 N. E. 1062. Proceedings to compel the repair of a bridge can only be instituted under this section where the bridge crosses a stream dividing the towns. *Matter of Freeholders of Cattaraugus Co.* (1874), 59 N. Y. 316; *Tift v. Alley* (1874), 3 T. & C. 784.

The necessary approaches to a free bridge between two towns are a part of the bridge for the maintenance of which both towns are liable. *Edwards v. Ford* (1897), 22 App. Div. 277, 47 N. Y. Supp. 995; *Hawxhurst v. New York* (1887), 43 Hun 588. This section must be construed to authorize the town superintendent to acquire real estate for the approaches. *Marshall v. Hayward* (1902), 74 App. Div. 27, 77 N. Y. Supp. 57.

Liability of towns for expense of building bridge over stream fixing boundary.—This section and section 255, *post*, seem to make the town upon which the notice provided for in section 255 is served, liable for its part of the expense of such bridge whether the town has funds or not properly applicable for that purpose, and may make such town liable therefor even against its protest. This is especially so where there is nothing impugning the good faith either of the plaintiff, the commissioners of highways or the town board of either town; where it appears the contract was entered into in good faith by all of the parties; where the bridge was constructed in accordance with the terms of the contract; and where it was accepted by the commissioners of highways of both towns, and ever since has been in constant use by the citizens of both towns and by the public generally, and forms a part of one continuous highway situated partly in each town. The statute gives the commissioners of highways power to enter into a joint contract for building the new bridge, and having done so, in good faith, and no steps having been taken to review or question their action, their action is not subject to review in an action in certiorari directing the town auditors of one of the towns to certify to the county clerk their proceedings in rejecting the claim of the plaintiff. It is then too late to raise these questions. It is unimportant whether the town line is in the center of the stream or upon one of its banks, in determining the liability of one of the towns, where it clearly appears that one of the approaches at least of the bridge is in such town. Each town is liable for one-half of the expenses of the repair of such bridge. *People ex rel. Canton Bridge Co. v. Town Auditors* (1909), 136 App. Div. 166, 120 N. Y. Supp. 696, *affd.* (1912), 204 N. Y. 609, 97 N. E. 1113.

Powers of town superintendents.—The town must act through the town superintendents, and there is no authority for employing anybody else, except in the construction of the bridge under contract, not even counsel or representatives of the different towns. The town superintendents do not constitute a single body, but each, by mutual agreement, becomes a party to the contract. *Marshall v. Hayward* (1902), 74 App. Div. 27, 77 N. Y. Supp. 57.

Liability for defects.—Both towns are responsible for the maintenance of the entire structure, and both are liable, even though the defects causing the injury be at a point on the bridge wholly within one town. *Hawxhurst v. New York* (1887), 43 Hun 588. As the duty of repairing the bridge is imposed upon the town superintendents of both towns, it necessarily follows that, for damages resulting from neglect to perform that duty, an action lies against both towns jointly. *Shaw v. Town of Potsdam* (1896), 11 App. Div. 508, 42 N. Y. Supp. 779; *Oakley v. Town of Mamaroneck* (1886), 39 Hun 448; *Clapp v. Town of Ellington* (1895), 87 Hun 542, 34 N. Y. Supp. 283, *affd.* (1898), 154 N. Y. 781, 49 N. E. 1095. Before 1880 (ch. 700) the highway commissioners of the two towns were jointly liable for a defect in a bridge maintained by the towns. *Bryan v. Landon* (1875), 3 Hun 500.

Where a bridge built by a private enterprise remains a private bridge, the town would not be liable for its defective condition. But if it be adopted by the public and is accepted and recognized as a town bridge by the public authorities, the

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town superintendent must keep it in repair and the town will be liable for injuries resulting from defects therein. *Heacock v. Sherman* (1835), 14 Wend. 58; *Dygert v. Schenck* (1840), 23 Wend. 446; *Town of Clay v. Hart* (1898), 25 Misc. 110, 55 N. Y. Supp. 43, *affd.* (1899), 41 App. Div. 625, 58 N. Y. Supp. 1150. A town is not liable for defects in a bridge temporarily erected by a town superintendent, acting as a volunteer and not in his official capacity, upon private property to take the place of a public bridge which had been carried out by a freshet. *Ehle v. Town of Minden* (1902), 70 App. Div. 275, 74 N. Y. Supp. 903.

§ 255. **Refusal to repair.**—If the town board of either of such towns, after notice in writing from the town board or any other of such towns, given by the town clerk thereof, shall not within twenty days give their consent in writing to build or repair any such bridge, and shall not within a reasonable time thereafter direct, by resolution, the same to be done, the town board giving such notice may direct the town superintendent to make or repair such bridge, and then maintain an action in the name of the town, against the town which neglects or refuses to join in such making or repairing, and in such action, the plaintiffs shall be entitled to recover so much from the defendant, as the town would be liable to contribute to the same, together with costs and interest.

Source.—Former Highway L. (L. 1890, ch. 568) § 135, modified so as to make town board responsible for refusal to repair or rebuild joint bridge. Originally revised from L. 1841, ch. 225, §§ 3, 4, as amended by L. 1857, ch. 383, § 3.

Action to recover contribution.—An action is not maintainable under this section to recover the amount which the town is liable to contribute toward the construction of a joint bridge unless all the precedent conditions imposed by statute have been complied with. *Flynn v. Hurd* (1889), 118 N. Y. 19, 22 N. E. 1109. Such an action may be maintained only where the town sued is liable for a portion of the expense of construction or maintaining the bridge. *Town of Candor v. Town of Tioga* (1896), 11 App. Div. 502, 42 N. Y. Supp. 911. The mere fact that an agreement has been reached as to payment does not preclude a recovery under this section where one town fails to make the payment as agreed. *Surdam v. Fuller* (1884), 31 Hun 500. The complaint need not allege that the defendant town had money with which to pay its share of the joint expense. *Oakley v. Town of Mamaroneck* (1886), 39 Hun 448.

Notice to repair.—If a town board directs the town superintendent to repair a joint bridge, without giving notice to the town boards of the other towns jointly liable, such town board may not maintain an action in the name of the town to recover the proportion of the expense to be borne by the other towns. *Flynn v. Hurd* (1889), 118 N. Y. 19, 22 N. E. 1109. A town's refusal to help rebuild the bridge is sufficient evidence of a waiver of the required notice. *Day v. Day* (1883), 94 N. Y. 153; *Clapp v. Town of Ellington* (1895), 87 Hun 542, 34 N. Y. Supp. 283, *affd.* (1898), 154 N. Y. 781, 49 N. E. 1095, in which case it was held that a commissioner who had refused to help in the repair of a bridge might be treated as having waived the statutory notice.

Notice to repair a bridge, given by the supervisor, instead of by the town clerk, as required by this section, being received and answered without objection, is valid. *Matter of Town of Rutland* (1910), 70 Misc. 82, 128 N. Y. Supp. 94.

§ 256. **Proceedings in court.**—Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns,

whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the town board in each of such towns, to build, rebuild or repair such bridge, and if such town boards refuse to build, rebuild or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each supervisor at least eight days before the hearing, may apply to the supreme court at a special term thereof, to be held in the judicial district in which such bridge or any part thereof shall be located, for an order requiring such town boards to direct the town superintendents to build, rebuild or repair such bridge, and the court upon such motion may, in doubtful cases, refer the case to some disinterested person to ascertain the requisite facts in relation thereto, and to report the evidence thereof to the court. Upon the coming in of the report, in case of such reference, or upon or after the hearing of the motion, in case no reference shall be ordered, the court shall make an order thereon as the justice of the case shall require. If the motion be granted in whole or in part, whereby funds shall be needed to carry the order into effect, such court shall specify the amount of money required for that purpose, and how much thereof shall be raised in each town.

Source.—Former Highway L. (L. 1890, ch. 568) § 136, modified so as to provide for an application to the town board rather than the town superintendent. Originally revised from L. 1857, ch. 639, §§ 1, 2.

Constitutionality.—This section is not unconstitutional by reason of its delegating to the court a power not judicial in its nature; to determine the liability of towns to erect and maintain bridges, to enforce such liability, and to order the mode in which aid shall be performed are acts peculiarly judicial in their character. *Matter of Mt. Morris & Castile* (1886), 41 Hun 29.

Application of section.—In the case of the *Matter of Certain Freeholders* (1887), 46 Hun 620, it was held that the proceedings provided for in this section could not be instituted where the boundary stream divided a town from a city of the third class. The law as it now stands renders the proceedings provided for in this section applicable to cities of the third class.

This section provides most effectually for the erection and repair of bridges between towns in every possible contingency, and resort to doubtful remedies is unnecessary. *Phelps v. Hawley* (1870), 3 Lans. 160, *affd.* (1873), 52 N. Y. 23. The proceedings provided for in this section are not inconsistent with those of § 255, ante; this article simply giving towns a choice of two remedies in a case to which it applies. *Beckwith v. Whalen* (1875), 65 N. Y. 322.

The term, "streams dividing such towns," used in this section, was intended to be synonymous with the term "streams upon their boundaries," used in § 250, and the remedy afforded by this section extends to all cases in which liability is imposed by § 250. This section applies to a case where the stream does not run along the line dividing adjoining towns but traverses such line. *Matter of Freeholders of Town of Madrid* (1904), 44 Misc. 431, 90 N. Y. Supp. 110. The expression "streams dividing towns" has been held not to include bays, lakes, marshes or other bodies of water not "streams." *Matter of Freeholders of Irondequoit* (1877), 68 N. Y. 376. This case is no longer applicable owing to amendment of law since it was decided.

Under the provisions of §§ 250 and 256 of the Highway Law, a bridge from a town in one county to a small island, and from this island to another town in an adjoining county on the other side of the river, which is the boundary, should be

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constructed and maintained by the towns jointly. *Matter of Town of Saratoga* (1914), 160 App. Div. 60, 145 N. Y. Supp. 468, *affd.* (1914), 211 N. Y. 543, 105 N. E. 1100.

When proceedings may be instituted.—Proceedings can be instituted under this section only where the bridge is over a stream dividing the towns. *Matter of Freeholders of Cattaraugus Co.* (1874), 59 N. Y. 316. This section has no application to a bridge upon a stream intersecting the town line at right angles, and intermediate between the exterior lines of a road district. *Tift v. Alley* (1874), 3 T. & C. 784. Liability to contribute cannot be enforced under this section where the proposed bridge will not connect a lawful highway in each town. *Matter of Freeholders of Montezuma* (1891), 80 Hun 581, 14 N. Y. Supp. 845.

It seems that where a highway in each town comes to the bank of a river dividing the towns, a bridge may be constructed across the river connecting such highways by proceedings pursuant to this section, although no bridge has existed there before. *Matter of Mohawk River Bridge* (1908), 128 App. Div 54, 112 N. Y. Supp. 428.

It is proper to make an application under this section when the adjoining towns refuse to rebuild a bridge over such a stream, although the bridge has been destroyed for eighty years, where there has been no abandonment of a highway. *In re Commissioners of Highways of Glen & Florida* (1888), 3 N. Y. Supp. 461.

Although there is no refusal on the part of the town to build yet for the reason that they are unable to agree as to the kind of bridge to be built, an application to the court under this section is proper. A case of public inconveniences is thus presented which justifies the application. *Matter of Mt. Morris & Castile* (1886), 41 Hun 29.

Section cited. *Matter of Town of Rutland* (1910), 70 Misc. 82, 128 N. Y. Supp. 94.

§ 257. Supervisor to institute proceedings.—The supervisor of any such town shall, when directed by the town board, institute and prosecute proceedings under this chapter, in the name of the town, to compel the town board of such adjoining town or towns to cause the town superintendents thereof to join in the building, rebuilding or repair of any such bridge, in like manner as freeholders are thereby authorized.

Source.—Former Highway L. (L. 1890, ch. 568) § 137, modified so as to authorize the supervisor, when directed by the town board, to institute the proceedings rather than the town superintendent. Originally revised from L. 1857, ch. 639, § 3.

§ 258. Duty of superintendents.—The order for building, rebuilding or repairing a bridge being made, and a copy thereof being served on the town superintendent of such adjoining towns respectively the town superintendents of such towns shall forthwith meet and cause such bridge to be built, rebuilt or repaired in accordance with plans and specifications, prepared or approved by the district or county superintendent, out of any funds in the hands of the supervisors of such towns applicable thereto; if an inadequate amount of such funds are on hand, the town boards of such towns shall direct the town superintendents thereof to build, rebuild or repair such bridge, and the same shall be done upon credit, or in part for cash and in part upon credit according to the exigency of the case; and such town boards shall direct the superintendents to enter into a contract, to be approved by such town boards, for building, rebuilding or repairing such

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bridge pledging the credit of each town for the payment of its appropriate share so far as the same shall be upon credit.

Source.—Former Highway L. (L. 1890, ch. 568) § 138, modified so as to provide for the preparation or approval of plans and specifications by district or county superintendents, and requiring the town boards of the several towns to direct the bridge to be built or repaired and to approve contracts therefor. Originally revised from L. 1857, ch. 639, § 4.

Application of section.—This section has been held inapplicable to the city of Auburn in an action brought by a town adjoining the city on the ground that no such power for raising funds is conferred upon that city. *Matter of Certain Freeholders* (1887), 46 Hun 620. But § 250 of the present Highway Law provides for the joint liability of a town and a city of the third class to construct and maintain bridges over boundary lines, and provides that "Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article."

It is within the contemplation of this section that the court may compel the expenditure of a larger sum than the towns are authorized to raise annually for the ordinary repair of internal highways and bridges. *Matter of Mt. Morris and Castile* (1886), 41 Hun 29.

§ 259. **Report of town superintendents, and levy of tax.**—The town superintendent of each town shall make a full and verified report of their proceedings in the premises including an accurate account of what has been done in respect to such bridge, and shall attach thereto a copy of the order granted by the supreme court. Such report, account and order shall be certified by the town board and delivered to the supervisor and be presented by him to the board of supervisors of his county. The board of supervisors at their annual meeting shall levy a tax upon each of such towns, when in the same county, and upon the appropriate towns when in different counties, for its share of the costs of building, rebuilding and repairing such bridge, after deducting all payments actually made by the supervisor upon the written order of the town superintendent. Such tax, including all payments, shall in no case exceed the amount specified in the order of the supreme court.

Source.—Former Highway L. (L. 1890, ch. 568) § 139, modified so as to provide for a certification of the report by the town board. Originally revised from L. 1857, ch. 639, § 5.

§ 260. **Appeals.**—Either party aggrieved by the granting or refusing to grant such order by the court at special term, may appeal from such decision to the appellate division of the supreme court for the review of the decision. The appellate division may alter, modify or reverse the order, with or without costs.

Source.—Former Highway L. (L. 1890, ch. 568) § 140, without change. Originally revised from L. 1857, ch. 639, § 6.

§ 261. **Power of court on appeal.**—The special term may grant or refuse costs as upon a motion, including also witnesses' fees, referees' fees and disbursements. The appeal provided for in the last preceding section shall

conform to the practice of the supreme court, in case of appeal from an order of a special term to the appellate division.

Source.—Former Highway L. (L. 1890, ch. 568) § 141, without change. Originally revised from L. 1857, ch. 639, § 7.

Reference.—The costs referred to in this section are those upon motion made by petitioners to compel town boards to direct town superintendents to construct or repair a bridge, Highway Law, § 250.

§ 262. Refusal to repair bridges.—Whenever any such bridge shall have been or shall be so out of repair as to render it unsafe for travelers to pass over the same, or whenever any such bridge shall have fallen down, or been swept away by a freshet or otherwise, if the town superintendent of the adjoining town or towns, after reasonable notice of such condition of the bridge, have neglected or refused, or shall neglect or refuse to repair or rebuild it, then whatever funds have been or shall be necessarily or reasonably laid out or expended in repairing such bridge or in rebuilding the same, by any person or corporation, shall be a charge on such adjoining town or towns, each being liable for its just proportion; and the person or corporation who has made such expenditure, or shall make such expenditures, may apply to the supreme court, at a special term, for an order requiring such towns severally to reimburse such expenditures, which application shall be made upon papers to be served upon the town superintendents of such towns at least eight days prior thereto; and the court may grant an order requiring each adjoining town or towns to pay its just proportion of the expenditure, specifying the same; and the town superintendent of each of such towns shall forthwith serve a copy of such order upon the supervisor of each of their towns, who shall present the same to the board of supervisors, at their next annual meeting. The board of supervisors shall raise the amount charged upon each town by the order, and cause the same to be collected and paid to such persons or corporation as incurred the expenditure. The order shall be appealable.

Source.—Former Highway L. (L. 1890, ch. 568) § 142, without change. Originally revised from L. 1857, ch. 639, § 8.

Application of section.—If none of the freeholders or town superintendents of either of the towns institute proceedings to compel the repair of a bridge, then any individual or corporation may repair, and sue for and recover of the towns, the sums expended in so doing. *Phelps v. Hawley* (1870), 3 Lans. 160, *affd.* (1873), 52 N. Y. 23.

§ 263.—Resolution of board of supervisors for abolition of toll bridges.—The board of supervisors of any county may, and upon the presentation of a petition signed by fifty per centum of the owners of real property and representing a majority of the assessed valuation of the town or city in which a toll bridge is wholly or partly situated must, except where such bridge extends between the state of New York and a foreign country, pass a resolution that public interest demands the abolition of such toll bridge situate wholly or partly within said county. In case of a toll bridge situ-

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ated in two counties such resolution shall be a concurrent resolution passed by the boards of supervisors of the counties wherein said bridge is situated. Within ten days after the passage of such resolution the clerk or clerks of the board or boards of supervisors shall transmit certified copies thereof to the state commission of highways. Before transmitting such certified copy or copies to the state commission of highways, the board or boards of supervisors shall investigate as to the value of such toll bridge and shall prepare an estimate of the probable cost of acquiring the same, and the clerk or clerks shall transmit such estimate, together with any data in relation to the value of such toll bridge which the board or boards of supervisors may secure, to the state commission of highways with the certified copy or copies of such resolution. (*Added by L. 1909, ch. 146, and amended by L. 1910, ch. 569.*)

Source.—New.

The Condemnation Law, when not in conflict with L. 1909, ch. 146, is applicable in proceeding to acquire toll bridge. Matter of People of State of New York (1910), 70 Misc. 72, 128 N. Y. Supp. 29.

§ 264. Investigation by the state commission of highways.—The state commission of highways shall upon the receipt of such resolution or concurrent resolution, investigate and determine whether the bridge so sought to be abolished is of sufficient public importance to come within the provisions of this article, taking into account the use, location and value of such toll bridge for the purpose of common traffic and travel and shall also investigate as to the value of such toll bridge and from the estimate and data transmitted by the board or boards of supervisors, or from such other information as the commission may secure, prepare an estimate of the probable cost of acquiring such toll bridge. After such investigation such commission shall certify its approval or disapproval of such resolution. If it shall disapprove such resolution, it shall certify its reasons therefor to such board or boards of supervisors. If it shall approve such resolution it shall certify its approval thereof to the attorney-general, and shall transmit to him the estimate made by the commission of the probable cost of acquiring such toll bridge, together with any data the commission may have in its possession in relation to the value thereof. (*Added by L. 1909, ch. 146, and amended by L. 1910, ch. 569.*)

Source.—New.

§ 265. Acquisition by attorney-general.—Upon the receipt of such certification of approval the attorney-general shall apply to the court, in the name of the people of the state, for the appointment of a commission to appraise the value of said toll bridge and the franchise thereof and proceed to acquire title to said toll bridge and its franchise rights in accordance with the provisions of the code of civil procedure for the condemnation of property for public purposes. When said commission shall have determined the value of such toll bridge, the attorney-general shall certify such

determination to the comptroller and to the board or boards of supervisors of the county or counties wherein such toll bridge is situated. After the receipt thereof, upon a majority vote of the board or boards of supervisors, they shall adopt a resolution approving the purchase of said toll bridge under the provisions of this article and providing for the payment of the county's share thereof and thereupon shall transmit a certified copy of such resolution to the state comptroller. The condemnation and purchase of toll bridges under the provisions of this article shall be taken up and carried forward in the order in which they are finally designated as determined by the date of the receipt in each case of the certified copy of the approval by the state commission of highways. (*Added by L. 1909, ch. 146.*)

Source.—New.

Proceeding for abolition of toll bridge; approval of purchase by supervisors: extra allowance to owners.—Where in a proceeding for the abolition of a toll bridge the board of supervisors have passed a resolution to that effect and the State Commission of Highways has certified its approval as required by the statute, and the court has adjudged the condemnation and appointed commissioners, who have made their report as to the amount to be paid to the owners and the Attorney General has certified to the supervisors and to the State Comptroller the determination of said commission and the expenses of the state, the court may make an order confirming the report of the commissioners and adjudging that compensation be made to the owners, and that upon the payment thereof the state should be entitled to enter into possession. This section should not be construed so as to require the approval of the supervisors before the final order, as it would be unreasonable for them to provide for payment of the county's share of the expense before it is known whether the award will be confirmed, modified or set aside and what the amount of costs will be. In a proceeding for the abolition of a toll bridge, the court has no power to grant the owners an extra allowance where no price for the property was offered to the owner and could not be offered, owing to the fact that the abolition of the bridge included the acquisition of the bridge company's franchise, which could not be sold without statutory authority, which did not exist. *Matter of State of New York* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485, *affd.* (1913), 207 N. Y. 582, 101 N. E. 462.

Upon a majority vote.—In construing this statute the proper interpretation of the provision "upon a majority vote" is "if a majority so vote," and hence the words, "upon a majority vote of the board or boards of supervisors, they shall adopt a resolution approving the purchase of said toll bridge," are not to be construed as a mandatory direction for approval. *Matter of State of New York* (1913), 207 N. Y. 582, 101 N. E. 462, *affg.* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485.

Confirmation of determination.—In proceedings under this section to appraise the value and acquire title to a toll bridge the determination of the commissioners of appraisal may properly be confirmed by the court before it has been certified to the boards of supervisors of the counties interested for their approval, as required by that section. The determination referred to therein is the determination when confirmed and made final. The provisions of § 3373 of the Code of Civil Procedure for entering judgment for the amount of the award and enforcement by execution have no application, since the method in which the award can be collected is exclusively that pointed out by the statute (Highway Law, § 266). *Matter of State of New York* (1913), 207 N. Y. 582, 101 N. E. 462, *affg.* 152 App. Div. 633, 137 N. Y. Supp. 485.

After the confirmation of an award of \$24,804.63 by commissioners appointed to

appraise the value of the toll bridge and franchise of the Mechanicville Bridge Company, in proceedings regularly taken under the Highway Law, but before the transfer of title, the bridge was seriously damaged by a flood in the Hudson river. The cost of repairing the bridge was about \$6,000 and the confirmation of a second award which exceeded the first by about \$300 was opposed by the bridge company as inadequate. It was held, that as neither the record nor the report of the commissioners disclosed that any wrong principle was applied by them in estimating the damages the motion to confirm the report and award will be granted. *Matter of Mechanicville Bridge* (1913), 83 Misc. 331, 145 N. Y. Supp. 1058.

Power of court to set aside confirmation of award; title of bridge pending payment of award.—Where, upon the confirmation of the report of commissioners in a proceeding by the state to acquire a toll bridge connecting highways in two counties, the attorney-general certified to the state comptroller and to the board of supervisors of each of said counties the expense of the bridge, as required by the Highway Law before payment could be enforced, and it appears that prior to the confirmation of the award, but after it was made, the bridge was damaged by a flood, which fact was unknown to the state officials at the time of the confirmation of the award, the court has inherent power to set aside the order of confirmation of the award and remit the matter to the commissioners for a new appraisal. Until the payment of the award the title to the bridge remained in the bridge company which had collected the tolls. *Matter of People of State of New York* (1913), 81 Misc. 324, 142 N. Y. Supp. 949.

§ 266. Payment of expense of acquisition.—One-half of the expense incurred in the condemnation and acquirement of said toll bridge shall be paid by the state treasurer upon the warrant of the comptroller out of any specific appropriations made to carry on the provisions of this article, but no such payment shall be made until the county or counties in which said toll bridge is situate shall have complied with all the provisions hereof. One-half of the expenses thereof shall be a charge, in the first instance, upon the county or counties in which said toll bridge is situate, and the same shall be paid by the county treasurer upon the requisition of the comptroller, but the amount so paid shall be apportioned by the board of supervisors so that thirty-five per centum of such cost shall be a general county charge and fifteen per centum shall be a charge upon the town or towns or city or cities in which said toll bridge is wholly or partly located. In case a toll bridge is located in two counties the fifty per centum of the expense to be borne by the counties shall be apportioned between them on the basis of their assessed valuation and the fifteen per centum shall be apportioned by the board of supervisors upon the town or towns or city or cities in the same manner. The board of supervisors of a county, the town board of a town or the common council of a city may determine that the portion of the expense chargeable to such county, town, or city, as the case may be, shall be raised by taxation and levied and collected as other municipal taxes, or that the money therefor be raised by the issue and sale of municipal bonds. In the case of a town such bonds shall be issued and sold in the manner provided by law for the issue and sale of town bonds, under the town law, to pay judgments. (*Added by L. 1909, ch. 146, and amended by L. 1914, ch. 81.*)

Source.—New.

Requisition on the county treasurer for the county's share, should not be made by the comptroller, when no funds are available to pay the state's share. Rept. of Atty. Genl. (1911) 321.

Full payment must be made to complete the acquisition of a toll bridge under this section. Rept. of Atty. Genl. (1911) 321.

Method of collecting the award is exclusively that pointed out by the statute. Matter of State of New York (1913), 207 N. Y. 582, 101 N. E. 462.

§ 267. Maintenance of bridge.—When a toll bridge shall have been acquired by the state under the provisions of this article it shall be maintained as a free bridge and the expense thereof shall be a charge upon the town or towns or city or cities within which it is situated. Upon the acquisition of any toll bridge as provided in this article, the board or boards of supervisors of the county or counties in which said toll bridge is located shall upon notice of such acquisition from the comptroller, accept and maintain the same as a part of the highway system of said county or counties and such acceptance shall be deemed to have been formally taken at the expiration of twenty days from the notice of said acquisition by the state comptroller. (*Added by L. 1909, ch. 146.*)

Source.—New.

§ 268. Use of toll bridge by public service corporations; conditions; powers of town board.—After a bridge shall be acquired by the state under the provisions of this article, the same shall not be used by any railroad, telephone, gas, electric light, heat or power company or any other public service corporation, for any purpose except upon such terms and the payment of such rental as shall be determined by the town board of the town or towns and the common council of the city or cities within which it is situated. The money received therefor shall be divided equally between the localities. The provisions of this section, however, shall not affect any existing contract for the use of such bridge by any such corporation, except that the compensation provided for such use in such existing contract shall be paid to the localities as herein provided. (*Added by L. 1910, ch. 569.*)

Source.—New.

§ 269. Acquisition of certain toll bridges at the expense of the state.—If a toll bridge for the traffic of vehicles and foot passengers constitutes a connecting link between two state routes as described in section one hundred and twenty of this chapter, or constitutes a part of a state route and is included in the description thereof, the board of supervisors of the county in which such bridge is situated, or if situated in two counties the board of supervisors of such counties concurrently, may, by resolution, petition the state commission of highways for the acquisition of such bridge by the state pursuant to this section. Within ten days after the passage of such resolution the clerk or clerks of the board or boards of supervisors shall transmit certified copies thereof to the state commission of highways together with an estimate of the probable cost of acquiring the

same and any data in relation to the value thereof which the board or boards of supervisors may secure.

The state commissioner of highways shall upon receipt of such resolution or concurrent resolution, and within three months thereafter, investigate and determine whether the public interest demands the acquisition of such bridge by the state and shall also within said three months approve or disapprove of such resolution and if such resolution be approved shall prepare an estimate of the probable cost of acquiring such bridge. If such resolution be disapproved the commission shall certify its reason therefor to such board or boards of supervisors.

If it be approved the commission of highways is hereby authorized and empowered to agree with the corporation owning the said bridge upon the compensation which shall be made to it for the said bridge and its appurtenances, its franchises, its rights for the maintenance and use of said bridge, and any and all damage which shall result to said corporation so owning the said bridge by reason of the taking of such structure, and such agreement shall be reduced to writing and executed by the commission of highways in the name of the people of the state of New York and by the corporation owning the said bridge, and filed in the office of the comptroller of the state of New York.

In the event that no agreement is reached between the said commission of highways and the corporation owning the said bridge for such purchase as aforesaid, the commission shall certify its approval to the attorney-general and transmit to him the estimate made by the commission of the probable cost of acquiring such toll bridge, franchises and rights, and the amount of any and all damage incurred by such acquisition, together with all data the commission may have in its possession in relation thereto.

Upon the receipt of such certificate of approval, if and when sufficient money shall have been appropriated by the state therefor, the attorney-general shall apply to the court in the name of the people of the state for the appointment of a commission, in accordance with the provisions of the code of civil procedure for the condemnation of property for public purposes, to appraise the value of such bridge, its franchises, rights and any and all damage which shall result to such corporation so owning the said bridge by reason of the taking of the structure and its rights and franchises in connection therewith.

The amount agreed upon between the said commission of highways and the said corporation, pursuant to such agreement so filed as aforesaid, or if no agreement be reached, the amount so appraised and determined by such condemnation commissioners, with the expenses of such condemnation, shall be paid by the state treasurer upon the warrant of the comptroller out of the moneys appropriated for such purpose. Until payment to such corporation be made after such agreement of the amount therein agreed to be paid or upon condemnation the amount so appraised and determined in such condemnation proceedings, the corporation owning the said bridge

shall be entitled to continue in possession and use thereof and of all the rights, privileges and franchises enjoyed by it in connection therewith, but upon such payment being made such bridge and all rights and franchises in connection therewith shall become the property of the state of New York and shall be maintained by the state as a free bridge and as a part of the state system of highways.

If such bridge be acquired by the state pursuant to this section the same shall not be used except as hereinafter provided by any railroad, telephone, gas, electric light, heat or power company or any other public service corporation for any purpose except upon such reasonable terms and the payment of such reasonable rental to the state as shall be determined by the commission of highways. The money received therefor shall be paid into the state treasury and so much thereof as may be needed appropriated for the maintenance of such bridge. The provisions of this section, however, shall not affect any existing contract for the use of such bridge by any corporation except that the compensation provided for such use in such existing contract shall be paid to the state.

Notwithstanding the provisions of this section, if any such bridge be owned by a domestic corporation carrying on the business of operating a railroad which operates cars thereover, the commission of highways in entering into such agreement or the commissioners in condemnation in making such appraisal and fixing such damages as aforesaid may take into consideration any bonds outstanding of such corporation which may have been authorized by any public service commission of this state to be issued by such corporation for the purchase of said bridge and its franchises or the stock of any corporation formerly owning the said bridge, and shall fix and determine in making such appraisal the amount of any and all damage which will result to such corporation so owning such bridge by reason of the taking of the said bridge and its rights and franchises in connection therewith, and such corporation when said bridge shall have been acquired and such compensation paid, and its successors, shall be permitted to continue to use said structure upon payment of such reasonable rental to the state for such use as shall be determined by the commission of highways, and further provided that if such corporation, or any successor thereof, should desire to use other parts or decks of such bridge or make such use thereof as would require the strengthening, reconstruction or change of the said bridge or its approaches, or the building of new approaches to the said bridge, such corporation or its successors may make such use thereof and strengthen, reconstruct or make such changes in the said bridge or its approaches or build new approaches to the said bridge and use the same in such manner upon filing with the commission of highways detailed plans for the proposed new use thereof, or for the strengthening, reconstruction of or changes in the said bridge or its approaches or for the building of new approaches to the said bridge, and upon obtaining the approval of such use and plans by the commission of highways and upon payment of such fur-

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ther reasonable rental to the state for any such additional use of said structure or such approaches as shall be determined by the commission of highways; provided further that the entire cost of any such strengthening, reconstruction, additions or changes of the said bridge or its approaches shall be paid exclusively by the corporation making such use of said bridge and shall be deemed to be an expenditure for capital purposes of such corporation paying the same for all purposes whatsoever. Any such corporation using such bridge at the time of the acquisition thereof by the state shall not be debarred from continuing such use by reason of such acquisition; but the failure or refusal to comply with such terms or to pay such rental shall forfeit the right of such corporation to use such bridge, and the state commission of highways is hereby authorized and empowered to close such bridge to the use of such offending corporation.

Any act or failure to act on the part of the commission of highways as in this section provided shall be reviewable by the supreme court of this state by mandamus or certiorari or such other appropriate remedy as the case may require. (*Added by L. 1917, ch. 598, in effect May 21, 1917.*)

Source.—New.

ARTICLE IX-A.

BRIDGES IN CERTAIN COUNTIES.

(Article added by L. 1917, ch 589, in effect May 21, 1917.)

Section 269-a. Application of article.

- 269-b. Construction, maintenance and control of bridges.
- 269-c. Plans and specifications to be prepared.
- 269-d. Condemnation of bridges.
- 269-e. Liability of county for damages.
- 269-f. Annual estimate of amount to be raised for bridge purposes.
- 269-g. Manner of providing money for bridges.
- 269-h. Construction of bridges to be by contract.
- 269-i. Reconstruction and repairs after condemnation.
- 269-j. Bridges upon county boundaries.

§ 269-a. Application of article.—So far as this article relates to a bridge wholly within a county its application is limited to a county having a population of less than two hundred thousand, adjacent to a city of the first class having a population of over three millions. So far as it relates to a bridge crossing the boundary line of two counties, its application is limited to such county and an adjoining county. A bridge, within the meaning of this article, shall be deemed to mean a bridge having a span of more than five feet. The provisions of sections two hundred and fifty-one to two hundred and sixty-two, inclusive, of this chapter, shall not apply to a bridge described in this or the next section. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-b. Construction, maintenance and control of bridges.—Bridges in

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any such county over streams or waterways intersecting or at the terminus of state highways, county highways or county roads shall be constructed, repaired and maintained by the county. Bridges connecting any such state or county highway or county road, over a stream or waterway, with a street, avenue, bridge or part of a bridge of an adjoining city of the first class or of a village or within an adjoining county, shall be constructed, repaired and maintained at the joint expense of such county and city or of such county and village or of such adjoining counties, as the case may be. The construction, repair and maintenance of a bridge wholly within the county shall be under the supervision of the county engineer. The construction, repair and maintenance of a bridge between a county described in section two hundred and sixty-nine-a and an adjoining county shall be under the supervision of the county engineers of the respective counties, unless they fail to agree in any matter and the state commissioner of highways may assume jurisdiction, in which case such commissioner shall have the supervision of such construction, repair or maintenance during such time as he shall consider advisable. The construction, repair and maintenance of a bridge connecting a state or county highway or county road, in any such county, with a street, avenue or bridge of an adjoining city of the first class shall be under the supervision of the county engineer of such county and the authorities of such city having control by law of its bridges, unless such authorities and county officer shall be unable to agree in any matter and the state commissioner of highways may assume jurisdiction, in which case such construction, repair or maintenance shall be under his supervision. The construction, repair and maintenance of a bridge connecting a state or county highway or county road in any such county, with a street, avenue or bridge of an adjoining village shall be under the supervision of the county engineer of such county, and the authorities of such village having control by law of its bridges. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-c. **Plans and specifications to be prepared.**—Plans, specifications and estimates for the repair or construction of any such bridge shall be prepared by the authorities having, in the first instance, supervision of such repair or construction. All such plans, specifications and estimates shall be submitted to the state commissioner of highways for approval, and the same shall not be used until approved by him. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-d. **Condemnation of bridges.**—The board of supervisors of such county shall cause an inspection to be made of any bridge which is reported to be unsafe for public use and travel by the county engineer or five residents of the county. If such bridge is found to be unsafe for public use and travel, said board of supervisors shall condemn such bridge and notify the county engineer of that fact. Such board of supervisors may direct the county engineer to prepare or cause to be prepared plans

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and specifications for the construction or reconstruction or repair of such bridge without delay. Upon receipt of such plans and specifications, such board of supervisors shall, after approving the same, procure estimates for the reconstruction or repair of such bridges as herein provided. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-e. **Liability of county for damages.**—The county shall be liable for damages suffered by any person from defects in any such bridge, located wholly within the county. Where such bridge is located in two counties, such counties shall be jointly and severally liable for such damages. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-f. **Annual estimate of amount to be raised for bridge purposes.**—The county engineer of such county shall, on or before December first in each year, prepare and submit to the board of supervisors of such county a statement of the amount necessary for the construction, improvement and maintenance of such bridges or parts of such bridges within the county. The county engineer of an adjoining county shall also, on or before such day in each year, prepare and submit to the board of supervisors of his county a statement of the amount necessary to be provided by the county for the construction, improvement and maintenance of bridges crossing the boundary between the latter county and the county first mentioned. Each statement provided for in this section shall show the total amount required and the location of the bridges for the repair, construction and maintenance of which such amount is necessary. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-g. **Manner of providing money for bridges.**—The board of supervisors of any such county shall, upon the receipt of the county engineer's annual statement, consider the estimate made therein of moneys required for the construction, repair or maintenance of bridges. The board may by resolution adopted by a majority vote approve, increase or reduce the amount of any such estimate. All such estimates as finally adopted shall be signed in duplicate by the chairman and clerk of the board, and one copy thereof shall be filed with the county clerk and the other with the county treasurer. The board of supervisors shall thereupon cause the amounts of such estimates to be assessed, levied and collected in the same manner as other county charges; or the board may borrow on the credit of the county the amount of any estimate or estimates for construction or the permanent betterment of any such bridge or bridges. For that purpose it may direct the issue of bonds of the county by the county treasurer. Such bonds shall not bear interest at a greater rate than five per centum per annum, and no such bonds shall be for a longer term than twenty years. Such bonds shall not be sold for less than par. Moneys derived from such taxation or realized from the sale of such bonds shall be used exclusively for the objects and purposes of the tax or debt as provided in this article. Nothing herein

contained shall prevent the board of supervisors from adding to the estimates of the county engineer, as contained in his annual statement, an item or items for the construction, repair or maintenance of a bridge or bridges not provided for in such report, or a gross sum of not exceeding two thousand dollars for emergency construction of or repairs to such bridges for the ensuing year. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-h. **Construction of bridges to be by contract.**—Whenever a bridge is to be constructed or any improvement or repairs made thereto by a county, under the provisions of this article, except ordinary repairs, such work shall be done by contract where the estimated cost exceeds five hundred dollars. Contracts shall be awarded for the performance of the work in accordance with the plans and specifications thereof prepared as provided in this article. The board of supervisors shall have charge of the letting of the contract. Any such contract shall be allowed to the lowest bidder, after advertisement once a week, for three successive weeks, in a newspaper published in the county. The bids for such work shall be opened in public and shall be filed in the office of the clerk of the board of supervisors. No such contract shall be awarded until the form and sufficiency of execution thereof shall have been approved by the board of supervisors. The person to whom such contract is awarded shall execute a bond to the county, in a sum equal to fifty per centum of the amount of the contract, with two or more sureties to be approved by the board of supervisors, conditioned for the faithful compliance with the terms of the contract and the plans and specifications and for the payment of all damages which may accrue to the county because of a violation thereof. Not more than ninety per centum of the contract price shall be paid before the completion of the work and its acceptance by the board of supervisors. The amounts due from time to time on the contract shall be paid out of moneys available therefor under the provisions of the preceding section. Payments upon such contracts, or for any other item of construction, maintenance or repair of such bridges, shall be made by the county treasurer upon certificates or warrants issued by the county superintendent, approved by the board of supervisors and the county comptroller. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-i. **Reconstruction and repairs after condemnation.**—Upon receiving notice of the condemnation of a bridge wholly within the county, the chairman of the board of supervisors shall call a meeting of the board, and such board shall appropriate and make immediately available the necessary moneys for the immediate rebuilding of such bridge. If the expense thereof shall not have been included in an estimate furnished by the county engineer in his annual statement, or as adopted by the board, or if there be no moneys in the county treasury available therefor, the board may cause the county treasurer to borrow on the credit of the county the moneys necessary to repair or rebuild the part so condemned, in the manner pro-

vided in section two hundred and sixty-nine-g. As soon as moneys are available therefor, the county engineer under the direction of the board of supervisors shall proceed with the repairing or rebuilding of such condemned bridge. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

§ 269-j. **Bridges upon county boundaries.**—If the board of supervisors of a county described in section two hundred and sixty-nine-a and of an adjoining county, across whose boundaries any such bridge is located, shall by resolution concur in determining upon the construction or repair of such bridge, the respective board of supervisors of such counties may unite in a contract with a person, firm or corporation therefor. If any such bridge shall have been condemned under the provisions of this article and if such boards of supervisors shall fail to concur in ordering the necessary repairs to or rebuilding of such bridge within three months after the condemnation, or if within the same time after a demand therefor by the state commissioner of highways the board of supervisors of either county shall fail to make available the necessary moneys therefor, or if the board of supervisors of either county shall determine that such improvements or repairs are necessary, and if both counties fail to concur therein, the board of supervisors of the county making such determination may submit the same to the state commissioner of highways. If such determination be approved by such commissioner, the board of supervisors making such determination may cause notice in writing to be served upon the chairman of the board of supervisors of the other county demanding that such county concur therein. If such concurrence be withheld or if necessary moneys be not made available for such work by the board of supervisors of the county upon which such demand is served, the board of supervisors giving such notice may provide the necessary moneys for the entire work of such improvement or repairs. Where one county has provided all of the money for the construction or improvement of such joint bridge, it may maintain an action against the county in default and recover from the defendant one-half of the cost or expense of such work, with costs of the action and interest. It shall be necessary to a recovery for the plaintiff to prove that the repairs or improvements were reasonably necessary; but the approval of the state commissioner of highways of plaintiff's determination for such improvement or repairs shall be prima facie evidence of the reasonable necessity therefor. No such action for the expense of the construction of a new bridge at a new site between counties shall be maintained unless the boards of supervisors of both counties shall have determined, by concurrent resolution, upon the construction thereof.

The board of supervisors and the lawful authorities of an adjoining city of the first class or of an adjoining village may likewise concur in determining upon the construction, improvement or repair of a bridge between such county and city and may unite in a contract with a person, firm or corporation therefor. (*Added by L. 1917, ch. 589, in effect May 21, 1917.*)

ARTICLE X.

FERRIES.

Section 270. Licenses.

271. Undertaking.

272. Appendages for rope ferries.

273. Superintendent of public works may lease right of passage.

274. When schedules to be posted.

§ 270. Licenses.—The county court in each of the counties of this state or the city court of a city, may grant licenses for keeping ferries in their respective counties and cities, to such persons as the court may deem proper, for a term not exceeding five years. No license shall be granted to a person, other than the owner of the land through which that part of the highway adjoining to the ferry shall run, unless the owner is not a suitable person or shall neglect to apply after being served with eight days' written notice from such person of the time and place at which he will apply for such license, or having obtained such license, shall neglect to comply with the conditions of the license or maintain the ferry. Every license shall be entered in the book of minutes of the court by the clerk; and a certified copy thereof shall be delivered to the person licensed. When the waters over which any ferry may be used shall divide two counties or cities, or a county and city, a license obtained in either of the counties or cities shall be sufficient to authorize transportation of persons, goods, wares and merchandise, to and from either side of such waters.

Source.—Former Highway L. (L. 1890, ch. 568) § 170, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 2, §§ 1-3, 5, 6, 9.

References.—Incorporation of ferry company, Transportation Corporation Law, §§ 1-6. Regulation of ferries by board of supervisors, County Law, § 77. Maintenance of ferry without authority, a misdemeanor, Penal Law, § 870.

Power to regulate.—The state and not the federal government has power to regulate ferries. *People v. Babcock* (1834), 11 Wend. 586. The county of Niagara may grant licenses to maintain ferries to the middle of the Niagara river, as far as the Canadian line; hence one operating a ferry across that river without a license, may be prosecuted. *People v. Babcock* (1834), 11 Wend. 586.

A license to operate ferry can only be obtained by one who owns property through which the highway runs approaching the ferry, except as provided by statute. *Bogardus v. Reed* (1914), 160 App. Div. 294, 145 N. Y. Supp. 397.

Written notice need be given to the owners of the land only, and not to all who claim a right to the ferry, nor to those who have obtained a license from another court or a ferry at the same place. *Wiswall v. Wandell* (1848), 3 Barb. ch. 312. The application cannot be granted without proof that notice has been given by the applicant to the owner of the land, at least eight days before, of the intention to make such application. *Matter of Talcott* (1884), 31 Hun 464.

Repeal by implication.—The exclusive right conferred by section 83 of the Greater New York Charter upon the city to establish and permit the operation of all ferries using any part of its water front impliedly repeals, so far as concerns the territorial water rights of the city, the provision of this section of the Highway Law which empowers county and city courts to grant licenses for "keeping

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ferries" in the respective counties and cities for five-year terms. *City of New York v. New Jersey and Staten Island Ferry Co.* (1915), 92 Misc. 40, 155 N. Y. Supp. 937.

Section cited.—*Village of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co.* (1908), 191 N. Y. 123, 136, 83 N. E. 693, 18 L. R. A. (N. S.) 713.

§ 271. **Undertaking.**—Every person applying for such license shall, before the same is granted, execute and file with the clerk of the court his undertaking with one or more sureties, approved by the court, to the effect that he will attend such ferry with sufficient and safe boats and other implements, and so many men to work the same as shall be necessary during the several hours in each day, and at such rates as the court shall direct.

Source.—Former Highway L. (L. 1890, ch. 568) § 171, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 2, § 4.

§ 272. **Appendages for rope ferries.**—Any person licensed to keep a ferry may, with the written consent of the town superintendent of the town where such ferry may be, erect and maintain within the limits of the highway, at such point as shall be designated in such consent, a post or posts, with all necessary braces and appendages for a rope ferry.

Source.—Former Highway L. (L. 1890, ch. 568) § 172, without change. Originally revised from L. 1861, ch. 30.

§ 273. **Superintendent of public works may lease right of passage.**—The superintendent of public works, may, where ferries are now maintained at tide-water, lease the right of passage for foot passengers across state lands adjoining tide-water for a period not exceeding ten years, on such conditions as he may deem advantageous to the state.

Source.—Former Highway L. (L. 1890, ch. 568) § 173, without change. Originally revised from L. 1884, ch. 359.

§ 274. **When schedules to be posted.**—Every person licensed to operate or control any ferry in this state, or between this state and any other state, operating from or to a city of fifty thousand inhabitants or over, shall post in a conspicuous and accessible position outside and adjacent to each entrance to such ferry, and in at least four accessible places, in plain view of the passengers upon each of the boats used in such ferry, a schedule plainly printed in the English language of the rates of ferriage charges thereon, and authorized by law to be charged for ferriage over such ferry. If any such person shall fail to comply with the provisions of this section, or shall post a false schedule, he shall forfeit the sum of fifty dollars for each day's neglect or refusal to post such schedule or any of them, to be recovered by any person who shall sue therefor in any court of competent jurisdiction.

Source.—Former Highway L. (L. 1890, ch. 568) § 174, as amended by L. 1900, ch. 313; originally revised from L. 1889, ch. 489, § 3.

Reference.—A neglect to post schedule of ferry rates a misdemeanor, Penal Law, § 871.

ARTICLE XI.

[Former article 11 relating to same subject repealed and new article 11 inserted by L. 1910, ch. 374, in effect Aug. 1, 1910, except as to examinations, issue of licenses, badges, etc., which provisions took effect May 31, 1910.]

MOTOR VEHICLES.

Section 280. Application of article.

281. Definitions.

282. Registration of motor vehicles; age of operator; fees; renewals.

283. Distinctive number; form of number plates.

284. Registration and number plates for manufacturers and dealers.

284-a. Limited use of dealer's number plates by vendee.

285. Exemption of nonresident owners.

286. Signaling and other devices; signals; rules of the road.

287. Speed permitted.

288. Local ordinances prohibited.

289. License of operators and chauffeurs; renewals.

290. Punishment for violation; procedure.

290-a. Suspension and revocation of a license of operator or chauffeur.

290-b. Certificate by magistrate.

291. Disposition of registration fees; fines and penalties.

292. Rates of toll on motor vehicles.

293. Acts repealed.

§ 280. Application of article.—Except as herein otherwise expressly provided, this article shall be exclusively controlling:

1. Upon the registration, numbering and regulation of motor vehicles and the licensing and regulation of chauffeurs and operators;
2. On their use of the public highways, and
3. On the accessories used upon motor vehicles and their incidents and the speed of motor vehicles upon the public highways;
4. On the punishment for the violation of any of the provisions of this article. (*Added by L. 1910, ch. 374 and amended by L. 1917, ch. 769, in effect July 1, 1917.*)

Source.—L. 1904, ch. 538, § 1, subd. 1.

References.—As to regulation of motor and other vehicles in their use of streets and highways, see General Highway Traffic Law, ante, p. 3234. Unauthorized use of automobiles, Penal Law, § 1293-a.

The object and purpose of the statute is to promote the safety of those traveling the public highways. While a motor vehicle is not, in and of itself, to be deemed a dangerous machine, nevertheless it becomes such in the hand of a careless and inexperienced person. The statute has, in effect, so declared when it forbids its operation by persons under the age of eighteen. It, in substance, declares that such persons do not possess the requisite care and judgment to run motor vehicles on the public highways without endangering the lives and limbs of others. While the relation of parent and child does not render the parent liable for the torts of the child, nevertheless a parent may become liable for an injury caused by the child. *Schultz v. Morrison* (1915), 91 Misc. 248, 154 N. Y. Supp. 257.

The Motor Vehicle Law (L. 1904, ch. 538) was clearly designed as a new, complete and general enactment to take the place of all the previous statutes, ordi-

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nances or rules relating to the use of motor vehicles upon the streets and highways of this state and must be held to have repealed all former statutes relating to such subject-matter, even if such former acts are not in all respects repugnant to its provisions. *City of Buffalo v. Lewis* (1908), 192 N. Y. 193, 84 N. E. 809.

The law applicable to dangerous instrumentalities does not apply to operation of a motor vehicle.—While the operation of a motor vehicle is attendant with dangers not common to the use of the ordinary vehicle, it cannot be placed in the same category as locomotives, gunpowder, dynamite and similar dangerous machines and agencies, and the rule of law applicable to dangerous instrumentalities does not apply. So where the driver of an electric truck leaves such truck for a few moments with power shut off and the brakes set, the owner is not liable for damages caused by the act of boys who started the machine and caused the accident resulting in the damage complained of. The proximate cause of the injury was not the leaving of the truck unattended, but the willful act of the boys in starting it. *Vincent v. Crandall & Godley Co.* (1909), 131 App. Div. 200, 115 N. Y. Supp. 600.

§ 281. *Definitions.*—The term “motor vehicle” as used in this article, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except motor bicycles, motor cycles, traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances and such vehicles as run only upon rails or tracks. The term “local authorities” shall include all officers of counties, cities, boroughs, towns or villages, as well as all boards, committees and other public officials of such counties, cities, boroughs, towns or villages. The term “chauffeur” shall mean any person operating or driving a motor vehicle, as an employee or for hire. The term “operator” shall mean any person, other than a chauffeur, who operates a motor vehicle in a county wholly included in a city. The term “state” as used in this article, except where otherwise expressly provided, shall also include the territories and the federal districts of the United States. The term “owner” shall also include any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days. The term “public highway” shall include any highway, county road, state road, public street, avenue, alley, park, parkway or public place in any county, city, borough, town or village, except any speedway which may have been or may be expressly set apart by law for the exclusive use of horses and light carriages. The term “omnibus,” as used in this article, shall include any motor vehicle held and used for the transportation of passengers for hire. (*Added by L. 1910, ch. 374, and amended by L. 1917, chs. 2 and 769, in effect July 1, 1917.*)

Source.—L. 1904, ch. 538, § 1, subd. 2.

Reference.—Terms “motor vehicle,” “public highway” and “driver” defined. General Highway Traffic Law, § 2, p. 3234.

The term “motor vehicle,” as defined by this section, does not include the ambulances operated by humane societies, veterinary or private hospitals. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 655.

The term “chauffeur” applies to an owner of an automobile who operates it himself and in which he carries passengers who pay him therefor, either in accordance with the distance traveled or otherwise. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 635.

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The words "public highway" as used in this section include all the highways within the state to which speed regulations apply. *People v. Hayes* (1910), 66 Misc. 606, 124 N. Y. Supp. 417.

§ 282. Registration of motor vehicles; age of operator; fees; renewals.—

1. Registration by owners. Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state, shall, except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the secretary of state, a verified application for registration on a blank to be furnished by the secretary of state for that purpose, containing: (a) A brief description of the motor vehicle to be registered, including the name of the manufacturer and factory number of such vehicle, the character and amount of the motive power stated in figures of horse power in accordance with the rating established by the Association of Licensed Automobile Manufacturers; (b) the name, age, residence, including county and business address, of the owner of such motor vehicle; (c) provided that, if such motor vehicle is used or to be used for purposes mentioned in subdivision six-a of this section, the applicant shall so certify, and also certify as to the weight of the truck and carrying capacity, or in the case of an omnibus the seating capacity, or if the omnibus is to be operated wholly within a municipality pursuant to a franchise other than a franchise express or implied in articles of incorporation, upon certain streets designated in such franchise, those facts shall also be certified, and a certified copy of such franchise furnished to the secretary of state. Every owner of a vehicle, commonly known as a "trailer," for the transportation of goods, wares and merchandise, not propelled by its own power, to be drawn on the public highways by a motor vehicle operated thereon shall also make application for the registration thereof in the manner herein provided for an application to register a motor vehicle, without the statement relating to motive power; but the application shall set forth the combined weight and carrying capacity of such trailer. (*Subd. amended by L. 1917, chs. 2, 727, in effect Aug. 1, 1917.*)

2. Restriction on operation. No person shall operate or drive a motor vehicle who is under eighteen years of age, unless such person is accompanied by a duly licensed chauffeur or the owner of the motor vehicle being operated. No person shall operate or drive a motor vehicle in a county wholly included within a city for more than ten days in any calendar year unless such person is a duly licensed chauffeur or operator whether the owner of such vehicle or otherwise. (*Subd. amended by L. 1917, ch. 769, in effect July 1, 1917.*)

3. Registration book. Upon the receipt of an application for registration of a motor vehicle, as provided in this article, the secretary of state shall file such application in his office at Albany and such other places within the state of New York as he may designate and register such motor vehicle or vehicles, with the name, residence and business address of the

owner, together with the facts stated in such application, in a book or index to be kept for the purpose, under the distinctive number assigned to such motor vehicle by the secretary of state, which book or index shall be open to public inspection during reasonable business hours. (*Subd. amended by L. 1917, ch. 174, in effect Feb. 1, 1918.*)

4. Certificate of registration. Upon the filing of such application and the payment of the fee hereinafter provided, the secretary of state shall assign to such motor vehicle a distinctive number and, without expense to the applicant, issue and deliver in such manner as the secretary of state may select to the owner a certificate of registration, in such form as the secretary of state shall prescribe, and two number plates at a place within the state of New York named by the applicant in his application. In the event of the loss, mutilation or destruction of any certificate of registration provided for in this article or of any number plate provided for in this section or of any license or badge, the owner of a registered motor vehicle or manufacturer, or dealer, or operator, or chauffeur, as the case may be, may obtain from the secretary of state a duplicate thereof upon filing in the office of the secretary of state an affidavit showing such fact and the payment of a fee of one dollar. It shall be the duty of every owner, operator or chauffeur holding a certificate as such from the secretary of state, to notify the secretary of state in writing of any change of residence of such person within ten days after such change occurs. (*Subd. amended by L. 1917, chs. 174 and 769, in effect July 1, 1917.*)

5. Times for registration and re-registration. Registration applied for on or before August first, nineteen hundred and seventeen, shall take effect on that date and certificates issued on such application or under any application made prior to January thirty-first, nineteen hundred and eighteen, shall expire on the latter date. The fees for such registration shall be one-half of the annual fees provided herein. Registration thereafter shall be renewed annually in the same manner and upon payment of the same annual fee as provided in this section for registration, to take effect on the first day of February, in each year beginning with such date in the year nineteen hundred and eighteen; and the certificates of registration issued thereunder or issued between any such dates shall expire on the succeeding thirty-first day of January. Nothing contained in this subdivision shall affect the registration of motor vehicles previously registered in accordance with the provisions of this section, prior to this amendment. (*Subd. amended by L. 1917, ch. 769, in effect July 1, 1917.*)

6. Registration fees. The following fees shall be paid to the secretary of state upon the registration or re-registration of a motor vehicle in accordance with the provisions of this article; five dollars upon the registration of a motor vehicle having a rating of twenty-five horse power or less; ten dollars upon the registration of a motor vehicle having a rating of more than twenty-five horse power and less than thirty-five horse power; fifteen dollars upon the registration of a motor vehicle having a rating of thirty-

five horse power and less than fifty horse power; twenty-five dollars upon the registration of a motor vehicle having a rating of fifty horse power or more; provided that if a motor vehicle is originally registered after August first in any year, the register fee for that year shall be one-half of the fee herein provided for; and further provided that for motor vehicles which are used or to be used for purposes mentioned in subdivision six-a of this section, the fee for such registration shall be as therein prescribed. The provisions hereof with respect to the payment of registration fees shall not apply to motor vehicles owned or controlled by the state, a city or county or any of the departments thereof, but in other respects shall be applicable. (*Subd. amended by L. 1915, ch. 348, and L. 1917, ch. 2, in effect Jan. 1, 1917.*)

6-a. Registration fees for auto trucks and omnibuses. The commissioner of highways, superintendent of public works and state engineer and surveyor having heretofore filed in the office of the secretary of state, in accordance with the former provisions of this subdivision, a schedule of registration fees to be paid upon the registration or reregistration, in accordance with the provisions of this article, of motor vehicles used as omnibuses for the transportation of passengers, and of motor vehicles constructed or specifically equipped for the transportation of goods, wares and merchandise and used or to be used for such purpose, and commonly known as auto trucks, such schedule as herein modified is hereby adopted and the registration fees for such auto trucks and for omnibuses are hereby established as follows:

SCHEDULE FOR MOTOR VEHICLES USED AS OMNIBUSES FOR THE
TRANSPORTATION OF PASSENGERS.

For each such vehicle having a seating capacity for passengers of five passengers or less, the annual fee of fifteen dollars.

For each such vehicle having a seating capacity for passengers of not less than six passengers, nor more than seven passengers, the annual fee of twenty-four dollars and fifty cents.

For each such vehicle having a seating capacity for passengers of not less than eight passengers, nor more than ten passengers, the annual fee of thirty dollars and fifty cents.

For each such vehicle having a seating capacity for passengers of not less than eleven passengers, nor more than sixteen passengers, the annual fee of forty-three dollars.

For each such vehicle having a seating capacity for passengers of not less than seventeen passengers, nor more than twenty passengers, the annual fee of fifty-two dollars.

For each such vehicle having a seating capacity for passengers of not less than twenty-one passengers, nor more than twenty-two passengers, the annual fee of fifty-five dollars.

For each such vehicle having a seating capacity for passengers of not

less than twenty-three passengers, nor more than twenty-six passengers, the annual fee of sixty-one dollars and fifty cents.

For each such vehicle having a seating capacity for passengers of not less than twenty-seven passengers, nor more than thirty passengers, the annual fee of sixty-seven dollars and fifty cents.

For each such vehicle having a seating capacity for passengers in excess of thirty passengers, the fee of sixty-seven dollars and fifty cents, and the additional fee of two dollars for each passenger (measured by seating capacity) in excess of thirty passengers.

Provided that if any such motor vehicle used as an omnibus for the transportation of passengers, and for which a fee is herein provided, is originally registered after August first in any year, the register fee for that year shall be one-half of the fee herein provided for such motor vehicle; and provided further that upon the registration or reregistration of any omnibus mentioned herein the number plates to be issued therefor shall, upon the payment of an additional fee of two dollars for each omnibus, be the same in form as is issued for passenger motor vehicles which are not omnibuses.

The foregoing schedules shall not apply to omnibuses operated pursuant to a franchise other than a franchise express or implied in articles of incorporation over streets designated in said franchise wholly within the municipality, and for any such omnibus, without regard to the seating capacity, the annual fee shall be ten dollars; but if any such omnibus shall be also operated outside of the municipality then the foregoing schedule of fees shall apply thereto; and provided further that if any such omnibus for which a ten-dollar fee is herein provided is originally registered after August first in any year the fee for that year shall be one-half the fee herein provided for such omnibus.

SCHEDULE FOR MOTOR VEHICLES, COMMONLY KNOWN AS AUTO TRUCKS,
USED FOR THE TRANSPORTATION OF GOODS, WARES AND MERCHANDISE.

For each such vehicle having a combined weight of truck and carrying capacity of two tons or less, the annual fee of ten dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than two tons, and not more than three tons, the annual fee of fifteen dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than three tons, and not more than four tons, the annual fee of twenty dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than four tons, and not more than five tons, the annual fee of twenty-five dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than five tons, and not more than six tons, the annual fee of thirty dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than six tons, and not more than seven tons, the annual fee of thirty-five dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than seven tons, and not more than eight tons, the annual fee of forty dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than eight tons, and not more than nine tons, the annual fee of forty-five dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than nine tons, and not more than ten tons, the annual fee of fifty dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than ten tons, and not more than eleven tons, the annual fee of fifty-five dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than eleven tons, and not more than twelve tons, the annual fee of sixty dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than twelve tons, and not more than thirteen tons, the annual fee of sixty-five dollars.

For each such vehicle having a combined weight of truck and carrying capacity of more than thirteen tons, and not more than fourteen tons, the annual fee of seventy dollars.

For each such vehicle having a combined weight of truck and carrying capacity in excess of fourteen tons, the fee of seventy dollars, and the additional fee of ten dollars for each ton in excess of fourteen tons.

Provided that if any such motor vehicle, commonly known as a truck, used for the transportation of goods, wares and merchandise and for which a fee is herein provided, is originally registered after August first in any year, the register fee for that year shall be one-half the fee herein provided for such motor vehicles. (*Subd. added by L. 1916, ch. 598, and amended by L. 1917, chs. 2 and 724, in effect June 4, 1917.*)

L. 1917, ch. 724. § 2. This act shall not affect a motor vehicle registration heretofore made.

6-b. Registration fees for trailers. The foregoing provisions of this section in relation to registration books and registration, certificates of registration, number plates, duplicates of certificates and number plates, times for registration and re-registration and the duration thereof, for motor vehicles, shall apply also to trailers. The following fees shall be paid to the secretary of state upon the registration or re-registration of a trailer in accordance with the provisions of this article:

For each trailer having a combined weight of truck and carrying capacity of two tons or less, the annual fee of five dollars.

For each trailer having a combined weight of truck and carrying capac-

ity of more than two tons and not more than five tons, the annual fee of ten dollars.

For each trailer having a combined weight of truck and carrying capacity of more than five tons and not more than seven tons, the annual fee of fifteen dollars.

For each trailer having a combined weight of truck and carrying capacity of more than seven tons and not more than ten tons, the annual fee of twenty dollars.

For each trailer having a combined weight of truck and carrying capacity of more than ten tons and not more than fourteen tons, the annual fee of thirty dollars.

For each trailer having a combined weight of truck and carrying capacity in excess of fourteen tons, the annual fee of thirty dollars and the additional fee of five dollars for each ton in excess of fourteen tons.

Provided that if any such trailer for which a fee is herein provided, is originally registered after August first in any year, the register fee for that year shall be one-half of the fee herein provided for such vehicles. (*Subd. added by L. 1917, ch. 727, in effect Aug. 1, 1917.*)

7. Fees in lieu of taxes. The registration fees imposed by this article upon motor vehicles, other than those of manufacturers and dealers and those used solely for commercial purposes, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject.

8. Sale and registration by vendee. Upon the sale or transfer of a motor vehicle registered in accordance with this section, the vendor shall immediately give notice thereof with the name and residence of the vendee to the secretary of state, and the vendee shall, within ten days after the date of such sale or transfer, notify the secretary of state thereof upon a blank furnished promptly by him for that purpose, stating the name and business address of the previous owner, if known, the number under which such motor vehicle is registered and the name, residence, including county and business address, of the vendee. Upon filing such statement duly verified such vendee shall pay to the secretary of state a fee of one dollar, and upon receipt of such statement and fee the secretary of state shall file such statement in his office and note upon the registration book or index such change in ownership. (*Section added by L. 1910, ch. 374 and amended by L. 1911, ch. 491. Subd. 9 repealed by L. 1917, ch. 174, in effect Feb. 1, 1918.*)

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A minor under eighteen years of age may not operate a motor vehicle upon a public highway, even though he be the owner of such vehicle. Rept. of Atty. Genl. (1910) 411.

Delivery of registration and number plates, as contemplated by this section, means delivery at the office of the Secretary of State. Rept. of Atty. Genl. (1911) 16.

Assessment.—Motor vehicles, other than those owned by manufacturers or dealers and those used solely for commercial purposes, should not be assessed in any manner against the owner, where the license fee has been paid. Rept. of Atty. Genl. (1911) 362.

Registration of automobiles owned by United States not required.—The State is not entitled to demand fees for the registration of automobiles owned by the government of the United States and used in the service of the War Department. Rept. of Atty. Genl. (1912) 37.

Failure to apply for renewal within one year from expiration of registration. The owner of a motor vehicle who fails to apply for a renewal of registration within one year from the expiration of the last registration is not entitled to renewal upon a renewal application but must apply as in the case of an original application. Rept. of Atty. Genl. (1911), Vol. 2, p. 686.

Disposal of motor vehicle after filing of renewal application.—Where a renewal application has been filed and the motor vehicle to which registration was assigned has been disposed of, it is within the administrative discretion of the Secretary of State, upon affidavit of the fact and upon the return of the number plates and certificate issued to the former owner and before the date upon which the registration would have taken effect, to cancel the registration and to transfer the fee to the credit of another registration of the former owner. He cannot properly refund the fee directly. Rept. of Atty. Genl. (1912) 44.

A dealer may loan his plates only to purchasers of his machine, and then only under the restrictions in subdivision 9 of this section. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 527.

Ownership of a vehicle implies possession and control, and, in an action to recover for injuries caused by the negligent use of the vehicle, proof of ownership makes out a *prima facie* case against the owner, for it is presumed that he was either in person or through his agent in control of the vehicle at the time of the accident. Proof of registration is competent evidence of ownership. *McCann v. Davison* (1911), 145 App. Div. 522, 130 N. Y. Supp. 473.

Violation of the provisions of the statute as to registration and display of registration number is not *per se* proof of negligence. *Hyde v. McCreery* (1911), 145 App. Div. 729, 130 N. Y. Supp. 269.

Liability of father for negligence of sixteen year old son.—Where, in an action for personal injuries received by plaintiff in a collision between a vehicle driven by him and an automobile owned by defendant but operated at the time of the accident by his sixteen-year-old son, it appeared that defendant granted his son's request for leave to take the machine down town to make a purchase, that on the way he picked up several of his school companions and on the way home ran into the rear of plaintiff's wagon, throwing him from his seat and severely injuring him, and the evidence shows a clear case of negligence on the part of the son, a verdict in favor of plaintiff will not be disturbed. *Schultz v. Morrison* (1915), 91 Misc. 248, 154 N. Y. Supp. 257.

§ 283. **Distinctive number; form of number plates.**—1. Distinctive number must be carried on motor vehicles. No person shall operate or drive a motor vehicle on the public highways of this state after the first day of August, nineteen hundred and ten, unless such vehicle shall have a distinctive number assigned to it by the secretary of state and a number plate issued by the secretary of state with a number, and other identification matter if any, corresponding to that of the certificate of registration conspicuously displayed, one on the front and one on the rear of such vehicle, each securely fastened so as to prevent the same from swinging.

2. Number plates to be changed annually. Such number plates shall be of a distinctly different color each year, and there shall be at all times

a marked contrast between the color of the number plates and that of the numerals or letters thereon.

3. Form of number plate. Such number plate shall be of metal, at least six inches wide and not less than fifteen inches in length, on which there shall be the initials "N. Y.," and there shall be the distinctive number assigned to the vehicle set forth in numerals four inches long, each stroke of which shall be at least five-eighths of an inch in width. No vehicle shall display the number plates of more than one state at a time, nor shall any plate be used other than those issued by the secretary of state.

4. Provisions relating to trailers. No person shall operate or drive a motor vehicle drawing a trailer on the public highways of the state after the first day of August, nineteen hundred and seventeen, unless such trailer shall have a distinctive number assigned to it by the secretary of state and a number plate issued by such secretary with a number corresponding to that of the certificate of registration displayed and fastened in the manner provided for number plates on a motor vehicle, nor unless such person shall also have with him the certificate of registration of such trailer. Such certificate shall be exhibited on demand to any peace officer or representative of the secretary of state. The provisions of subdivisions three and four of this section relating to number plates for a particular motor vehicle shall apply to number plates for any such trailer, except that the word "trailer" shall also appear on such plates. (*Section added by L. 1910, ch. 374 and amended by L. 1911, ch. 491 and L. 1917, ch. 174, in effect Feb. 1, 1918. Subd. 4 added by L. 1917, ch. 727, in effect Aug. 1, 1917.*)

Failure to provide number plate; criminal intent.—One who drives a motor vehicle on the public highways without having a distinctive number, corresponding to a proper certificate of registration, conspicuously displayed on the front and on the rear of said vehicle, is guilty of a violation of subdivision 1 of this section of the Highway Law, without regard to criminal intent. *People v. Schoepflin* (1912), 78 Misc. 62, 137 N. Y. Supp. 675.

§ 284. Registration and number plates for manufacturers and dealers.—

1. Every person, firm, association or corporation manufacturing or dealing in motor vehicles, may, instead of registering each motor vehicle so manufactured or dealt in, apply to the secretary of state for a single registration as manufacturer or dealer, as the case may be, and for number plates. The application shall be upon a blank to be furnished by the secretary of state, and shall be verified. It shall contain a brief description of each style or type of motor vehicle manufactured or dealt in by the applicant, including the character of the motor power stated in figures of horse power in accordance with the rating established by the Society of Automobile Engineers, and if an auto truck the combined weight and carrying capacity and if a motor vehicle adapted specially for use as an omnibus the seating capacity, and the name and residence, including county

and business address, of such manufacturer or dealer. The application shall be accompanied with the payment of a registration fee of fifteen dollars. Two number plates of the same kind shall constitute a set, and the fee for each set shall be five dollars; except that the first set of number plates shall be furnished without the payment of any fee in addition to the registration fee. The application shall be filed and registered in the office of the secretary of state in the same manner as provided in this chapter for the registration of a motor vehicle. The secretary of state shall thereupon assign a distinctive manufacturer's or dealer's registration number to the applicant and issue to the applicant a certificate of such registration with and for each separate set of number plates. Each certificate shall, in addition to the general registration number, recite any and all distinctive words, numbers or marks on the set of plates for which such certificate is issued. The secretary of state shall also promptly deliver to the applicant, at a place within the state to be designated by him in the application, the set or sets of number plates to which he is entitled. The applicant shall be provided with the one set furnished with his application and such additional sets, not exceeding four, for which he shall have paid the fees above provided. Each number plate shall be of metal, and the manufacturer's or dealer's general registration number shall be set forth thereon together with the initials "N. Y." The size of a manufacturer's or dealer's plate and of the numerals of such general registration number shall be the same as for a number plate described in section two hundred and eighty-three. All of such plates may contain such other identification matter as the secretary of state may deem proper. The provisions of subdivision two of section two hundred and eighty-three shall apply to such number plates. Additional number plates, in sets, with the corresponding certificates, may be obtained from the secretary of state at any time, upon the payment of the fee above provided; but the secretary of state may limit the total number of dealers' plates to be issued to any particular dealer in excess of five. A duplicate of any manufacturer's or dealer's number plate, in case of loss or destruction, which fact shall be proven by the affidavit of the manufacturer or dealer, may be obtained from the secretary of state for two dollars and fifty cents.

2. Except as otherwise provided in the next section, no person shall operate or drive, or cause to be operated or driven, on the public highways a motor vehicle to which any such manufacturer's or dealer's number plates are attached unless the manufacturer or dealer is the owner or entitled to the possession of such vehicle.

3. Registration under this section shall be renewed and new plates procured annually, to take effect on the first day of February of each year. All registrations under this section, including original registrations made after February first of any year, shall expire on the thirty-first day of January following the time the registration takes effect.

4. The privileges of this section shall not extend to any motor vehicle

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operated or driven by a manufacturer or dealer for pleasure purposes or for private use or for hire. (*Added by L. 1910, ch. 374, and amended by L. 1911, ch. 491 and L. 1917, ch. 174, in effect Feb. 1, 1918.*)

L. 1917, ch. 174, § 7. This act shall take effect February first, nineteen hundred and eighteen, but registration of dealers or manufacturers and issuance of number plates under section two hundred and eighty-four of the highway law as amended by this act for the year beginning on the first day of February, nineteen hundred and eighteen, may be applied for within sixty days next preceding such day, and no registration of manufacturers or dealers for such year under section two hundred and eighty-four of such law as in force prior to such day shall be applied for or made.

Manufacturer or dealer in motor vehicles duly registered, upon purchase of a registered car, may operate the same under the regular dealer's license, provided it be the style and type described in dealer's registration, and is purchased for resale, and notice of transfer is made under subdivision 8. Rept. of Atty. Genl. (1910) 427.

The phrase "nothing in this subdivision shall be construed to apply to a motor vehicle operated for private use or for hire" means that when the preferred classes of manufacturers and dealers do operate for private use or for hire, they must comply with the additional requirements for ordinary owners' registration, and for which regular fees are charged. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 527.

The use of dealer's plates in the operation by a dealer or his agents of his automobiles for private use or for hire is prohibited. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 527.

The retirement of a member of a partnership holding a dealer's registration plate, does not require a transfer of the registration or the issuance of a new one during the term of the original. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 527.

§ 284-a. Limited use of dealer's number plates by vendee.—Upon the sale of a motor vehicle by registered dealer, the vendee shall be allowed to operate the same upon the public highways for the period of five days after taking possession thereof, without carrying number plates issued upon a registration under section two hundred and eighty-two, if the motor vehicle shall have attached thereto and displayed thereon, in the manner provided in section two hundred and eighty-three, a set of dealer's number plates issued to such dealer under section two hundred and eighty-four, and if a proper application for registration and number plates for such vehicle under the provisions of section two hundred and eighty-two shall have been mailed or presented to the secretary of state, accompanied with payment of the required fee, within twenty-four hours after he has taken possession thereof.

No person shall operate or drive upon the public highways any motor vehicle on which is fastened or displayed any such dealer's number plates after a sale of such vehicle by the dealer except in compliance with the foregoing provisions.

A dealer who sells a motor vehicle shall not deliver to or permit to be taken by the vendee any such number plates without first mailing to the secretary of state a verified statement, upon a blank to be furnished by him, setting forth the following facts: A description, by general and dis-

tinctive numbers and characters thereon, of the plates and certificate to be loaned; the name and residence, including county and business address, of the vendee of the motor vehicle; a brief description of the motor vehicle sold, including the name of the manufacturer and factory number; the character and amount of the motive power stated in figures of horse power in accordance with the rating established by the Society of Automobile Engineers, or, if it be an auto truck, the combined weight of the truck and carrying capacity. The dealer shall also state whether he has knowledge or is informed that the motor vehicle is to be used as an omnibus, and if he states that he has knowledge or information that it is to be so used he shall also specify the seating capacity of the motor vehicle sold.

A vendee to whom number plates are delivered or by whom they are held under the provisions of this section shall return the same, and the accompanying registration certificate, to the dealer before the expiration of six days after he took possession of the motor vehicle purchased. If number plates so delivered or held, or such certificate, are not returned within the time above limited, the dealer shall immediately notify the secretary of state of that fact by mail describing the plates according to the general and distinctive numbers and characters thereon. (*Added by L. 1917, ch. 174, in effect Feb. 1, 1918.*)

§ 285. **Exemption of nonresident owners.**—The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration numbers as required thereby. The provisions of this section, however, shall be operative as to a motor vehicle owned by a nonresident of this state only to the extent that under the laws of the foreign country, state, territory or federal district of his residence like exemptions and privileges are granted to motor vehicles duly registered under the laws of and owned by residents of this state. (*Added by L. 1910, ch. 374.*)

Non-resident owners of cars are not required to register if their state or country has granted the same exemption to this state, and where such owner has complied with the laws of his state and conspicuously displays his registration number. Rept. of Atty. Genl. (1910) 420.

Motor vehicles owned by residents of the State of New Jersey and there registered may be operated in this state without registration herein for a period or periods not to exceed fifteen days in each calendar year. Rept. of Atty. Genl. (1912), Vol. 2, p. 221.

§ 286. **Signaling and other devices; signals; rules of the road.**—1. Brakes, horns and lamps. Every motor vehicle, operated or driven upon

the public highways of the state, shall be provided with adequate brakes in good working order and sufficient to control such vehicle at all times when the same is in use, and a suitable and adequate horn or other device for signaling, and shall, during the period from one-half hour after sunset to one-half hour before sunrise, display at least two lighted lamps on the front and one on the rear of such vehicle, which shall also display a red light visible from the rear. The rays of such rear lamp shall shine upon the number plate carried on the rear of such vehicle in such manner as to render the numerals thereon visible for at least fifty feet in the direction from which the motor vehicle is proceeding. The light of the front lamps shall be visible at least two hundred feet in the direction in which the motor vehicle is proceeding and shall give sufficient light to reveal any person, vehicle or substantial object on the road straight ahead of such motor vehicle for a distance of at least two hundred and fifty feet. The front lights shall be so arranged that no portion of the beam of the reflected light projected to the left of the axis of the vehicle when measured seventy-five feet or more ahead of the lamps shall rise above forty-two inches on the level surface on which the vehicle stands. They shall also give sufficient side illumination to reveal any person, vehicle or substantial object ten feet to both sides of said vehicle, at a point ten feet ahead of the lamps. The term "beam of light" as used in the above provision shall be construed as meaning the approximately parallel, focalized rays gathered and projected by a reflector, lens or other device. If, in addition to headlights, any motor vehicle is equipped with any auxiliary light, projecting device or devices, other than the rear lamp, such auxiliary lights shall be subject to all the restrictions of this section regarding direction of the beam. (*Subd. amended by L. 1917, ch. 785, in effect Aug. 1, 1917.*)

2. Stopping on signal, and other regulations. A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person riding, leading or driving a horse or horses or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal; provided that, in case such horse or animal appears badly frightened or the person operating such motor vehicle is so signaled to do, such person shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others. In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down and if it be necessary for the safety of the public he shall bring said vehicle to a full stop. Upon approaching a pedestrian who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway where the operator's view is obstructed, every person operating a motor

vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling.

3. Rules of the road. Whenever a person operating a motor vehicle shall meet on a public highway any other person riding or driving a horse or horses or other draft animals or any other vehicle, the person so operating such motor vehicle shall seasonably turn the same to the right of the center of such highway so as to pass without interference. Any such person so operating a motor vehicle shall, on overtaking any such horse, draft animal or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right and pass to the right of such intersection when turning to the left. (*Added by L. 1910, ch. 374.*)

References.—As to regulation of use of streets and highways by automobiles and other vehicles, see General Highway Traffic Law, ante, p. 3234. Law of the road, generally, governing vehicles and persons on streets and highways, § 332, post, and cases cited.

Rules of the road.—The driver is not bound to go over on the extreme right-hand side of the highway; the rule of the road merely requires that the rider or driver of a horse or vehicle, on being overtaken by an automobile, shall, "as soon as practicable, turn to the right so as to allow free passage on the left." *Tooker v. Fowler & Sellars Co.* (1911), 147 App. Div. 163, 132 N. Y. Supp. 213.

Action to recover damages for personal injuries received by the conductor of a trolley car who while crossing the road at night to operate a signal light was struck by the defendant's automobile. The plaintiff testified that, alighting from the right-hand side of his car, he passed behind it and, having seen the defendant's automobile coming from behind, continued to cross the left-hand side of the road to reach the signal, assuming that the defendant when he overtook the car would pass to the right instead of to the left. On all the evidence, it was held that a judgment for the plaintiff should be affirmed. The law of the road is not such an absolute rule that the plaintiff was bound to presume that the defendant on overtaking the trolley car would pass to the left rather than to the right, regardless of the fact that the road on the right-hand afforded a better passage. *Kalb v. Redwood* (1911), 147 App. Div. 77, 131 N. Y. Supp. 789, *affd.* (1913), 207 N. Y. 739, 101 N. E. 1107.

Reasonable care.—The fundamental principle of conduct in the movement of automobiles is that of reasonable care and accommodation, measured by the immediate circumstances of each case and exercised by each traveler for the purpose of affording to the other his just and reasonable rights in the highway. *Mark v. Fritsch* (1909), 195 N. Y. 282, 88 N. E. 300, 22 L. R. A. (N. S.) 632.

Turning around at street intersections.—A company operating motor busses on city streets has a right to turn them around at the intersection of two streets, and its only duty is to exercise reasonable care in so doing. In making the turn its chauffeur is not obliged to wait until there is no automobile approaching that will have to lessen its speed while he is thus making a lawful use of the street. If, however, the position of the bus turning around at the intersection of streets is such at the time another automobile is approaching that there is danger of its running into said automobile if the course of the latter is not

changed, the owner of the bus may be held liable for the damages inflicted by the automobile in changing its course and running upon the sidewalk, even though the chauffeur of said automobile is also negligent. *Ackerman v. Fifth Avenue Coach Co.* (1916), 175 App. Div. 508, 162 N. Y. Supp. 49.

Permitting car to pass.—Where a collision occurred between two motor cars while defendant's car was attempting to pass that of plaintiff, a request to charge "that there was no legal duty on the part of the plaintiff to stop his machine so as to enable the defendant to pass," was *held* to be properly refused under the circumstances. The duty of a person running a motor car on the highway, toward one following at a more rapid pace, is to yield room enough for the latter to pass when it is needful and practicable so to do and he is thereunto requested. *Mark v. Fritsch* (1909), 195 N. Y. 282, 88 N. E. 80, 22 L. R. A. (N. S.) 632.

Passing to right at street intersections.—The driver of a motor vehicle in the city of New York who, coming westerly through a cross street, desires to make a left turn southerly into an avenue should make a wide turn, pass to the right of the center of the street intersection and reduce his speed to not more than four miles an hour. Where the driver of a motor truck violated both of the rules aforesaid and turned into the avenue with a high rate of speed, with a result that there was a collision between his vehicle and a motorcycle, the violation of the rules is sufficient to charge him with negligence. *Berckhemer v. Empire Carrying Corporation* (1916), 172 App. Div. 866, 158 N. Y. Supp. 856.

When driver not bound to pass to right of center of intersection of roads.—*Brush v. Constable* (1915), 166 App. Div. 543, 152 N. Y. Supp. 20.

Driving on the left side of a highway is not a nuisance, and does not violate section 1530 of the Penal Law, nor is it a misdemeanor within the meaning of section 43 of the Penal Law which involves a wrongful purpose. Driving on the left side of a road subjects the offender only to a civil penalty, to be recovered by the party injured, in addition to the damages caused by such violation. Hence, a driver of a farm wagon cannot be convicted under section 43 of the Penal Law for a misdemeanor for driving on the wrong side of the road in the evening without lights, thereby causing injury to a motor car and the driver thereof. *People v. Martinitis* (1915), 168 App. Div. 446, 153 N. Y. Supp. 791.

Failure to have light on wagon.—Collision between automobile and unlighted wagon while passing at turn in the road, failure to have light on wagon as contributory negligence. *Martin v. Herzog* (1917), 176 App. Div. 614, 163 N. Y. Supp. 189.

A failure to immediately stop on signal from a driver of horses, as provided in subdivision 2 of this section is negligence. *Union Transfer & S. Co. v. Westcott Express Co.* (1913), 79 Misc. 408, 140 N. Y. Supp. 98.

Contributory negligence of pedestrian struck by automobile while crossing street at intersection. *Wall v. Merkert* (1915), 166 App. Div. 608, 152 N. Y. Supp. 293.

Section cited.—*Iuppa v. Saxton* (1917), 176 App. Div. 944, 162 N. Y. Supp. 1125.

§ 287. Speed permitted.—Every person operating a motor vehicle on the public highway of this state shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person; provided, that a rate of speed in excess of thirty miles an hour for a distance of one-fourth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent. (*Added by L. 1910, ch. 374.*)

Reference.—Speed regulations, General Highway Traffic Law, § 14.

The object of this section is to make certain uniform speed regulations applicable
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to the entire state. *People v. Hayes* (1910), 66 Misc. 606, 124 N. Y. Supp. 417. (This and the following cases were decided under the law as it existed prior to the amendment of 1910.)

An information which states that the defendant was driving at a rate of speed exceeding thirty miles an hour, to-wit, at a rate of thirty-five miles an hour, without the additional statement that such speed was maintained for a distance of one-fourth of a mile, charges no crime. *People v. Fuchs* (1911), 71 Misc. 69, 129 N. Y. Supp. 1011; *People v. Payne* (1911), 71 Misc. 72, 129 N. Y. Supp. 1007.

An information charging defendant with running a motor vehicle at a speed exceeding ten miles per hour in violation of this section but which fails to allege the erection of a sign with the inscription required by statute at the place where the excessive speed was to be reduced, does not allege the commission of a crime. *People v. Hayes* (1910), 66 Misc. 606, 124 N. Y. Supp. 417.

In a trial for manslaughter of the chauffeur of an automobile who was charged with the death of a person in a highway resulting from such chauffeur's running the car at an unlawful rate of speed, it is not error for the trial judge to call the jurors' attention to the prohibition as to operating a motor vehicle at a greater speed than twenty miles per hour. *People v. Scanlon* (1909), 132 App. Div. 528, 117 N. Y. Supp. 57.

Evidence and charge as to speed. *Ackerman v. Stacey* (1913), 157 App. Div. 835, 143 N. Y. Supp. 227.

Conviction for violation of this section reversed. *People v. Winston* (1913), 155 App. Div. 907, 139 N. Y. Supp. 1072.

§ 288. **Local ordinances prohibited.**—Except as herein otherwise provided, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner, operator or chauffeur to whom this article is applicable any tax, fee, license or permit for the use of the public highways, or excluding any such owner, operator or chauffeur from the free use of such public highways, excepting such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages or in any other way respecting motor vehicles or their speed upon or use of the public highways; and no ordinance, rule or regulation contrary to or in anywise inconsistent with the provisions of this article, now in force or hereafter enacted, shall have any effect; provided, however, that the power given to local authorities to regulate vehicles offered to the public for hire, and processions, assemblages or parades in the streets or public places, and all ordinances, rules and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect; and provided, further, that local authorities may set aside for a given time a specified public highway for speed contests or races, to be conducted under proper restrictions for the safety of the public; and provided, further, that local authorities may exclude motor vehicles from any cemetery or grounds used for the burial of the dead, and may by general rule, ordinance or regulation exclude motor vehicles used solely for commercial purposes from any park or part of a park system where such general rules, ordinance or regulation is applicable equally and generally to all other vehicles used for the same purposes, and provided further that nothing in

this article contained shall impair the validity or effect of any ordinances, regulating the speed of motor vehicles, or of any traffic regulations with regard to the operation of motor vehicles, heretofore or hereafter made, adopted or prescribed pursuant to law in any city of the first class or in any city of the second class in a county adjoining a city of the first class; provided, further, that the local authorities of other cities and incorporated villages may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitation not to be in any case less than one mile in four minutes, and the maintenance of a greater rate of speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent, and on further condition that each city or village shall have placed conspicuously on each main public highway where the city or village line crosses the same and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words, "City of" or "Incorporated village of", "Slow down to miles" (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, which punishment shall, during the existence of the ordinance, rule or regulation, supersede those specified in subdivision two of section two hundred and ninety of this chapter but, except in cities of the first or second class shall not exceed the same. Official copies of all local ordinances passed under the provisions of this subdivision shall be filed with the secretary of state at least thirty days before they shall respectively take effect and all such local ordinances shall be printed in pamphlet form and issued at regular intervals by the secretary of state. (*Added by L. 1910, ch. 374, and amended by L. 1915, ch. 487, L. 1916, ch. 579, and L. 1917, ch. 769, in effect July 1, 1917.*)

A local ordinance licensing and regulating express wagons and drivers will not apply to an automobile and chauffeur, both duly licensed by the state, engaged in the express business. *Barrett v. City of New York* (1911), 189 Fed. 268.

Ordinances by cities of the first class may be passed regulating the speed of automobiles, without any condition as to posting signs. *People v. Untermeyer* (1912), 153 App. Div. 176, 138 N. Y. Supp. 334. Under the provisions of the Highway Law, as amended by chapter 374 of the Laws of 1910, cities of the first class may pass ordinances regulating the speed of automobiles, without any condition as to posting signs. *People v. Untermeyer* (1912), 153 App. Div. 176, 138 N. Y. Supp. 334.

Park ordinance in Greater New York, excluding vehicles of all kinds except horses and light carriages, from certain drive, is valid. *People ex rel. Cavanagh v. Waldo* (1911), 72 Misc. 416, 131 N. Y. Supp. 307, *affd.* (1912), 149 App. Div. 927, *affd.* (1912), 205 N. Y. 589, 98 N. E. 1111.

Power of local authorities to permit speed contests of motor vehicles; authority of state highway commission.—The Legislature contemplated the probability of speed contests and for that purpose permitted the suspension of the limitations of speed by such vehicles by the proper local authorities; the power to grant or to withhold the necessary consents is given to the local authorities alone, whose districts would be injured by the wear and tear of the machines and possibly benefited by the com-

mercial advantages accruing from the race. When this permission is obtained from the local authorities the State Highway Commission is without power notwithstanding the provisions of section 17, *ante*, to add additional conditions. The consent of the State Highway Commission need not be obtained before the race is run. *Morrell v. Skene* (1909), 64 Misc. 185, 119 N. Y. Supp. 28.

Commissioners of the state reservation at Niagara may pass an ordinance absolutely prohibiting the use of chains upon motor vehicles within the reservation. *Rept. of Atty. Genl.* (1908) 481.

The restriction contained in this section does not apply to the State Reservation at Niagara. *Rept. of Atty. Genl.* (1911) 528.

Municipalities are not forbidden, because of the restrictions in the Highway Law, the exercise of ordinance power to suppress within their borders nuisances like the noisy use of muffler cut outs and the discharge of excessive smoke by automobiles. *Rept. of Atty. Genl.* (1914) 149.

Power of village to enforce speed ordinance.—Power is conferred upon villages to punish as a misdemeanor a violation of an ordinance relating to speed of automobiles passed pursuant to the Highway Law. The power conferred is not an unconstitutional grant of legislative power. *Opinion of Atty. Genl.* (1914) 203.

Where the trustees of a village pass an ordinance regulating the speed of motor vehicles in the village and fix the punishment for a violation, section 290, subd. 2 of the Highway Law making a violation of the statute a misdemeanor, is no longer applicable in that village. *Chapman v. Selover* (1916), 172 App. Div. 858, 159 N. Y. Supp. 632.

Proof on trial for violation of village ordinance; adoption and publication of ordinance.—On a trial for a violation of a village ordinance the prosecution must prove not only that such ordinance was duly adopted but also that there has been a compliance with all the requirements of law pertaining to the enactment of village ordinances. After proof that a proposed ordinance regulating the speed of motor vehicles within the limits of a village had been filed with the secretary of state, as required by this section, more than thirty days before defendant's alleged violation of said ordinance and that it was published in a newspaper in the village for at least twenty-nine days, and no evidence being offered to show that said newspaper was the official village paper, or that it was the only newspaper published in the village, or that copies of the ordinance were posted in at least three public places as required by the Village Law, the ordinance is of no force and effect and defendant's conviction thereunder must be set aside and his fine of fifty dollars remitted. *People v. Chapman* (1914), 88 Misc. 469, 152 N. Y. Supp. 204.

The presumption allowed by this section is simply in aid of the proof, and a village has the right to absolutely limit speed to one mile in four minutes, by following the requirements of the statute. *People v. Bell* (1914), 148 N. Y. Supp. 753.

An ordinance passed by an incorporated village limiting the speed of motor vehicles "within the corporate limits of the village" is unauthorized, as the statute limits the power of villages in this regard to supervision of "the public highways." *People v. Bell* (1914), 148 N. Y. Supp. 753.

Violation punished by fine.—The trustees of a village in the exercise of their statutory power to fix the punishment for the violation of a local ordinance respecting the speed of motor vehicles are limited to the imposition of a fine to be collected by civil action, except that they may also ordain that such violation constitutes disorderly conduct which, under sections 93 and 338 of the Village Law, subjects an offender to arrest without process where the violation is committed in the presence of a police officer. Hence, where a local village ordinance respecting the speed of motor vehicles merely imposed a fine and did not make a

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violation disorderly conduct, a police officer who arrested a person for the violation of the ordinance and brought him before a magistrate was guilty of assault and false imprisonment and is liable in a civil action to recover damages therefor. *Chapman v. Selover* (1916), 172 App. Div. 858, 159 N. Y. Supp. 632.

Power of city to tax motor vehicles.—The common council of the city of Buffalo had no power, in 1907, to enact an ordinance in pursuance of the provision of chapter 31 of the Laws of 1904, amending section 17 of the city charter (L. 1891, ch. 105), and authorizing it to enact an ordinance imposing a tax upon the owners of motor vehicles for the privilege of operating them upon the streets of such city, since the provisions of the statute in question must be considered as repealed by the subsequent enactment of the Motor Vehicle Law, and that statute expressly provides that with certain exceptions, not applicable to the question under consideration, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license, or permit, to use the public highways contrary to or inconsistent with its provisions. *City of Buffalo v. Lewis* (1908), 192 N. Y. 193, 84 N. E. 809.

Section cited.—*Yellow Taxicab Co. v. Gaynor* (1913), 82 Misc. 94, 110, 143 N. Y. Supp. 279, *affd.* (1913), 159 App. Div. 893, 144 N. Y. Supp. 299, *affd.* (1914), 211 N. Y. 597, 105 N. E. 1087.

§ 289. **License of operators and chauffeurs; renewals.**—1. License of operators or chauffeurs. Application for license to operate motor vehicles, as an operator or chauffeur, may be made, by mail or otherwise, to the secretary of state or his duly authorized agent upon blanks prepared under his authority. The secretary of state shall appoint examiners and cause examinations to be held at convenient points throughout the state as often as may be necessary. Such application, if for a chauffeur's license, shall be accompanied by a photograph of the applicant in such numbers and forms as the secretary of state shall prescribe, said photograph to be taken within thirty days prior to the filing of said application and to be accompanied by the fee provided herein. An owner of a motor vehicle or a member of his immediate family shall be granted an operator's license, subject to this article, upon application, without examination. Before such a license is granted the applicant if not the owner of a motor vehicle or a member of his immediate family shall pass such examination as to his qualifications as the secretary of state shall require. No operator's or chauffeur's license shall be issued to any person under eighteen years of age. To each person shall be assigned some distinguishing number or mark, and the license issued shall be in such form as the secretary of state shall determine; it may contain special restrictions and limitations concerning the type of motor power, horse power, design and other features of the motor vehicles which the licensee may operate; it shall contain the distinguishing number or mark assigned to the licensee, his name, place of residence and address, a brief description of the licensee for the purpose of identification and the photograph of the licensee if a chauffeur. Such distinctive number or mark shall be of a distinctly different color each year and in any year shall be of the same color as that of the number plates

issued for that year. The secretary of state shall furnish to every chauffeur so licensed a suitable metal badge with the distinguishing number or mark assigned to him thereon without extra charge therefor. This badge shall thereafter be worn by such chauffeur affixed to his clothing in a conspicuous place, at all times while he is operating or driving a motor vehicle upon the public highway. Said badge shall be valid only during the term of the license of the chauffeur to whom it is issued as aforesaid. Every person licensed to operate motor vehicles as aforesaid shall indorse his usual signature on the margin of the license, in the space provided for the purpose, immediately upon receipt of said license, and such license shall not be valid until so indorsed. Every application for a chauffeur's license filed under the provisions of this section shall be sworn to and shall be accompanied by a fee of five dollars, two dollars of which shall be for his examination aforesaid and three dollars for license fee. Every application for an operator's license shall be sworn to and be accompanied by a fee of one dollar, which shall be refunded if the application be denied. The license hereunder granted on or before August first, nineteen hundred and seventeen, shall take effect on that date, and licenses issued prior to January thirty-first, nineteen hundred and eighteen, shall expire on that date. A chauffeur's license in force when this section takes effect shall be deemed a chauffeur's license hereunder.

2. Operators' and chauffeurs' licensed registration book. Upon the receipt of such an application, the secretary of state shall thereupon file the same in his office, and register the applicant in a book or index which shall be kept in the same manner as the book or index for the registration of motor vehicles, and when the applicant, if a chauffeur, shall have passed the examination provided for in the preceding section, the number or mark assigned to such applicant together with the fact that such applicant has passed such examination shall be noted in said book or index.

3. Unauthorized possession or use of license or badge. No operator or chauffeur having been licensed as herein provided shall voluntarily permit any other person to possess or use his license or badge, nor shall any person while operating or driving a motor vehicle use or possess any license or badge belonging to another person, or a fictitious license or badge.

4. Unlicensed operators or chauffeurs cannot drive motor vehicle. An operator's license shall not entitle a person to drive a motor vehicle as an employee or for hire. No person shall operate or drive a motor vehicle upon a public highway of this state after the first day of August, nineteen hundred and seventeen, unless such person shall have complied in all respects with the requirements of this section and of section two hundred and eighty-two of this act; provided, however, that a nonresident owner, operator or chauffeur, who has registered under provisions of law of the foreign country, state, territory or federal district of his residence substantially equivalent to the provisions of this article, shall be exempt from license under this section; and provided, further, he shall wear the badge or carry the

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license certificate assigned to him in the foreign country, state, territory or federal district of his residence in the manner provided in this section.

5. **Renewal.** Such license shall be renewed annually, such renewal to take effect on the first day of February of each year. The secretary of state may refuse to issue or renew a license if he deems the applicant not qualified to receive such license, but the refusal of the secretary of state may be reviewed by writ of certiorari. For renewals to take effect on and after February first, nineteen hundred and eighteen, the fee shall be two dollars for a chauffeur's license and one dollar for an operator's license. (*Added by L. 1910, ch. 374, and amended by L. 1911, ch. 491, and L. 1917, ch. 769, in effect July 1, 1917.*)

The renewal of a license to a chauffeur may be withheld if the applicant is not deemed a proper person to receive it. Rept. of Atty. Genl. (1911) 463.

A chauffeur may renew his license upon application to the Secretary of State at any time during the year prior to Feb. 1, 1912. Rept. of Atty. Genl. (1911) 9.

Return of license fee should be made to applicant who fails to pass his examination. Rept. of Atty. Genl. (1911) 212.

Inspection of record book of registration of chauffeurs may be permitted where it will not interfere with the work of the office. Rept. of Atty. Genl. (1911) 99.

Who must procure chauffeurs' license.—Municipal officers and officers of a corporation under salary, need not procure license to drive car belonging to such municipality or corporation. Rept. of Atty. Genl. (1910) 685.

The owner of a part interest in a car, who is employed to operate said car by the owner of the other interest and actually does operate it for wages or for hire, must procure a license. Rept. of Atty. Genl. (1910) 961.

Chauffeurs residing in New Jersey, who are registered under the laws of that state and are eighteen years of age and upwards, may act as such in this state without registration here. Rept. of Atty. Genl. (1912), Vol. 2, p. 221.

An employee of an electric company who not having a chauffeur's license uses in the discharge of his duties an automobile furnished by his employer is properly convicted of operating an automobile without a chauffeur's license. *People v. Fulton* (1916), 96 Misc. 663, 162 N. Y. Supp. 125.

Licensed chauffeurs need not be furnished by the Utility Car Company for their machines. Rept. of Atty. Genl. (1910) 418.

Officers and enlisted men of the United States Army, operating automobiles used in the service, need not be licensed. Rept. of Atty. Genl. (1912) 37.

Driving borrowed car.—A party, not a licensed chauffeur, may borrow and drive a friend's automobile without the owner being in the car. Rept. of Atty. Genl. (1911) 97.

Steering towed car.—Subdivision 4 of this section was intended to prohibit the management or operation by an unlicensed chauffeur of a car propelled by its own motive power, and does not prohibit such a chauffeur from steering a towed car. *Wolcott v. Renault Selling Branch* (1916), 175 App. Div. 858, 162 N. Y. Supp. 496.

Effect of failure to procure license.—Where the court in an action to recover for personal injuries caused by an automobile admits, tentatively, proof of the fact that the chauffeur had no license, but subsequently charges that that fact is not proof that he was guilty of negligence at the time of the accident, the error, if any, in admitting such evidence was cured by the subsequent charge. This is true although the evidence was not subsequently stricken out, for it is

presumed that the jury obeyed the instruction of the court. *Hatch v. Terry* (1912), 153 App. Div. 230, 137 N. Y. Supp. 1082.

§ 290. Punishment for violation; procedure.—1. The violation of any of the provisions of sections two hundred and eighty-two, two hundred and eighty-three, two hundred and eighty-four, two hundred and eighty-four-a and two hundred and eighty-nine of this article shall constitute a misdemeanor punishable by a fine not exceeding fifty dollars. (*Subd. amended by L. 1917, ch. 174.*)

2. The violation of any of the provisions of section two hundred and eighty-seven of this article shall constitute a misdemeanor punishable by a fine not exceeding one hundred dollars.

3. Punishment for operating motor vehicle while in an intoxicated condition; for going away without stopping after accident and making himself known. Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor. Any person operating a motor vehicle who, knowing that injury has been caused to a person or damage caused to a vehicle, due to the culpability of the person operating such motor vehicle, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than five hundred dollars or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment; and if any person be convicted a second time of either of the foregoing offenses, he shall be guilty of a felony punishable by imprisonment for a term of not less than one year and not more than five years. A conviction of a violation of this subdivision shall be reported forthwith by the trial court or the clerk thereof to the secretary of state, who shall upon recommendation of the trial court suspend the license of the person so convicted or if he be an owner the certificate of registration of his motor vehicle and, if no appeal therefrom be taken, or if an appeal duly taken be dismissed, or the judgment affirmed, and upon notice thereof by said clerk, the secretary of state shall revoke such license or in the case of an owner the certificate of registration of his motor vehicle, and shall order the license or certificate of registration delivered to the secretary of state, and shall not reissue to him said license or certificate of registration or any other license or certificate of registration unless the secretary of state in his discretion, after an investigation or upon a hearing, decides to reissue or issue such license or certificate.

4. Any operator or chauffeur operating a motor vehicle while his license is suspended or revoked shall be guilty of a misdemeanor.

5. Any person who operates any motor vehicle while a certificate of registration of motor vehicle issued to him is suspended or revoked shall be guilty of a misdemeanor.

6. Upon a third or subsequent conviction of a chauffeur or operator for a violation of the provisions of section two hundred and eighty-seven, or an ordinance, rule or regulation regulating speed of motor vehicles under section two hundred and eighty-eight, the secretary of state, upon the recommendation of the trial court, shall forthwith revoke the license of the person so convicted and no new license shall be issued to such person for at least six months after the date of such conviction nor thereafter except in the discretion of the said secretary of state.

7. Any person making a false statement in the verified application for registration shall be guilty of a misdemeanor punishable by a fine of not exceeding fifty dollars.

8. Any person violating any of the provisions of any section of this article, which violation is stated separately to be a misdemeanor, is punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or by both, and for a violation of any other provision of this article, for which violation no punishment has been specified, shall be guilty of a misdemeanor punishable by a fine of not exceeding twenty-five dollars.

9. Certifying conviction to the secretary of state. Upon the conviction of any person for a violation of any of the provisions of this article the trial court or the clerk thereof shall immediately certify the facts of the case, including the name and address of the offender, the judgment of the court and the sentence imposed, to the secretary of state who shall enter the same either in the book or index of registered motor vehicles or in the book or index of registered chauffeurs, as the case may be, opposite the name of the person so convicted, and in the case of any other person, in a book or index of offenders to be kept for such purpose. If any such conviction shall be reversed upon appeal therefrom, the person whose conviction has been so reversed may serve on the secretary of state a certified copy of the order of reversal, whereupon the secretary of state shall enter the same in the proper book or index in connection with the record of such conviction. (*Subd. amended by L. 1913, ch. 1.*)

10. Release from custody, bail, et cetera. In case any person shall be taken into custody charged with a violation of any of the provisions of this article, he shall forthwith be taken before the nearest magistrate, captain, lieutenant, clerk of the court or acting lieutenant who shall have the power of a magistrate and be entitled to an immediate hearing or admission to bail, and if such hearing cannot then be had, be released from custody on giving a bond or undertaking, executed by a fidelity or surety company authorized to do business in this state, or other bail in the form provided by section five hundred and sixty-eight of the code of criminal procedure, such bond or undertaking to be in an amount not exceeding one hundred dollars, if the charge be for a misdemeanor, except as herein provided where the charge is a violation of subdivision three of section two hundred and ninety of this article, for his appearance to answer for such violation at

such time and place as shall then be indicated. In case a person is taken into custody charged with being guilty of a felony in violation of any of the provisions of this article, such bond or undertaking shall be in an amount not less than one thousand dollars. On giving his personal undertaking to appear to answer any such violation at such time and place as shall then be indicated, secured by the deposit of a sum of money equal to the amount of such bond or undertaking, or in lieu thereof, in case the person taken into custody is the owner, by leaving the motor vehicle, or in case such person taken into custody is not the owner, by leaving the motor vehicle as herein provided with a written consent given at the time by the owner who must be present, with such officer; or in case such person is taken into custody because of a violation of any of the provisions of this article other than on a charge of violating any of the provisions of subdivision three of section two hundred and ninety and such officer is not accessible, be forthwith released from custody on giving his name and address to the person making the arrest and depositing with such arresting officer the sum of one hundred dollars, or in lieu thereof, in case the person taken into custody is the owner, by leaving the motor vehicle, or, in case such person taken into custody is not the owner, by leaving the motor vehicle with a written consent at the time by the owner who must be present; provided that, in any such case, the officer making the arrest shall give a receipt in writing for such sum or vehicle deposited and notify such person to appear before the most accessible magistrate, describing him, and specifying the place and hour. In case such bond or undertaking shall not be given or deposit made by the owner or other person taken into custody, the provisions of law in reference to bail, in case of misdemeanor, shall apply. Where the charge is a violation of subdivision three of section two hundred and ninety of this article, the provisions of law in reference to bail in cases of a misdemeanor or a felony as the case may be shall apply exclusively.

11. Holding defendant to answer where magistrate has not jurisdiction to try offender; admitting to bail. In case the magistrate before whom any person shall be taken, charged with the violation of any provision of this article, shall not have jurisdiction to try the defendant, but shall hold the defendant to answer as provided by section two hundred and eight of the code of criminal procedure, he shall admit such defendant to bail upon his giving a surety company's bond or undertaking to appear to answer for such violation at such time and place as shall then be indicated, or upon his giving a written undertaking in the form provided in section five hundred and sixty-eight of the code of criminal procedure in a sum not exceeding one hundred dollars, except that in a case where the defendant is charged with a violation of any of the provisions of subdivision three of section two hundred and ninety of this article, the provisions of law in reference to bail in cases of a misdemeanor or a felony as the case may be shall apply exclusively. (*Subd. amended by L. 1913, ch. 1.*)

12. Disposition and return of bail. Such bail as may be deposited as

herein provided shall be held by the officer accepting the same or the clerk of the court. Upon the person who has been taken into custody and given security or bail for his appearance surrendering himself for trial and upon the conclusion of such trial the court shall issue to the defendant an order upon the magistrate or clerk of the court or other officer authorized to accept bail to return or deliver back said security or bail as was given.

13. A conviction of violation of any provision of this article shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle. (*Section added by L. 1910, ch. 374, and amended by L. 1917, ch. 769, in effect July 1, 1917.*)

Constitutionality.—Subdivision 3 of this section is not unconstitutional. In operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and in a case of a privilege the legislature may prescribe on what conditions it shall be exercised. *People v. Rosenheimer* (1913), 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, revg. 146 App. Div. 875, 130 N. Y. Supp. 544, 70 Misc. 433, 128 N. Y. Supp. 1093.

Return of fines and penalties.—Fines and penalties paid to state treasurer in accordance with the provisions of this section cannot be returned under the direction of the county court where the conviction has been set aside. *Rept. of Atty. Genl.* (1911) 215.

Costs; town charge.—When a fine is imposed by a justice of the peace for a criminal act in relation to the use of public highways by motor vehicles, the costs of the proceeding are properly a town charge and may not be deducted by the justice from the fine before forwarding the penalty to the state treasurer. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 436.

Operating motor vehicle while intoxicated; liability for damages.—An innocent party injured as a result of the violation of subdivision three of this section, which expressly prohibits the operation of a motor vehicle by an intoxicated person, may maintain an action for damages. In an action to recover for damages to the taxicab of plaintiff struck at a street crossing by defendant's motor vehicle which he was driving, evidence that at the time of the accident he was put under arrest in an intoxicated condition is material and its exclusion is error. It had a further bearing on defendant's negligence by reason of the testimony of a disinterested witness who testified that defendant's car was going in a "wobbly" condition at from fifty-five to sixty miles an hour, that the taxicab was near the center of the street when struck by defendant's car, and that no collision would have occurred had defendant directed his car to the rear of the taxicab. *Lincoln Taxicab Co. v. Smith* (1914), 88 Misc. 9, 150 N. Y. Supp. 86.

Amount of fine.—Under subdivision 9 providing that "any person violating any of the provisions of any section of this article . . . for which violation no punishment has been specified, shall be guilty of a misdemeanor punishable by a fine of not exceeding twenty-five dollars," an ordinance fixing a fine at a sum not over fifty dollars is illegal and beyond the power of the court to impose. *People v. Chapman* (1914), 88 Misc. 469, 152 N. Y. Supp. 204.

It is essential to a conviction under an indictment for violation of subdivision 3 of this section that the jury should be satisfied beyond a reasonable doubt not only that an injury had been caused to person or property, but that the defendant knew that such injury had been caused, and notwithstanding such knowledge left the scene of the accident without giving his name, address or license number, and that he neglected subsequently to report the injury to the nearest police station or judicial officer as the law requires. *People v. Curtis* (1916), 217 N. Y. 304, 112 N. E. 54, revg. (1915), 168 App. Div. 935, 153 N. Y. Supp. 1132.

Evidence.—Upon the trial of an indictment for a violation of this section of the law, evidence may properly be given showing how much a person was injured in an automobile collision as bearing upon the seriousness of the accident and tending to show that it ought not to have escaped the notice and attention of the defendant. The subsequent suffering of the injured person, however, and testimony as to the length of time he was compelled to remain in the hospital and the details of the medical or surgical treatment which he received should not be admitted. Error was committed in receiving the testimony to the effect that a witness saw an automobile running through a street in the city where the accident occurred about twelve o'clock on that night at a speed of forty or fifty miles an hour, where the witness did not identify the car nor state any fact which warranted the inference that it was the automobile of the defendant. *People v. Curtis* (1916), 217 N. Y. 304, 112 N. E. 54, revg. (1915), 168 App. Div. 935, 153 N. Y. Supp. 1132.

Death caused by reckless driving.—A chauffeur may be indicted and tried for murder in the first degree and convicted of manslaughter in the first degree where, while driving a high-powered motor car on a city street, he committed several misdemeanors, *i. e.*, a violation of the Highway Law in exceeding the speed limit, a violation of section 1530 of the Penal Law, and while so doing he bore down upon a boy who was playing with companions in a public street and whom he saw for a distance of a full block so that he could readily have brought his machine to a stop, struck him with great force, carried him about 150 feet before he fell to the ground, and inflicted injuries from which he died. *People v. Darragh* (1910), 141 App. Div. 408, 126 N. Y. Supp. 522, *affd.* (1911), 203 N. Y. 527, 96 N. E. 1124.

Liability of owner for misconduct of chauffeur.—Where a chauffeur, while in charge of an automobile with the owner's consent on a pleasure trip on his own account, so managed the machine that it ran into a doctor's covered carriage which stood at the side of the street in front of a house, and the doctor's driver was thrown out and injured, a charge to the jury, in an action against the owner and the chauffeur, that the owner of an automobile should be responsible for injuries caused by it by the negligence of any one whom he permits to run it in the public street, correctly lays down the rule of liability. An automobile is a dangerous machine; and the owner is liable, while it is being used with his consent by his chauffeur upon a public highway, for injuries caused thereby to a third person. *Ingraham v. Stockamore* (1903), 63 Misc. 114, 118 N. Y. Supp. 399.

§ 290-a. **Suspension and revocation of a license of operator or chauffeur.**—The secretary of state may suspend any certificate of registration, or any license, issued to any person under the provisions of this article for any of the following causes: a. For a third or subsequent violation of the speed provisions of this article or ordinance or regulation made by competent local authority within one calendar year. b. Upon the conviction of the holder of a license of a felony under this act. c. Because of some physical or mental disability of the holder arising or discovered since the original issuance of the license or its renewal, or the disability of the holder by reason of intoxication or the use of drugs. d. Because of the gross negligence of the operator whereby person or property has been injured. e. For going away without stopping and giving his name and address after causing injury to any person or damage to any vehicle. f. Operating a motor vehicle in a manner showing a reckless disregard for life or property of others. Before revoking such certificate or license, the holder thereof shall be enti-

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tled to a hearing before the secretary of state or his deputy, upon ten days' notice in writing; on the revocation of a certificate of registration or license to operate, neither the license nor the certificate shall be reissued unless upon investigation the secretary of state shall determine that the operator may again be legally permitted to operate. Upon the conviction of a person for an offense involving a third violation of section two hundred and eighty-seven of this article, within one calendar year or of operating a motor vehicle while under the influence of intoxicating liquors or drugs, or of injuring a person or property by reason of gross negligence in operating, or of going away without stopping or giving his name and address after causing injury to any person or damage to any vehicle, the secretary of state may immediately revoke the license of the person so convicted and if any person convicted of any such offense shall appeal from the decision of such trial court, the secretary of state may suspend forthwith the license of the person so convicted and appealing and may order the license delivered to him and shall not reissue the same unless such person is acquitted upon such appeal, or unless the secretary of state in his discretion shall decide that such license shall be reissued. Whenever any license or certificate shall have been revoked under the provisions of this article no new license or certificate shall be issued unless by the secretary of state to such person until after thirty days from the date of such revocation, nor thereafter except in the discretion of the secretary of state. Notice of revocation and suspension of any license or certificate of registration shall be transmitted forthwith by the secretary of state to the chief of police of the city or prosecuting officer of the locality in which the person whose license or certificate of registration so revoked or suspended, resides. (*Added by L. 1917, ch. 769, in effect July 1, 1917.*)

§ 290-b. **Certificate by magistrate.**—Upon conviction of any operator or chauffeur of a violation of this article, for any reason specified in the last preceding section as a ground for suspension or revocation of a license of an operator or chauffeur, the magistrate or other officer before whom such operator or chauffeur has been convicted, shall forthwith transmit to the secretary of state a certificate stating in detail the conviction and the reasons for such conviction, for such action as the secretary of state may determine under section two hundred and ninety-a of this act. Such certificate shall be presumptive evidence of the conviction of such operator or chauffeur. (*Added by L. 1917, ch. 769, in effect July 1, 1917.*)

§ 291. **Disposition of registration fees; fines and penalties.**—1. On the first day of each month or within ten days thereafter all fines, penalties or forfeitures collected for violations of any of the provisions of this article or of any act in relation to the use of the public highways by motor vehicles now in force or hereafter enacted, under the sentence or judgment of any court, judge, magistrate or other judicial officer having jurisdiction in the premises, shall be paid over by such court, judge, magistrate or other

judicial officer to the treasurer of the state, with a statement accompanying the same, setting forth the action or proceeding in which such moneys were collected, the name and residence of the defendant, the nature of the offense, and the fine, penalty, sentence or judgment imposed. On the first day of each month or within ten days thereafter, every judge, magistrate or clerk of a court having jurisdiction of the violation of any of the provisions of this article, shall make and forward to the treasurer of the state, a verified report of all criminal actions or proceedings instituted or tried before him or it during the preceding calendar month for violation of any of the provisions of this article, which report shall set forth the name and address of the defendants, the nature of the offenses and the fines and penalties collected or imposed by such court, judge, magistrate or judicial officer, which report shall be open to inspection during reasonable business hours to any citizen of the state. On or before the first day of February of each year, the treasurer shall transmit to each branch of the legislature a statement showing the amount of the receipts under this article during the preceding fiscal year paid into the state treasury.

2. The secretary of state shall deposit all registration fees collected by him under this article in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the secretary of state on account of the motor vehicle law. Every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the secretary of state and comptroller for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the secretary of state and comptroller may fix. Every such undertaking shall have endorsed thereon or annexed thereto the approval of the attorney-general as to its form. The secretary of state shall on the first day of each month make a verified return to the state treasurer of all registration fees received by him under this article during the preceding calendar month, stating from what county received and by whom and when paid.

3. The secretary of state shall on or before the tenth day of each month pay to the state treasurer fifty per centum of the balance to his credit in such bank, banking house or trust company, on account of registration fees collected under this article, at the close of business on the last day of the preceding month, and from the money so deposited shall pay to the treasurer of each county fifty per centum of the registration fees collected from residents of such county during the preceding calendar month. In the city of New York such payment shall be made through the chamberlain of such city on account of all counties included therein.

4. All moneys paid into the state treasury pursuant to this article shall be appropriated and used for the maintenance and repair of the improved

roads of the state, under the direction of the state commissioner of highways. All money received by the chamberlain of the city of New York, pursuant to this article, shall be paid into the treasury of the city to the credit of the general fund. All moneys received by the county treasurer of any county pursuant to this article, shall be used for the permanent construction or improvement of town highways only in such county as defined by subdivision four of section three of this chapter. The county treasurer shall, upon receipt of such moneys, keep an accurate record thereof, and shall furnish the board of supervisors of the county, upon request by it, with a certified statement of such receipts. The board of supervisors of the county shall, at a regular or special meeting and by a majority vote, allot such moneys to one or more of the towns within such county, and shall by resolution appropriate for the use of such town or towns the moneys so allotted. A certified copy of such resolution shall be filed with the county treasurer of such county, whereupon such county treasurer shall pay to the supervisor of such town or towns the amount to which each is entitled as determined and indicated by such resolution. Before receiving any such moneys the supervisor shall give a bond in accordance with the provisions of section one hundred and four of this chapter. The places and the manner in which such moneys shall be expended shall be determined by the town board and the town superintendent subject to the approval of the state commission of highways in accordance with the provisions of section one hundred and five of this chapter, which shall also govern the method by which such moneys shall be expended. A statement of the receipts and expenditures of such moneys shall be included in the report required by section one hundred and seven of this chapter. The provisions of section one hundred and eight of this chapter shall apply as to the method of keeping accounts, the forms, blanks and orders used, and the filing of records in the town clerk's office. (*Added by L. 1910, ch. 374, and amended by L. 1916, ch. 577.*)

Construction.—In the provision of subdivision 2 that "all fines, penalties, or forfeitures collected for violations of any of the provisions of this article *or of any act* in relation to the use of public highways by motor vehicles now in force or hereafter enacted," the legislature used the word "act" with reference to acts of its own making and not ordinances or regulations made by local authorities, not even statutes having only a local application. *People v. City of Buffalo* (1916), 93 Misc. 275, 157 N. Y. Supp. 938, *affd.* 175 App. Div. 218, 161 N. Y. Supp. 706.

Payment of fines and penalties collected may be made by a check and assignment of the account where the bank designated by local statute as a depository of court funds has become insolvent. *Rept. of Atty. Genl.* (1911) 79; (1911) 35.

Fines and penalties collected by local authorities for any criminal act in relation to the use of public highways by motor vehicles, whether imposed under local ordinances or state law, should be paid into the state treasury. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 382.

Subdivision 2 of this section relating to the disposition of fines collected for violations of the statute and ordinances, does not include fines and penalties collected under the provisions of the ordinances of the city of Buffalo, a city of the

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first class, and the rules and regulations of the park commissioners, and said city having retained the fines and penalties collected for violations of such ordinances, rules and regulations is not guilty of conversion in refusing to turn them over to the state treasurer. *People v. City of Buffalo* (1916), 175 App. Div. 218, 161 N. Y. Supp. 706, affg. 93 Misc. 275, 157 N. Y. Supp. 938.

Disposition of fines and penalties in cities of the first class.—Cities of the first class may not retain fines and penalties collected from violations of city ordinances regulating the use of streets by motor vehicles. Such fines and penalties should be turned over to the State Treasurer. *Opinion of Atty. Genl.* (1915) 4. But see *People v. City of Buffalo* (1916), 175 App. Div. 218, 161 N. Y. Supp. 706.

§ 292. **Rates of toll on motor vehicles.**—Where a different rate is not otherwise prescribed or permitted by law, any person or corporation maintaining a plankroad, turnpike road or bridge and authorized, or which shall be hereafter authorized, to receive tolls for the passage of vehicles over the same, may charge and receive for each and every motor vehicle propelled by any power other than animal power, passing over the same, a toll rate not greater than the maximum rate allowed by law to be charged and received for the passage of a vehicle drawn over such road or bridge by two animals, provided that for such motor vehicles designed to carry only two persons the rate of toll charged or received shall not exceed the maximum rate allowed by law to be charged and received for the passage of a vehicle drawn over such road or bridge, without a load, by a single animal. (*Added by L. 1910, ch. 374.*)

§ 293. **Acts repealed.**—All acts or parts of acts inconsistent with this article or contrary thereto are hereby expressly repealed. (*Added by L. 1910, ch. 374.*)

L. 1910, ch. 374, § 2.—This act shall take effect August first, nineteen hundred and ten, excepting that applications for registration may be made, examinations held and number plates, licenses and badges issued, at any time within ninety days prior to the time of the taking effect of this article.

ARTICLE XI-A.

(Article added by L. 1916, ch. 72.)

MOTOR CYCLES.

Section 300. Application of article.

301. Definitions.

302. Registration of motor cycles; age of operator; fees; renewals.

303. Distinctive number; form of number plates.

304. Exemption of nonresident owners.

305. Signaling and other devices; signals; rules of the road.

306. Speed permitted.

307. Local ordinances prohibited.

308. Punishment for violation; procedure.

309. Disposition of registration fees; fines and penalties; reports of criminal actions or proceedings.

309-a. Powers of inspector.

310. Acts repealed.

§ 300. Application of article.—Except as herein otherwise expressly provided, this article shall be exclusively controlling:

1. Upon the registration, numbering and regulation of motor cycles;
2. On their use of the public highways, and
3. On the accessories used upon motor cycles and their incidents and the speed of motor cycles upon the public highways;
4. On the punishment for the violation of any of the provisions of this article. (*Added by L. 1916, ch. 72.*)

§ 301. Definitions.—The term “motor cycle” as used in this article, except where otherwise expressly provided, shall include all motor cycles. A motor cycle is a vehicle with two wheels, one following the other, propelled by other than muscular power, or such vehicle with a car attached to the side, front or rear and operated on one or more additional wheels. The term “local authorities” shall include all officers of counties, cities, boroughs, towns or villages, as well as all boards, committees and other public officials of such counties, cities, boroughs, towns or villages. The term “state” as used in this article, except where otherwise expressly provided, shall also include the territories and the federal districts of the United States. The term “owner” shall also include any person, firm, association or corporation renting a motor cycle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days. The term “public highway” shall include any highway, county road, state road, public street, avenue, alley, park, parkway or public place in any county, city, borough, town or village, except any speedway which may have been or may be expressly set apart by law for the exclusive use of horses and light carriages. (*Added by L. 1916, ch. 72.*)

§ 302. Registration of motor cycles; age of operator; fees; renewals.—

1. Registration by owners. Every owner of a motor cycle which shall be operated or driven upon the public highways of this state shall, except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the secretary of state a verified application for registration on a blank to be furnished by the secretary of state for that purpose, containing: (a) A brief description of the motor cycle to be registered, including the name of the manufacturer and factory number of such vehicle; (b) the name, age, residence, including county and business address, of the owner of such motor cycle; (c) provided that, if such motor cycle is used or to be used solely for commercial purposes, the applicant shall so certify.

2. Age of operator. No person shall operate or drive a motor cycle who is under sixteen years of age.

3. Registration book. Upon the receipt of an application for registration of a motor cycle, as provided in this article, the secretary of state shall file such application in his office at Albany and such other places within the

state of New York as he may designate and register such motor cycle or motor cycles, with the name, residence and business address of the owner, together with the facts stated in such application, in a book or index to be kept for that purpose, under the distinctive number assigned to such motor cycle by the secretary of state, which book or index shall be open to public inspection during reasonable business hours.

4. Certificate of registration. Upon the filing of such application and the payment of the fee hereinafter provided, the secretary of state shall assign to such motor cycle a distinctive number and, without expense to the applicant, issue and deliver in such manner as the secretary of state may select to the owner a certificate of registration, in such form as the secretary of state may prescribe, and a number plate at a place within the state of New York named by the applicant in his application. In the event of the loss, mutilation or destruction of any certificate of registration or number plate, the owner of a registered motor cycle may obtain from the secretary of state a duplicate thereof upon filing in the office of the secretary of state an affidavit showing such fact and the payment of a fee of fifty cents.

5. Times for registration and re-registration. Registration applied for on or before April first, nineteen hundred and sixteen, shall take effect on that date and certificates issued on such application or under any application made prior to January thirty-first, nineteen hundred and seventeen, shall expire on the latter date. Registration thereafter shall be renewed annually in the same manner and upon payment of the same annual fee as provided in this section for registration, to take effect on the first day of February, in each year beginning with such date in the year nineteen hundred and seventeen; and the certificates of registration issued thereunder or issued between any such dates shall expire on the succeeding thirty-first day of January.

6. Registration fees. The following fees shall be paid to the secretary of state upon the registration or re-registration of a motor cycle in accordance with the provisions of this article: Two dollars and fifty cents upon the registration of any motor cycle of whatever horse-power, provided that if a motor cycle is originally registered after August first in any year, the register fee for that year shall be one-half of the fee herein provided for. The provisions hereof with respect to the payment of registration fees shall not apply to motor cycles owned or controlled by the state, a city or county or any of the departments thereof, but in other respects shall be applicable.

7. Fees in lieu of taxes. The registration fees imposed by this article upon motor cycles shall be in lieu of all taxes, general or local, to which motor cycles may be subject.

8. Sale and registration by vendee. Upon the sale or transfer of a motor cycle registered in accordance with this section, the vendor shall immediately give notice thereof with the name and residence of the vendee to the secretary of state, and the vendee shall, within ten days after the date

of such sale or transfer, notify the secretary of state thereof upon a blank furnished promptly by him for that purpose, stating the name and business address of the previous owner, if known, the number under which such motor cycle is registered and the name, residence, including county and business address, of the vendee. Upon filing such statement duly verified such vendee shall pay to the secretary of state a fee of one dollar, and upon receipt of such statement and fee the secretary of state shall file such statement in his office and note upon the registration book or index such change in ownership. (*Added by L. 1916, ch. 72.*)

§ 303. **Distinctive number; form of number plates.**—1. Distinctive number must be carried on motor cycles. No person shall operate or drive a motor cycle on the public highways of this state after the first day of April, nineteen hundred and sixteen, unless such motor cycle shall have a distinctive number assigned to it by the secretary of state and a number plate issued by the secretary of state with a number corresponding to that of the certificate of registration conspicuously displayed on the rear of such motor cycle, securely fastened so as to prevent the same from swinging.

2. Number plates to be changed annually. Such number plates shall be of a distinctly different color each year, and there shall be at all times a marked contrast between the color of the number plates and that of the numerals or letters thereon.

3. Form of number plate. Such number plates shall be of metal, on which there shall be the initials "N. Y.," and there shall be the distinctive number assigned to the motor cycle. The size and shape of number plates and size of letters and numerals thereon shall be determined by the secretary of state. No motor cycle shall display the number plates of more than one state at a time, nor shall any plate be used other than those issued by the secretary of state. (*Added by L. 1916, ch. 72.*)

§ 304. **Exemption of nonresident owners.**—The provisions of the foregoing sections relating to registration and display of registration numbers shall not apply to a motor cycle owned by a nonresident of this state, other than a foreign corporation doing business in this state, provided that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence relative to registration of motor cycles and the display of registration numbers thereon, and shall conspicuously display his registration numbers as required thereby. The provisions of this section, however, shall be operative as to a motor cycle owned by a nonresident of this state only to the extent that under the laws of the foreign country, state, territory or federal district of his residence like exemptions and privileges are granted to motor cycles duly registered under the laws of and owned by residents of this state. (*Added by L. 1916, ch. 72.*)

§ 305. **Signaling and other devices; signals; rules of the road.**—1. Brakes, horns and lamps, signaling at crossings. Every motor cycle, oper-

ated or driven upon the public highways of this state, shall be provided with adequate brakes in good working order and sufficient to control such motor cycle at all times when the same is in use, and a suitable and adequate bell, horn or other device for signaling, and shall, during the period from one-half hour after sunset to one-half hour before sunrise, display one lighted lamp on the front and one on the rear, or, when such motor cycle is operated with a passenger or other truck attached to the side or front, two such lamps on the front and one on the rear; and in all cases the lamps on a motor cycle shall include a red light visible from the rear. The rays of such rear lamp shall shine upon the number plate carried on the rear of such motor cycle in such manner as to render the numerals thereon visible for at least fifty feet in the direction from which the motor cycle is proceeding. The light of the front lamp or lamps shall be visible at least two hundred feet in the direction in which the motor cycle is proceeding. Every person operating or driving a motor cycle on the public highways of this state shall also, when approaching a cross road outside the limits of a city or incorporated village, slow down the speed of the same and shall sound his bell, horn or other device for signaling in such a manner as to give notice and warning of his approach.

2. Stopping on signal, and other regulations. A person operating or driving a motor cycle shall, on signal by raising the hand, from a person riding, leading or driving a horse or horses or other draft animal, bring such motor cycle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal; provided that, in case such horse or animal appears badly frightened or the person operating such motor cycle is so signaled to do, such person shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others. In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor cycle shall slow down and if it be necessary for the safety of the public he shall bring said motor cycle to a full stop. Upon approaching a pedestrian who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching an intersecting highway or a curve or a corner in a highway where the operator's view is obstructed, every person operating a motor cycle shall slow down and give a timely signal with his bell, horn or other device for signaling.

3. Rules of the road. Whenever a person operating a motor cycle shall meet on a public highway any other person riding or driving a horse or horses or other draft animals or any other vehicle, the person so operating such motor cycle shall seasonably turn the same to the right of the center of such highway so as to pass without interference. Any such person so operating a motor cycle shall, on overtaking any such horse, draft animal

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or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any such person so operating a motor cycle shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right and pass to the right of such intersection when turning to the left. (*Added by L. 1916, ch. 72.*)

§ 306. **Speed permitted.**—Every person operating a motor cycle on the public highways of this state shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person; provided, that a rate of speed in excess of thirty miles an hour for a distance of one-fourth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent. (*Added by L. 1916, ch. 72.*)

§ 307. **Local ordinances prohibited.**—Except as herein otherwise provided, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner to whom this article is applicable any tax, fee, license or permit for the use of the public highways, or excluding any such owner from the free use of such public highways, excepting such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages or in any other way respecting motor cycles or their speed upon or use of the public highways; and no ordinance, rule or regulation contrary to or in anywise inconsistent with the provisions of this article, now in force or hereafter enacted, shall have any effect; provided, however, that the power given to local authorities to regulate vehicles offered to the public for hire, and processions, assemblages or parades in the streets or public places, and all ordinances, rules and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect; and provided, further, that local authorities may set aside for a given time a specified public highway for speed contests or races, to be conducted under proper restriction for the safety of the public; and provided, further, that local authorities may exclude motor cycles from any cemetery or grounds used for the burial of the dead, and may by general rule, ordinance or regulation exclude motor cycles used solely for commercial purposes from any park or part of a park system where such general rule, ordinance or regulation is applicable equally and generally to all other vehicles used for the same purposes, and provided further that nothing in this article contained shall impair the validity or effect of any ordinances, regulating the speed of motor cycles, or of any traffic regulations with regard to the operation of motor cycles, heretofore or hereafter made, adopted or prescribed pursuant to law in any city of the first class or in any city of the second class in a county adjoining a city of the first class; provided, further, that the local authorities of other cities and in-

corporated villages may limit by ordinance, rule or regulation the speed of motor cycles on the public highways, such speed limitation not to be in any case less than one mile in four minutes, and the maintenance of a greater rate of speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent, and on further condition that each city or village shall have placed conspicuously on each main public highway where the city or village line crosses the same and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highways, bearing the words, "City of....." or "Incorporated village of.....," "Slow down to.....miles" (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, which punishment shall, during the existence of the ordinance, rule or regulation, supersede those specified in subdivision two of section three hundred and eight of this chapter but, except in cities of the first class, shall not exceed the same. Official copies of all local ordinances passed under the provisions of this subdivision shall be filed with the secretary of state at least thirty days before they shall respectively take effect and all such local ordinances shall be printed in pamphlet form and issued at regular intervals by the secretary of state. (*Added by L. 1916, ch. 72.*)

§ 308. Punishment for violation; procedure.—1. The violation of any of the provisions of sections three hundred and two and three hundred and three of this article shall constitute a misdemeanor punishable by a fine not exceeding twenty-five dollars.

2. The violation of any of the provisions of section three hundred and six of this article shall constitute a misdemeanor punishable by a fine of not exceeding twenty-five dollars.

3. Punishment for operating motor cycle while in an intoxicated condition; for going away without stopping after accident and making himself known. Whoever operates a motor cycle while in an intoxicated condition shall be guilty of a misdemeanor. Any person operating a motor cycle who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than five hundred dollars or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment; and if any person be convicted a second time of either of the foregoing offenses, he shall be guilty of a felony punishable by imprisonment

for a term of not less than one year and not more than five years. A conviction of a violation of this subdivision shall be reported forthwith by the trial court or the clerk thereof to the secretary of state, who shall upon recommendation of the trial court suspend the license of the person so convicted or if he be an owner the certificate of registration of his motor cycle and, if no appeal therefrom be taken, or if an appeal duly taken be dismissed, or the judgment affirmed, and upon notice thereof by said clerk, the secretary of state shall revoke such license or in the case of an owner the certificate of registration of his motor cycle, and shall order the license or certificate of registration delivered to the secretary of state, and shall not reissue to him said license or certificate of registration or any other license or certificate of registration unless the secretary of state in his discretion, after an investigation or upon a hearing, decides to reissue or issue such license or certificate.

4. Any person who operates any motor cycle while a certificate of registration of motor cycles issued to him is suspended or revoked shall be guilty of a misdemeanor.

5. Any person making a false statement in the verified application for registration shall be guilty of a misdemeanor punishable by a fine of not exceeding fifty dollars.

6. Upon a third or subsequent conviction of the registered owner of a motor cycle for a violation of the provisions of section three hundred and six or an ordinance, rule or regulation regulating speed of motor cycles under section three hundred and seven, the secretary of state upon the recommendation of the trial court shall forthwith revoke the license of the person so convicted and no new license shall be issued to such person for at least six months after the date of such conviction nor thereafter except in the discretion of the said secretary of state.

7. Any person violating any of the provisions of any section of this article, which violation is stated separately to be a misdemeanor, is punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or by both, and for a violation of any other provision of this article, for which violation no punishment has been specified, shall be guilty of a misdemeanor punishable by a fine of not exceeding twenty-five dollars.

8. Certifying conviction to the secretary of state. Upon the conviction of any person for a violation of any of the provisions of this article the trial court or the clerk thereof shall immediately certify the facts of the case, including the name and address of the offender, the judgment of the court and the sentence imposed, to the secretary of state, who shall enter the same in the book or index of registered motor cycles opposite the name of the person so convicted, and in the case of any other person, in a book or index of offenders to be kept for such purpose. If any such conviction shall be reversed upon appeal therefrom, the person whose conviction has been so reversed may serve on the secretary of state a certified copy of

the order of reversal, whereupon the secretary of state shall enter the same in the proper book or index in connection with the record of such conviction.

9. Release from custody, bail, et cetera. In case any person shall be taken into custody charged with a violation of any of the provisions of this article, he shall forthwith be taken before the nearest magistrate, captain, lieutenant, clerk of the court or acting lieutenant who shall have the power of a magistrate and be entitled to an immediate hearing or admission to bail, and if such hearing cannot then be had, be released from custody on giving a bond or undertaking, executed by a fidelity or surety company authorized to do business in this state, or other bail in the form provided by section five hundred and sixty-eight of the code of criminal procedure, such bond or undertaking to be in an amount not exceeding one hundred dollars, if the charge be for a misdemeanor, except as herein provided where the charge is a violation of subdivision three of section three hundred and eight of this article, for his appearance to answer for such violation at such time and place as shall then be indicated. In case a person is taken into custody charged with being guilty of a felony in violation of any of the provisions of this article, such bond or undertaking shall be in an amount not less than one thousand dollars. On giving his personal undertaking to appear to answer any such violation at such time and place as shall then be indicated, secured by the deposit of a sum of money equal to the amount of such bond or undertaking, or in lieu thereof, in case the person taken into custody is the owner, by leaving the motor cycle, or in case such person taken into custody is not the owner, by leaving the motor cycle as herein provided with a written consent given at the time by the owner who must be present, with such officer; or in case such person is taken into custody because of a violation of any of the provisions of this article other than on a charge of violating any of the provisions of subdivision three of section three hundred and eight and such officer is not accessible, be forthwith released from custody on giving his name and address to the person making the arrest and depositing with such arresting officer the sum of one hundred dollars, or in lieu thereof, in case the person taken into custody is the owner, by leaving the motor cycle, or, in case such person taken into custody is not the owner, by leaving the motor cycle with a written consent at the time by the owner who must be present; provided that, in any such case, the officer making the arrest shall give a receipt in writing for such sum or motor cycle deposited and notify such person to appear before the most accessible magistrate, describing him, and specifying the place and hour. In case such bond or undertaking shall not be given or deposit made by the owner or other person taken into custody, the provisions of law in reference to bail, in case of a misdemeanor, shall apply, where the charge is a violation of subdivision three of section three hundred and eight of this article, the provisions of law in reference to bail in cases of a misdemeanor or a felony as the case may be shall apply exclusively.

10. Holding defendant to answer where magistrate has not jurisdiction

to try offender; admitting to bail. In case the magistrate before whom any person shall be taken, charged with the violation of any provision of this article, shall not have jurisdiction to try the defendant, but shall hold the defendant to answer as provided by section two hundred and eight of the code of criminal procedure, he shall admit such defendant to bail upon his giving a surety company's bond or undertaking to appear to answer for such violation at such time and place as shall then be indicated, or upon his giving a written undertaking in the form provided in section five hundred and sixty-eight of the code of criminal procedure in a sum not exceeding one hundred dollars, except that in a case where the defendant is charged with a violation of any of the provisions of subdivision three of section three hundred and eight of this article, the provisions of law in reference to bail in cases of a misdemeanor or a felony as the case may be shall apply exclusively.

11. Disposition and return of bail. Such bail as may be deposited as herein provided shall be held by the officer accepting the same or the clerk of the court. Upon the person who has been taken into custody and given security or bail for his appearance surrendering himself for trial and upon the conclusion of such trial the court shall issue to the defendant an order upon the magistrate or clerk of the court or other officer authorized to accept bail or return or deliver back said security or bail as was given.

12. A conviction of violation of any provision of this article shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor cycle. (*Added by L. 1916, ch. 72.*)

§ 309. Disposition of registration fees; fines and penalties; reports of criminal actions or proceedings.—1. Of the registration fees collected as herein provided, fifty per centum shall be paid by the secretary of state into the state treasury as provided in the state finance law. The remaining fifty per centum of each fee shall be paid by the secretary of state, on the first day of each month or within ten days thereafter, to the treasurer of the county in which the person paying the fee resides, unless such person resides in a county wholly contained within a city, in which case such fifty per centum shall be so paid to the chamberlain or other chief fiscal officer of such city.

2. All fines, penalties or forfeitures collected for violations of any of the provisions of this article or of any act in relation to the use of the public highways by motor cycles now in force or hereafter enacted, under the sentence or judgment of any court, judge, magistrate or other judicial officer having jurisdiction in the premises, whether imposed by statute or local ordinance, rule or regulation, shall be apportioned as follows: Fifty per centum to the state and fifty per centum to the county wherein the violation occurred, unless the same occurred in a county wholly contained within the boundaries of a city, in which case such fifty per centum shall be paid to such city. Such moneys shall be paid over by such court, judge,

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magistrate or other judicial officer, according to such apportionment, on the first day of each month or within ten days thereafter, as follows: The amount due the state, to the state treasurer, and the amount due to a county or city to the treasurer of the county or chamberlain or other chief fiscal officer of the city. Each such payment shall be accompanied with a statement, setting forth the actions or proceedings in which the moneys so paid were collected, the name and residence of the defendant in each case, the nature of the offense, and the fine, penalty, sentence or judgment imposed.

3. The portion of the fees, fines, penalties and forfeitures paid into the state treasury under this section shall be appropriated and used for the maintenance and repair of the improved roads of the state, under direction of the state commission of highways. The portion of the fees, fines, penalties and forfeitures paid to a county under this section shall be used exclusively for the maintenance and repair of state and county highways within the county and be subject to the draft of the state commission of highways. The portion of such fees, fines, penalties and forfeitures paid to a city wholly containing within its boundaries one or more counties shall be available for the ordinary expenses of such city unless otherwise specially provided by law.

4. On the first day of each month or within ten days thereafter, every judge, magistrate or clerk of a court having jurisdiction of the violation of any of the provisions of this article, shall make and forward to the treasurer of the state, a verified report of all criminal actions or proceedings instituted or tried before him or it during the preceding calendar month for violation of any of the provisions of this article, or of any statute or local ordinance, rule or regulation, which report shall set forth the name and address of the defendants, the nature of the offenses and the fines or penalties collected or imposed by such court, judge, magistrate or judicial officer, which report shall be open to inspection during reasonable business hours to any citizen of the state. On or before the first day of February of each year, the treasurer shall transmit to each branch of the legislature a statement showing the amount of receipts under this article during the preceding fiscal year paid into the state treasury. (*Added by L. 1916, ch. 72.*)

§ 309-a. Powers of inspector.—Any employee in the motor vehicle bureau of the office of the secretary of state, designated by the secretary of state as inspector of motor vehicles and who receives compensation from the state for such employment, is hereby declared to be a peace officer within the provisions of section one hundred and fifty-four of the code of criminal procedure. (*Added by L. 1917, ch. 243, in effect Apr. 23, 1917.*)

§ 310. Acts repealed.—All acts or parts of acts inconsistent with this article or contrary thereto are hereby expressly repealed. (*Added by L. 1916, ch. 72.*)

ARTICLE XII.

MISCELLANEOUS PROVISIONS.

Section 320. Construction or improvement of highways by county and town.

- 320-a. County system of roads.
- 321. When commissioners do not act.
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- 323. Drivers, when to be discharged.
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- 325. Owners of certain carriages liable for acts of drivers.
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- 327. Entitled to free use of highways.
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- 330. Injuries to highways.
- 331. When town not liable for damages.
- 331-a. Excessive loads on unsafe bridges.
- 332. Law of the road.
- 333. Trees; to whom they belong.
- 334. Injuring fruit or shade trees.
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- 339. Borrowing money; bonds.
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- 341. Roads so acquired to be part of highway system.
- 342. When road is in two or more counties.
- 343. Albany post road; railroad tracks thereon.
- 344. Lighting roads, highways and bridges.

§ 320. Construction or improvement of highways by county and town.—

The board of supervisors of a county may provide for the construction or improvement of a highway or section thereof in one or more towns of the county or of a highway laid out along the boundary line between a city or village and a town or towns, at the joint expense of the county and town, as provided in this section. The board may, by resolution, direct the district or county superintendent to examine such highway or sections thereof, and report thereon, and if the board considers such highway or section thereof, to be of sufficient importance to be constructed or improved as provided herein, it shall direct such district or county superintendent to prepare or cause to be prepared maps, plans, specifications and estimates therefor and such district or county superintendent shall, subject to the direction and control of the board of supervisors, have the same powers and duties with respect to such highway or section thereof as are given the division engineer with respect to state and county highways in section one hundred and twenty-five of this chapter. Such maps, plans and specifications may provide for the change in grade of a highway already existing

if thereby a lessened gradient may be obtained without decreasing the usefulness of the highway. Upon the completion of such preliminary maps, plans, specifications and estimates they shall be submitted to the board of supervisors for approval, and such board may thereupon adopt a resolution providing for the construction or improvement of such highway in accordance with such maps, plans, specifications and estimates or in accordance with such maps, plans, specifications and estimates as may be approved by it. The board of supervisors shall award contracts for the construction or improvement of such highway and the provisions of section one hundred and thirty of this chapter shall apply so far as may be to such contracts and the award, execution and fulfillment thereof. Such contract may be awarded to the town board of any town in which such highway or section thereof is located and the provisions of section one hundred and thirty-one of this chapter shall apply thereto as far as may be. The board of supervisors shall determine the portion of the cost of the construction or improvement of such highway to be borne by the county and the portion to be borne by the town or towns in which such highway is located. The cost of the portion constructed or improved within the boundaries of a city shall be borne by the county. The amount to be borne by the county shall be levied and collected as a county charge and paid into the county treasury. The amount to be borne by the town or towns in which the highway is located shall be levied and collected as a town charge and, when collected shall be paid into the county treasury. If such highway or section thereof deviate from the line of a highway already existing, the board of supervisors shall acquire land for the requisite right of way, and such board may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction or improvement of such highway or section thereof, or for spoil banks, together with a right of way to such spoil banks and to any bed, pit, quarry or other place where such gravel, stone or other material may be located, and the provisions of sections one hundred and forty-eight to one hundred and fifty-five, both inclusive, shall apply to the acquisition of such lands as far as may be, except that the cost of such lands and the expenses incident to acquiring the same shall be deemed a part of the cost of the construction or improvement of such highway under the provisions of this section. If the construction or improvement of such highway involve the elimination of a grade crossing the portion of the cost of such elimination and the construction of a new crossing chargeable to the town in pursuance of law shall be deemed a part of the cost of the construction or improvement of such highway under the provisions of this section. The amount so paid by the town shall not be considered in determining the minimum amount to be levied and collected in each year for the repair and improvement of highways as provided in section ninety-four of this chapter nor shall such amount be considered in determining the amount to be paid by the state to the town for the repair and improvement of highways therein. The

board of supervisors may by resolution authorize the county treasurer of the county or the supervisors of the respective towns to borrow money on the faith and credit of the county or of such towns by temporary loan in anticipation of the next succeeding tax levy or of an issue of bonds before such levy, or by the issue and sale of bonds, to pay the portion of the cost of such construction or improvement to be borne respectively by the county or such town or towns. Such resolution may also provide for the issue and sale of such bonds and shall conform so far as may be with the provisions of this chapter relating to a resolution authorizing a town to borrow money to pay its share of the cost of construction or improvement of a county highway. The construction or improvement authorized by such resolution shall be done under the supervision and direction of the district or county superintendent. Payments therefor shall be made from time to time by the county treasurer upon the certificate of the district or county superintendent indorsed by the chairman of the board of supervisors.

Such highways, when completed and accepted by the board of supervisors, shall be thereafter repaired and maintained by the towns wherein such highways are located in the same manner as all other town highways; except there shall be raised annually by the county and by the town a tax of not less than one hundred dollars per mile for each mile of highways improved in a town under the provisions of this section. The amount thereof to be borne by the county or by the town shall be apportioned by the board of supervisors. The portion to be borne by the county shall be levied and collected in the same manner as other county taxes and shall be paid into the county treasury. The resolution providing for the collection of such taxes shall also indicate the amount which shall be paid to each town and a certified copy thereof shall be filed with the county treasurer. The amount thereof to be borne by the town shall, by resolution of the town board, be paid from any funds in such town that may be legally used for highway purposes. (*Amended by L. 1912, ch. 534, L. 1914, ch. 198, and L. 1917, ch. 558, in effect May 18, 1917.*)

Source.—New.

References.—Form of resolution authorizing issue of obligations, County Law, § 14. Resolution of board of supervisors to have title prefixed, *Id.* § 17.

Acquisition of lands.—County authorities are recognized as the parties to acquire the necessary land in certain instances for the extension or change in county roads, whether receiving state aid or not. *County of Nassau v. Luessen* (1910), 69 Misc. 184, 125 N. Y. Supp. 206.

§ 320-a. County aid for construction, improvement and maintenance of town highways.—The board of supervisors of a county may aid a town or towns in the construction or improvement of a highway or highways therein, and shall designate the highway or highways which the town or towns are to construct or improve by the aid of the county. Such county may prepare a map of the system of highways thus to be improved in that county.

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The board may by resolution direct the county superintendent to supervise the preparation of grade and culvert work of a road so designated by said map for improvement, by the town superintendent of the town in which such improvement shall be made, and upon the completion thereof by the town, and the county superintendent's certification that the road is so prepared and the town is equipped with sufficient machinery to properly perform the work, such machinery to be furnished by the town and used during the road's construction, the board may, by resolution, order the construction of an improved road under the direction of a committee known as the highway officials of the county as hereinafter provided. The construction work shall be under the charge and supervision of the town superintendent of the town in which the work is being done. If for any cause the town superintendent is incapacitated or in the opinion of the county superintendent is incompetent * to properly take charge of the

* So in original.

work, some competent person shall be designated by the county superintendent by and with the advice and consent of the town board and the compensation of the town superintendent or person in charge shall be a town charge.

The employment of convict labor on roads so constructed shall be authorized and permitted, in the discretion of the superintendent of state prisons, upon the requisition of the county superintendent of highways. The board of supervisors of Erie county shall have power, if they deem it proper, to employ convicts, sentenced to be confined in a penitentiary situate within the territorial limits of such county and liable to be employed at hard labor, upon any highway or work connected therewith within such county, and such board of supervisors shall have power to make all necessary appointments, rules and regulations for such employment within such county, including the right to fix a per diem compensation for such employment at a rate not to exceed ten cents.

The highway officials of the county under this section shall consist of the county superintendent, three members of the board, appointed by the chairman. The supervisor of the town in which a road is being improved shall be a member of the said committee on all questions involving the work in the town of which he is the supervisor.

Unless the advice and direction of the highway officials shall be followed in the prosecution of the work, no liability therefor shall accrue to the county for its share of the cost of work.

Upon ordering the construction of an improved road under this section, the board of supervisors shall, by resolution, determine the proportions thereof to be borne by the county and town or towns respectively. The part, if any, to be borne by a town, as shown by such determination, shall be a town charge, and the residue shall be a county charge. The amounts to be borne by the county shall be provided for by a tax, to be levied upon the taxable property of the county and collected in the same manner as

for other county charges and shall be paid into the county treasury. The amount thereof to be borne by the town shall, by resolution of the town board, be paid from any funds in such town that may be legally used for highway purposes. The board of supervisors may, in its discretion, appropriate and make immediately available from county funds either the whole of the moneys to complete the construction of such road or the part thereof to be provided by the county. If it shall determine that sufficient moneys are not available to pay the amount appropriated, or a specified part thereof, after defraying other county expenses, it may direct the county treasurer to borrow the same, in anticipation of taxes or of the proceeds of bonds to be issued as hereinafter provided, and to pledge the faith and credit of the county for the payment of the amount when due, with interest, and issue temporary certificates of indebtedness therefor. The board may, by resolution, authorize the issuance and sale of bonds of the county for the amount appropriated or for any part thereof, which may be the whole of such additional amount needed for the completion of such improvement or the county's share thereof or a part of such share. The proceeds of such bonds shall be paid into the county treasury and applied to the cost of such improvement or to the payment and redemption of certificates of indebtedness, if any, issued as above provided. Upon petition of the town board of a town in which any part of the improved road is located, the board of supervisors may, by resolution, authorize the town to borrow a sufficient sum, to be specified in the resolution, for paying its share of such improvement, not exceeding the estimate above provided for of the town's share of the amount needed for completing an improvement which shall have been ordered by the board of supervisors. Town bonds may be issued and sold by the supervisor, in the name of the town, for the amount so authorized. The proceeds thereof shall be paid into the county treasury and be a part of the fund to be applied to the cost of such improvement within the town or to the payment and redemption of county bonds, if any, issued to pay the share of such town. County or town bonds issued under the foregoing provisions shall be payable not more than thirty years from their date and shall be sold for not less than par. The board of supervisors shall, from time to time, impose upon the taxable property of the county a tax sufficient to pay at maturity any such county bonds, and interest, and upon the taxable property of any town a tax sufficient to pay at maturity any such bonds of the town, and interest. Payments from time to time by the county treasurer of moneys provided for under this section shall be made for the prosecution of such work upon the certificate of the district or county superintendent countersigned by the chairman of the highway officials committee. Said orders shall be drawn to the order of the supervisors of the respective towns where roads are being constructed to be disbursed by them, upon the orders of the town superintendent or person designated in his stead, in accordance with the agreement as provided by section one hundred and five of this chapter and accounted for

in the supervisor's annual report as provided by section one hundred and seven of this chapter.

Such highways, when completed and accepted by the board of supervisors, shall be thereafter repaired and maintained by the towns wherein such highways are located in the same manner as all other town highways; except there shall be raised annually by the county and by the town a tax of not less than one hundred dollars per mile for each mile of highways improved in a town under the provisions of this section. The amount thereof to be borne by the county or by the town or towns shall be apportioned by the board of supervisors. The part, if any, to be borne by a town or towns, as shown by such apportionment, shall be a charge against the town or towns and the residue shall be a county charge. The amount to be borne by the county shall be provided for by a tax levied upon the taxable property of the county and collected in the same manner as for other county charges and shall be paid into the county treasury. The amount thereof to be borne by the town shall, by resolution of the town board, be paid from any funds in such town that may be legally used for highway purposes. The resolution providing for such apportionment shall also indicate the amount which shall be paid to each such town, and a certified copy thereof shall be filed with the county treasurer. On receipt of such money the supervisor shall credit the amount to the town highway fund to be paid out on the written order of the town superintendent in accordance with agreement which is provided by section one hundred and five of this chapter and shall be accounted for in the supervisor's annual report as provided by section one hundred and seven of this chapter. (*Added by L. 1914, ch. 61, and amended by L. 1915, ch. 556, L. 1916, ch. 458, and L. 1917, ch. 231, in effect Apr. 20, 1917.*)

§ 321. **When commissioners do not act.**—When a commissioner or other officer appointed by a court under this chapter shall neglect or be prevented from serving, the courts which appointed him shall appoint another in his place.

Source.—Former Highway L. (L. 1890, ch. 568) § 151, without change.

References.—Commissioners appointed to lay out, alter or discontinue highway, Highway Law, § 193. Commissioners appointed in proceeding to acquire lands for right of way for state and county highway, Id. § 151.

§ 322. **Intemperate drivers not to be engaged.**—No person owning any carriage for the conveyance of passengers, running or traveling upon any highway or road, shall employ, or continue in employment, any person to drive such carriage who is addicted to drunkenness, or to the excessive use of spirituous liquors; and if any such owner shall violate the provisions of this section, he shall forfeit at the rate of five dollars per day, for all the time during which he shall have kept any such driver in his employment.

Source.—Former Highway L. (L. 1890, ch. 568), § 158, without change. Originally revised from R. S., pt. 1, ch. 20, tit. 13, § 2.

§ 323. **Drivers, when to be discharged.**—If any driver, while actually employed in driving any such carriage, shall be guilty of intoxication, to such a degree as to endanger the safety of the passengers in the carriage, the owner of such carriage shall, on receiving written notice of the fact, signed by any one of said passengers, and certified by him on oath, forthwith discharge such driver from his employment; and every such owner, who shall retain, or have in his service within six months after the receipt of such notice, any driver who shall have been so intoxicated, shall forfeit at the rate of five dollars per day, for all the time during which he shall keep any such driver in his employment after receiving such notice.

Source.—Former Highway L. (L. 1890, ch. 568) § 159, without change. Originally revised from R. S., pt. 1, ch. 20, tit. 13, § 3.

§ 324. **Leaving horses without being tied.**—No driver of any carriage used for the purpose of conveying passengers for hire shall leave the horses attached thereto, while passengers remain in the same, without first making such horses fast with a sufficient halter, rope or chain, or by placing the lines in the hands of some other person so as to prevent their running; and if any such driver shall offend against the provisions of this section, he shall forfeit the sum of twenty dollars.

Source.—Former Highway L. (L. 1890, ch. 568) § 160, without change. Originally revised from R. S., pt. 1, ch. 20, tit. 13, § 5.

§ 325. **Owners of certain carriages liable for acts of drivers.**—The owners of every carriage running or traveling upon any turnpike, road or highway, for the conveyance of passengers, shall be liable jointly and severally, to the party injured, for all injuries and damages done by any person in the employment of such owners, as a driver, while driving such carriage, whether the act occasioning such injury or damage be wilful or negligent, or otherwise, in the same manner as such driver would be liable.

Source.—Former Highway L. (L. 1890, ch. 568) § 161, without change. Originally revised from R. S., pt. 1, ch. 20, tit. 13, § 6.

At common law the owner was liable for the negligent but not wilful acts of his driver; the statute making the owner liable for wilful acts applies to owners of carriages for conveyance of passengers only. *Wright v. Wilcox* (1838), 19 Wend. 343; *Mall v. Lord* (1868), 39 N. Y. 381.

Street cars.—The conductor or motorman of a street car is not a driver of a carriage within the meaning of this section. *Isaacs v. Third Ave. R. R. Co.* (1871), 47 N. Y. 122; *Whitaker v. Eighth Ave. R. R. Co.* (1873), 51 N. Y. 295.

§ 326. **Term "carriage" defined.**—The term "carriage" as used in this article shall be construed to include stage coaches, wagons, carts, sleighs, sleds, automobiles or motor vehicles, and every other carriage or vehicle used for the transportation of persons and goods, or either of them, and bicycles, tricycles and all other vehicles propelled by manumotive or pedomotive power, or by electricity, steam, gasoline or other source of energy.

Source.—Former Highway L. (L. 1890, ch. 568) § 162, as amended by L. 1901, Vol. III—61

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ch. 531, without change. Originally revised from R. S., pt. 1, ch. 20, tit. 13, § 7; L. 1887, ch. 704, § 1.

Section applied to a bicycle. *Rooks v. Houston*, West St. R. R. Co. (1896), 10 App. Div. 98, 41 N. Y. Supp. 824; *Rogers v. City of Binghamton* (1905), 101 App. Div. 352, 92 N. Y. Supp. 179, *affd.* (1906) 186 N. Y. 595, 79 N. E. 1115; *Lechner v. Village of Newark* (1896), 19 Misc. 452, 44 N. Y. Supp. 556.

Section cited.—*Mallory v. Haynes* (1916), 170 App. Div. 587, 156 N. Y. Supp. 318; *Andrews v. Cohen* (1914), 163 App. Div. 580, 587, 148 N. Y. Supp. 1028.

§ 327. Entitled to free use of highways.—The commissioners, trustees or other authorities having charge or control of any highway, public street, park, parkway, driveway, or place, shall have no power or authority to pass, enforce or maintain any ordinance, rule or regulation by which any person using a bicycle or tricycle shall be excluded or prohibited from the free use of any highway, public street, avenue, roadway, driveway, parkway, park, or place, at any time when the same is open to the free use of persons having and using other pleasure carriages, except upon such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages. But nothing herein shall prevent the passage, enforcement or maintenance of any regulation, ordinance or rule, regulating the use of bicycles or tricycles in highways, public streets, driveways, parks, parkways, and places, or the regulation of the speed of carriages, vehicles or engines, in public parks and upon parkways and driveways in the city of New York, under the exclusive jurisdiction and control of the department of parks of said city, nor prevent any such commissioners, trustees or other authorities in any other city from regulating the speed of any vehicles herein described in such manner as to limit and determine the proper rate of speed with which such vehicle may be propelled nor in such manner as to require, direct or prohibit the use of bells, lamps and other appurtenances nor to prohibit the use of any vehicle upon that part of the highway, street, park, or parkway, commonly known as the footpath or sidewalk.

Source.—Former Highway L. (L. 1890, ch. 568) § 163, as amended by L. 1901, ch. 531; L. 1903, ch. 625; L. 1905, ch. 540.

References.—Municipal ordinances regulating the use of bicycles, tricycles and similar vehicles, General Municipal Law, §§ 180–182. Riding bicycle on sidewalks or footpath, Penal Law, 1907–1909. Regulation of use of streets and highways by motor and other vehicles, General Highway Traffic Law, ante, p. 3234. Operation of bicycles on streets and highways, *Id.* § 19.

Use of bicycle in highway.—The language of the statute recognizes the absolute rights of the bicycle in the main part of the highway, but it also seems to recognize the peculiar sphere of the bicycle as a vehicle by vesting local authorities with discretionary power to grant the thing which may be prohibited. *Lechner v. Village of Newark* (1896), 19 Misc. 452, 44 N. Y. Supp. 556. For enforcement of penal provision prohibiting use of bicycle on sidewalk, see *People v. Meyer* (1899), 26 Misc. 117, 56 N. Y. Supp. 1097; *Fuller v. Redding* (1896), 16 Misc. 634, 39 N. Y. Supp. 109, *revd.* (1897), 13 App. Div. 61, 43 N. Y. Supp. 96. For power of local authorities to regulate use of bicycle on sidewalks, see *People v. Meyer* (1899), 26 Misc. 117, 56 N. Y. Supp. 1097.

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A person riding on a bicycle may lawfully ride on the aperture between the rails provided for the cable, commonly called the slot. *Rooks v. Houston*, West St. R. R. Co. (1896), 10 App. Div. 98, 41 N. Y. Supp. 824. New York City park authorities may prohibit use of bicycle on the "Speedway." *Doll v. Devery* (1889), 27 Misc. 149, 57 N. Y. Supp. 767.

An abutting owner, owning the fee of a highway to its center, is not entitled to compensation for the construction of a side path in front of his premises, as a highway is impliedly dedicated to those uses which the public may require in the future, and bicycles have become a public use. A portion of a highway may be set aside for the use of bicycles in the same manner as for the use of pedestrians. *Ryan v. Preston* (1900), 32 Misc. 92, 66 N. Y. Supp. 162, *affd.* (1901), 59 App. Div. 97, 69 N. Y. Supp. 100.

§ 328. Depositing ashes, stones, sticks, or other rubbish upon the highway.—Any person who shall deposit or throw loose stones in the gutter or grass adjoining a highway, or shall deposit or throw upon a highway, ashes, papers, stones, sticks or other rubbish, shall be liable to a penalty of ten dollars to be sued for and recovered by the town superintendent. No stone or other rubbish shall be drawn to and deposited within the limits of any highway, except for the purpose of filling in a depression or otherwise improving the highway, without the consent and under the direction of the town superintendent.

Source.—The last sentence is from former Highway L. (L. 1890, ch. 568) § 165, as added by L. 1898, ch. 352. The rest of the section is a substitute for former Highway L. (L. 1890, ch. 568) § 20, subd. 5.

§ 329. Traction engines on highways.—The owner of a steam roller, steam traction engine, any other machinery propelled or driven by steam, or of any gasoline driven traction engine, his servant or agent, shall not allow, permit or use the same, to pass over, through or upon any public highway or street except upon railroad tracks, unless such owner or his agents or servant shall send before the same a person of mature age, at least one-eighth of a mile in advance, who shall notify and warn persons traveling and using such highway or street with horses or other domestic animals, of the approach thereof, and at night such person shall carry a red light, except in incorporated villages and cities. (*Amended by L. 1914, ch. 64.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 155, as amended by L. 1901, ch. 531, without change. Originally revised from L. 1866, ch. 269, §§ 1-3.

Reference.—Violation of section a misdemeanor, Penal Law, § 1425, subd. 11.

Purpose and effect of section.—Section is directed against traction engines, and does not include automobiles. *Nason v. West* (1900), 31 Misc. 583, 65 N. Y. Supp. 651. This section and the provision of the Penal Law (§ 1425, subd. 11) making its violation a misdemeanor show that by common consent a steam roller is considered a dangerous thing to be taken through the streets, and emphasizes to whomever does so the necessity of giving such warning as will prevent those driving horses from unexpectedly meeting it. As to whether such warning was given is a question of fact for the jury. *Mullen v. Village of Glens Falls* (1896), 11 App. Div. 275, 42 N. Y. Supp. 113; *Rice v. Buffalo Steel House Co.* (1897), 17 App. Div. 462, 45 N. Y. Supp. 277.

The mere presence and use, by a municipal corporation, on one of its public

streets, of a steam roller does not render the street defective within the meaning of the statute (*vide* section 74, ante). *Mullen v. Village of Glens Falls* (1896), 11 App. Div. 275, 42 N. Y. Supp. 113.

Damages for failure to comply.—Where a steam roller is used upon the highway without sending a person ahead to warn travelers of its approach, and the plaintiff's horse is frightened thereby, a verdict for the plaintiff is warranted if there be no contributory negligence on his part. *Buchanan's Sons v. Cranford Co.* (1906), 112 App. Div. 278, 98 App. Div. 378.

Failure to give warning of approach of steam roller.—Where plaintiff, while running a steam roller on a highway, was injured by a collision with a trolley car as he was crossing the track, and no notice was given of the approach of the roller by sending a person in advance as is required by this section and subdivision 11 of section 1425 of the Penal Law, these statutes are proper subjects for consideration by the jury on the question of plaintiff's negligence. *Kelley v. N. Y. State Railways* (1913), 207 N. Y. 342, 100 N. E. 1115.

§ 329-a. **Lights on vehicles.**—Every vehicle on wheels whether stationary or in motion, while upon any public street, avenue, highway or bridge, shall have attached thereto a light or lights to be visible from the front and from the rear from one hour after sunset to one hour before sunrise; provided, however, that this section shall not apply to a vehicle designed to be propelled by hand or to a vehicle designed principally for the transportation of hay or straw while loaded with such commodities. Upon the written application and presentation of reasons therefor by the owner of the vehicle, the state commission of highways may in writing, and subject to such requirements as it may elect to impose, but without expense to the applicant, except said vehicle from the provisions of this section for such period of time as the commission may determine. The provisions of this section shall apply to all cities, towns, and villages of the state except the city of New York. Nothing in this section shall be construed to affect the provisions of any existing statute, rule, or regulation requiring lights on motor vehicles or affecting the obligations of operators or occupants thereof. A person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed ten dollars. (*Added by L. 1914, ch. 32, and amended by L. 1915, ch. 367.*)

Reference.—Nature of lamps to be used on motor vehicles, see § 286, ante as amended by L. 1917, ch. 785 (Anti-glare Law).

Lights on bicycles.—Bicycles are comprehended by the provisions of the new law requiring that lights be displayed on vehicles after dark. The law clearly contemplates that a single light only need be carried at the front, if visible from the rear. *Opinion of Atty. Genl.* (1914) 213.

Collision between automobile and unlighted wagon while passing at a turn in the road; contributory negligence; failure to have light on wagon.—Where, in an action for negligence, it appears that the defendant's automobile, properly lighted, collided with decedent's horse-drawn wagon which carried no light, as required by statute, as they were passing at a turn in the road, due to the defendant's being too far toward the left side, it was error for the court to refuse to charge "that the failure to have a light on the plaintiff's vehicle is *prima facie* evidence of contributory negligence on the part of the plaintiff." The absence of the light on the wagon was under the circumstances a contributory cause, for the statute intended that

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such a light should be a signal to aid a person operating a motor vehicle to "turn the same to the right of the center of such highway so as to pass without interference." *Martin v. Herzog* (1917), 176 App. Div. 614, 163 N. Y. Supp. 189.

§ 330. Injuries to highways.—Whoever shall injure any highway or bridge maintained at the public expense, by obstructing or diverting any creek, water-course or sluice, or by dragging logs or timber on its surface, or by drawing or propelling over the same a load of such weight as to injure or destroy the culverts or bridges along the same, or of such weight that will destroy, break or injure the surface of any improved state, county or town highway, or by any other act, or shall injure, deface or destroy any mile-stone or guide-post erected on any highway, shall for every such offense forfeit treble damages. (*Amended by L. 1910, ch. 568.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 153, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, §§ 128-130.

References.—Erection of guide-posts by superintendent, Highway Law, § 68. Injury to milestone or guide-post punishable by imprisonment for not more than two years, Penal Law, § 1423, subd. 6. Wilful or malicious injury to highway or bridge punishable by imprisonment for not more than two years, *Id.* § 1423. Depositing of injurious substances in highway a misdemeanor, *Id.* § 1434.

Action for treble damages.—The treble damages are merely cumulative, and may be waived and the single damages sued for. *Dygert v. Schenck* (1840), 23 Wend. 446. An action for injury to a bridge can only be prosecuted by the town superintendent in the name of the town; it is improper to join him as party plaintiff. *Town of Palatine v. Canajoharie W. S. Co.* (1904), 90 App. 548, 86 N. Y. Supp. 412, *affd.* (1906), 184 N. Y. 582, 77 N. E. 1197.

Liability to third persons.—The owner of the fee of the highway may dig a ditch across it; all the public can require is that he restore the road to as good condition as it was before. But if such restoration is made by building a bridge over the ditch he must keep the bridge in good condition, and if he fail to do so he is liable if any injury occurs because of it. *Dygert v. Schenck* (1840), 23 Wend. 446. It is essential that special damages be alleged and proved; and an individual may sue for an obstruction to a public highway where special damages have resulted to him, and where he has expended money in removing obstructions so that he could travel on the road. *Lansing v. Wiswall* (1848), 5 Den. 213.

§ 331. When town not liable for damages.—No town shall be liable for any damage resulting to person or property by the reason of the breaking of any bridge, sluice or culvert, by transportation on the same of any traction engine, portable piece of machinery, or of any vehicle or load, together weighing eight tons or over, but any owner thereof or other person engaged in transporting or directing the same shall be liable for all damages resulting therefrom.

Source.—Former Highway L. (L. 1890, ch. 568) § 154, without change. Originally revised from L. 1887, ch. 526, § 1, as amended by L. 1890, ch. 210.

Application of section.—This section does not apply to bridges constructed by a railroad company to restore an appropriated highway to its former state, but only to bridges of a town maintained at public expense. *Bush v. D., L. & W. R. R. Co.* (1901), 166 N. Y. 210, 59 N. E. 838; *Lee v. D., L. & W. R. R. Co.* (1901), 62 App. Div. 624, 71 N. Y. Supp. 120. Section cited to show that a railroad company is required to construct bridges of such strength only as will support vehicles that

ordinarily pass over highways. *People ex rel. W. N. Y. & P. R. R. Co. v. Adams* (1895), 88 Hun 122, 34 N. Y. Supp. 579, *affd.* (1895), 147 N. Y. 722, 42 N. E. 725.

Evidence as to weight of load.—In an action against a town, for injury received by a collapse of a bridge, it appeared that a traction engine weighing three and one-half tons was upon the bridge, that it was hauling a threshing machine weighing about one and one-half tons, and that at the time the accident occurred the engine alone was on the bridge; it was held that evidence may be introduced to show how much was added to the weight of the engine by reason of the effort of the engine to haul the weight of the threshing machine. *Heib v. Town of Big Flats* (1901), 66 App. Div. 88, 73 N. Y. Supp. 86. See also *Vandewater v. Town of Wappinger* (1902), 69 App. Div. 325, 74 N. Y. Supp. 699. A verdict against a town for the death of a driver caused by the breaking of a bridge, will be reversed when it appears that the weight of the wagon and load, as determined by scales which had been repaired six months before the accident and were found to be correct six months after, was over four tons. *Kelly v. Town of Saugerties* (1906), 110 App. Div. 561, 97 N. Y. Supp. 177.

Application to bridges maintained by state.—*Quare*, as to whether the statutes giving immunity to towns for damages resulting from the fall of a bridge caused by vehicles exceeding certain weights apply to the State or any person or corporation maintaining bridges. In any event, where a person driving a traction engine weighing in the neighborhood of five tons over a canal bridge owned by the State was killed when the bridge collapsed, the State cannot escape liability on the theory that it was entitled to the protection of the statutes aforesaid where at the time of the accident the statutory load which a town bridge was required to bear was eight tons. Assuming that the statutory load which a town bridge must bear applies also to highway bridges across a canal maintained by the State, the State was negligent in allowing the bridge to remain in a condition where it would not bear the statutory load of eight tons for 104 days after the statute establishing that load went into effect. *O'Ryan v. State of New York* (1911), 148 App. Div. 542, 132 N. Y. Supp. 1098.

This section is limited to town bridges and does not apply to a bridge over the Erie Canal. *Murray v. State of New York* (Court of Claims, 1916) 10 State Dept. Rep. 120.

§ 331-a. **Excessive loads on unsafe bridges.**—Whenever by order of the town board of any town in which a bridge, sluice or culvert is located or, if a bridge, sluice or culvert connects two towns, by order of the town boards of such towns, a notice shall be erected upon each end of such bridge, sluice or culvert prohibiting the use of such bridge, sluice or culvert for loads in excess of ten tons, any person, firm or corporation transporting or causing to be transported over any such bridge, sluice or culvert any traction engine, tractor, portable piece of machinery or any vehicle or load weighing ten tons or over shall be guilty of a misdemeanor, and upon conviction of a first offense shall be liable to a fine of not to exceed twenty-five dollars. A second offense shall be a misdemeanor punishable by a fine or imprisonment or both. (*Added by L. 1917, ch. 568, in effect May 18, 1917.*)

§ 332. **Law of the road.**—1. Whenever any persons traveling with any carriages, or riding horses or other animals, shall meet on any turnpike road or highway, the persons so meeting shall seasonably turn their carriages, horses, or other animals to the right of the center of the road, so as

to permit such carriages, horses, or other animals to pass without interference or interruption.

2. Any carriage or the rider of a horse or other animal, overtaking another shall pass on the left side of the overtaken carriage, horse or other animal. When requested to do so, the driver or person having charge of any carriage, horse or other animal, traveling, shall, as soon as practicable, turn to the right, so as to allow any overtaking carriage, horse or other animal free passage on his left.

3. In turning corners to the right, carriages, horses or other animals shall keep to the right of the center of the road. In turning corners to the left, they shall pass to the right of the center of intersection of the two roads.

4. Any person neglecting to comply with, or violating any provision of this section shall be liable to a penalty of five dollars to be recovered by the party injured, in addition to all damages caused by such neglect or violation.

References.—As to general regulation of use of streets and highways by vehicles and pedestrians, see General Highway Traffic Law, ante, p. 3234; as to rule of road as applied to motor vehicles, see § 286, ante.

Source.—Former Highway L. (L. 1890, ch. 568) § 157, as amended by L. 1902, ch. 96, without change. Originally revised from R. S., pt. 1, ch. 20, tit. 13, § 1.

Law of the road in general.—The law of the road as declared in this section existed at common law and would continue to exist if the statute were repealed. *Wright v. Fleischman* (1903), 41 Misc. 533, 85 N. Y. Supp. 62.

In the use of a public highway, a party has a right to expect ordinary prudence from others, and to rely upon that in determining his own use of the road; not to justify his own foolhardiness, but to warrant him to pursue his own business in a convenient manner, where he has no reason to suppose the convenience or safety of others will be prejudiced thereby. *Harpell v. Curtis* (1850), 1 E. D. S. 78. It is doubtful if the rule applies to one leading a horse. *Mooney v. Trow Directory, Printing and Bookbinding Co.* (1893), 2 Misc. 238, 21 N. Y. Supp. 957.

For rule as to passing when going in the same direction, before the amendment of 1902, see *Adolph v. Cen. Park, N. Y. & E. River R. R. Co.* (1879), 76 N. Y. 530; *Dudley v. Bolles* (1840), 24 Wend. 465; *Savage v. Gerstner* (1899), 36 App. Div. 220, 55 N. Y. Supp. 306.

Failure to comply with law of road.—Violation of the law of the road, while evidence of negligence, is not conclusive. The mere fact that a person is on the wrong side will not prevent his recovering damages. The presumption is that a collision is caused by the negligence of the person violating the rule, but his presence on the wrong side of the road may be explained. *Quinn v. O'Keefe* (1896), 9 App. Div. 68, 41 N. Y. Supp. 116; *Hoffman v. Union Ferry Co.* (1877), 68 N. Y. 385. Presumptively a liability is incurred by a person who refuses to obey the statute, to the injury of another who is free from contributory negligence. *Pike v. Bosworth* (1887), 7 N. Y. St. Rep. 665. Where plaintiff was on the wrong side of the road a valid excuse therefor must appear affirmatively; but the plaintiff's negligence unexplained will not justify any intentional or unnecessary damage by the defendant. *Burdick v. Worrall* (1848), 4 Barb. 596.

Although this section provides a penalty for failure to observe the law of the road, it does not provide that the defendant is liable for all the damages that may happen while he is on the wrong side. While it may be legal negligence for him to be there, his liability must depend on the rules of law applicable to cases of

negligence. *Newman v. Ernst* (1890), 31 N. Y. St. Rep. 1, 10 N. Y. Supp. 310. Violation of the rules does not deny the defendant the right to set up contributory negligence. *Simmonson v. Stellenmerf* (1845), 1 Edm. Sel. Cas. 194.

The facts that the road was rough and rutty on defendant's side, that he had no design in running against plaintiff's vehicle, and that plaintiff was driving faster than defendant, constitute no defense unless the road on defendant's side is such as to render it impracticable or extremely difficult for him to turn out. *Earing v. Lansingh* (1831), 7 Wend. 185. It is no excuse that defendant had no time to turn out, when he was driving fast at night time on the wrong side of the road. *Simmonson v. Stellenmerf* (1845), 1 Edm. Sel. Cas. 194.

Right of the center of the highway.—The rule requiring persons meeting to keep their vehicles to the right of the center of the road, does not apply in winter when the depth of the snow renders it impossible or difficult to ascertain the center thereof. It is a reasonable construction of the statute to define the center of the road in such a case, as the center of the traveled track regardless of the worked part of the road. *Smith v. Dygert* (1852), 12 Barb. 613. The right of the center of the road, as used in this section, means the right of the worked part of the road and not the right of the most traveled part, although the whole of the traveled part may be on one side of the center. *Earing v. Lansingh* (1831), 7 Wend. 185.

The rule with regard to keeping to the right does not apply when there are obstructions on that side of the highway. *Mooney v. Trow Directory, Printing and Bookbinding Co.* (1893), 2 Misc. 238, 21 N. Y. Supp. 957. The section applies to the case of vehicles passing each other on the same side of roads and streets so wide that there is no necessity for them to turn to the right of the center line of the highway in order to pass safely. *Wright v. Fleischman* (1903), 41 Misc. 533, 85 N. Y. Supp. 62.

In approaching the intersection of roads a driver should keep to the right; if he turns to the left, and an automobile coming from behind, in attempting to pass to the left, as required in this section, strikes and injures the horse and wagon, the question as to the liability of the defendant is a question of fact for the jury. *Mendleson v. Van Rensselaer* (1907), 118 App. Div. 516, 103 N. Y. Supp. 577.

"Seasonably turn," as used in this section, means that travelers shall turn to the right in such season that neither shall be retarded in his progress by the other occupying his half of the way, when he may have occasion to use it in passing. *Spooner v. Brooklyn, etc., R. R. Co.* (1873), 54 N. Y. 230.

Rights of pedestrians.—The law of the road does not apply to persons passing each other on foot on the sidewalk. *Grant v. City of Brooklyn* (1864), 41 Barb. 381; nor does it apply to a carriage meeting a person on foot in the highway. *Savage v. Gernster* (1899), 36 App. Div. 220, 55 N. Y. Supp. 306; although there can be no question as to the right of a person to pass along a highway on foot, and he is entitled to the exercise of reasonable care on the part of persons driving along the highway. Vehicles and pedestrians have equal rights in the highway, and both should exercise the care and caution that the circumstances demand.

A person on foot has a right to cross the street, not only at the cross walk, but wherever he pleases; and one driving horses is bound to be watchful at all points so as not to injure persons crossing. *Moebus v. Herrmann* (1888), 108 N. Y. 349, 15 N. E. 415. Footmen or vehicles have no superior rights of way, the one over the other. Each has a right of passage in common, and in its use is bound to exercise reasonable care for his own safety, and to avoid injury to the other. For a person crossing a street on foot, where vehicles are numerous, to fail to look in both directions and ascertain if any vehicles are approaching, their rate of speed and distance from the crossing, is negligence. *Barker v. Savage* (1871), 45 N. Y. 191. A person driving horses along the streets of a city is bound to look out

for travelers on foot and must take reasonable care to avoid them. *Murphy v. Orr* (1884), 96 N. Y. 14; *Hyland v. Yonkers R. R. Co.* (1888), 15 N. Y. St. Rep. 824, 1 N. Y. Supp. 363.

Privileged vehicles.—Where by special enactment an exception has been made to the law of the road, the driver of the privileged vehicle (e. g., an ambulance) may assume that the drivers of other vehicles will heed his warning and turn out. *Byrne v. Knickerbocker Ice Co.* (1889), 4 N. Y. 531.

Collision; liability.—Plaintiff must use ordinary diligence to avoid the collision. *Center v. Finney* (1852), 17 Barb. 94. To excuse a collision upon a highway on the ground of inevitable accident, where defendant neglected to turn out, it must appear that it could not be avoided by defendant and that no blame be imputed to him. *Center v. Finney* (1852), 17 Barb. 94.

This section has no application to the meeting of railroad cars with common vehicles in the streets of a city. *Hegan v. Eighth Avenue Railroad Co.* (1857), 15 N. Y. 380; *Whitaker v. Eighth Avenue R. R. Co.* (1873), 51 N. Y. 295; *Barker v. Hudson River R. R. Co.* (1872), 4 Daly 274.

Driving on the left side of a highway is not a nuisance under section 1530 of the Penal Law, nor is it a misdemeanor within the meaning of section 43 of the Penal Law which involves a wrongful purpose. *People v. Martinitis* (1915), 168 App. Div. 446, 153 N. Y. Supp. 791.

Section cited.—*Mallory v. Haynes* (1915), 170 App. Div. 587, 588, 156 N. Y. Supp. 318.

§ 333. **Trees; to whom they belong.**—All trees standing or lying on land within the bounds of any highway, shall be for the proper use of the owner or occupant of such land, except that they may be required to repair the highway or bridges of the town. Where a right of way has been or shall be acquired, under the provisions of this chapter, for a state or county highway, the owner of the fee shall have and may harvest for his own use the fruit upon all fruit-bearing trees left standing from time to time within the right of way so acquired, until forbidden in writing by the governing board of the political subdivisions in which the title to such right of way vests. (*Amended by L. 1916, ch. 147.*)

Source.—Former Highway L. (L. 1890, ch. 568) § 156, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 126.

References.—Town superintendent may authorize owners of property adjoining highway to locate and plant trees within the highway, Highway Law, § 61. Allowances for setting out shade trees along highway, Id. § 63. Town superintendent has control of shade trees in public highway, Id. § 64.

Rights of abutting owners as to trees.—Trees standing on streets and highways, of which the soil belongs to adjacent owners, are the property of such owners, who may remove them at pleasure. Laws passed for the protection of such trees apply only to persons other than the owners; nor can the legislature authorize the infliction of a penalty upon the owner of the trees for removing them, unless the public has acquired them by purchase or condemnation. *Village of Lancaster v. Richardson* (1871), 4 Lans. 136. The public authorities cannot arbitrarily cut down trees within the street boundaries. They are the property of the abutting owner, and he is entitled to maintain them there unless some proper street use requires their removal, or they are condemned for public use and paid for. *Ellison v. Allen* (1894), 62 N. Y. St. Rep. 274, 30 N. Y. Supp. 441.

A pole carrying electric wires interferes with and perhaps destroys the legal

right of the owner to plant and grow shade trees and to use the side of the road, and makes permanent and exclusive use of the highway; hence, outside of incorporated villages and cities at least, such poles cannot be erected in the highway without the consent of the abutting owner. *Palmer v. Larchmont Electric Co.* (1896), 6 App. Div. 12, 39 N. Y. Supp. 522, revd. (1899), 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672. Applied to city street where fee is in abutting owners. *Osborne v. Auburn Telephone Co.* (1907), 189 N. Y. 393, 82 N. E. 428, revg. (1906), 111 App. Div. 702, 97 N. Y. Supp. 874.

An abutting owner on a city street whose ownership does not extend to the middle of the street, who has set out ornamental shade trees on the sidewalk with the implied sanction of the municipal authorities, has a right in such trees in the nature of an equitable easement, and, where one of them is girdled and destroyed by a horse, he may recover from the owner of the horse the damages thus sustained. *Lane v. Lamke* (1900), 53 App. Div. 395, 65 N. Y. Supp. 1090.

A street railway may not cut down trees belonging to the abutting owner without compensating him therefor. The measure of damages is the difference between the value of the premises before and after the trees are removed, and not the value of the wood; and the plaintiff may recover treble damages under §§ 1667-1669 of the Code of Civil Procedure. *McCruden v. Rochester Railway Co.* (1893), 5 Misc. 59, 25 N. Y. Supp. 114, affd. (1894), 77 Hun 609, 28 N. Y. Supp. 1135, affd. (1896), 151 N. Y. 623, 45 N. E. 1123.

§ 334. Injuring fruit or shade trees.—It shall be unlawful for any person or persons whatsoever in this state to hitch any horse or other animal or to leave the same standing near enough to injure any fruit or forest tree growing within the bounds of the public highway, or used as a shade or ornamental tree around any schoolhouse, church or public building, or to cut down or mutilate in any way any such ornamental or shade tree; but the right of property owners along the highway to cultivate, train and use such shade trees shall not be impaired or abridged hereby. Any person or persons guilty of violating the provisions of this section shall be deemed guilty of misdemeanor, and shall be punishable by a fine of not less than five dollars, nor more than twenty-five dollars for each such offense, and in case of failure to pay any fine imposed, may be committed to jail, not exceeding one day for each dollar of such fine. Courts of special sessions having jurisdiction to try misdemeanors, as provided by section fifty-six of the code of criminal procedure, shall have exclusive jurisdiction to try offenders in all cases occurring in the same manner as in other cases, where they now have jurisdiction, and subject to the same power of removal, and to render and enforce judgments, to the extent herein provided. All fines collected under the provisions of this act shall be paid when the offense is committed in a town outside of incorporated villages, to the supervisor of the town, to be used as the town board and town superintendent may direct. When the offense is committed in any village of the county, which by law is constituted a separate road district, the fine shall be paid to the treasurer of said village, to be used as the board of trustees may direct.

Source.—L. 1875, ch. 215, §§ 1, 2, as amended by L. 1881, ch. 344.

§ 335. Penalty for falling trees.—If any person shall cut down any tree

on land not occupied by him, so that it shall fall into any highway, river or stream, unless by the order and consent of the occupant, the person so offending shall forfeit to such occupant the sum of one dollar for every tree so fallen, and the like sum for every day the same shall remain in the highway, river or stream.

Source.—Former Highway L. (L. 1890, ch. 568) § 102, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 111.

References.—Trees obstructing highways to be removed, Highway Law, § 52. Town superintendent may remove trees which have fallen into highway and charge the expense against abutting owners, Id. § 55.

§ 336. **Fallen trees to be removed.**—If any tree shall fall, or be fallen by any person from any inclosed land into any highway, any person may give notice to the occupant of the land from which the tree shall have fallen, to remove the same within two days; if such tree shall not be removed within that time, but shall continue in the highway, the occupant of the land shall forfeit the sum of fifty cents for every day thereafter, until the tree shall be removed.

Source.—Former Highway L. (L. 1890, ch. 568) § 103, without change. Originally revised from R. S., pt. 1, ch. 16, tit. 1, § 110.

§ 337. **Penalties, how recovered.**—All penalties or forfeitures given in this chapter, and not otherwise specially provided for, shall be recovered by the town superintendent, in the name of the town in which the offense shall be committed; and when recovered, shall be applied by him in improving the highways and bridges in such town.

Source.—Former Highway L. (L. 1890, ch. 568) § 164, without change.

References.—Duty of town superintendent to collect penalties, Highway Law, § 47, subd. 12. Penalties when recovered to be paid by town superintendent to supervisor, Id. § 104.

Recovery by town superintendent.—This section does not authorize the superintendents of two towns to unite as plaintiffs and bring an action to recover a penalty or forfeiture for an encroachment upon a highway. *Bradley v. Plair* (1854), 17 Barb. 480.

The right of the town superintendent to negotiate amicable settlements of controversies relating to encroachments, is incident to their general power of prosecuting for recovery of penalties incurred because of such encroachments. *Commissioners of Highways of Cortlandville v. Peck* (1843), 5 Hill 215.

Actions for recovery of penalties can be brought only in relation to public highways, and not to private roads. *Fowler v. Lansing* (1812), 9 Johns. 349. In an action under this section a proper reference to the statute under which the suit is brought must be indorsed upon the summons as required by Code of Civil Procedure, § 1897. *Hitchman v. Baxter* (1884), 34 Hun 271.

§ 338. **Acquisition of plankroads.**—The board of supervisors of any county, except a county wholly within the city of New York, except the county of Erie, may by a vote of a majority of the members thereof, by resolution, determine to acquire the rights and franchises of any individual or corporation, lawfully entitled to exact toll or charge for walking, riding or driving over any plankroad or turnpike, or a bridge within such

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county, erected over any unnavigable stream, or over the Hudson river above Waterford. Upon the adoption of such a resolution, the board of supervisors shall acquire such rights, franchises and property by purchase, if able to agree with the owners thereof, and otherwise by condemnation in the name of the county. (*Amended by L. 1914, ch. 200.*)

Source.—L. 1899, ch. 594, § 1, in pt., as amended by L. 1907, ch. 104.

References.—Upon dissolution of turnpike or plankroad corporation such turnpike or plankroad becomes a public highway, Transportation Corporation Law, § 149. Board of supervisors may provide for the use of abandoned turnpike and plankroads within a town as public highway, County Law, § 80.

Section cited.—Matter of Saratoga Lake Bridge Co. v. Walbridge (1910), 140 App. Div. 817, 821, 126 N. Y. Supp. 468, *affd.* (1914), 211 N. Y. 543, 105 N. E. 1100.

§ 339. **Borrowing money; bonds.**—The board of supervisors of such county may borrow money for the acquisition of such rights, franchises, and property, and may issue the bonds or other evidences of indebtedness of the county therefor, but such bonds or other evidences of indebtedness shall not bear a rate of interest exceeding five per centum per annum and shall not run for a longer period than twenty years and shall not be sold for less than par.

Source.—L. 1899, ch. 594, § 2, without change.

§ 340. **Raising money to pay bonds and interest.**—Except in the counties of Rensselaer, Onondaga, Albany and Columbia, the amount of such bonds in whole or in part together with the interest thereon may be apportioned by the boards of supervisors upon the towns, cities and villages constituting separate highway districts, in which such plankroad, turnpike or bridge is located, in such proportions as the boards may deem just and the amount so apportioned to each municipality for the payment of the principal and interest of such bonds shall be annually levied and collected at the same time and in the same manner as money for other county charges. In the counties of Rensselaer and Columbia, the boards of supervisors, in making up the annual tax budget of the counties, shall each year levy and assess upon and against the taxable property in said counties, in addition to the amounts levied and assessed for other county charges, an amount sufficient to pay the interest falling due and payable on the said bonds during such year, and also an amount sufficient to pay the proportion of the years fixed at the time during which said bonds shall run from their issue to maturity. The amount raised by tax in each year for the payment of the principal of said bonds shall be preserved intact by the county treasurers of said counties until said bonds mature and are payable, and upon the maturity of said bonds, said county treasurer shall pay the same in full out of the moneys so raised by annual tax therefor and shall thereupon take back said bonds with receipts for the payment thereof and deliver them to the boards of supervisors of said counties for cancellation. Said county treasurer shall deposit at interest the said moneys yearly raised by tax for payment of the principal of said bonds in such bank or depository as shall be desig-

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Miscellaneous provisions.

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nated by the boards of supervisors of said counties, and the amount realized from the interest thereon shall be used for the purposes of the said counties under the direction of the said boards of supervisors.

Source.—L. 1899, ch. 594, § 3, as amended by L. 1905, ch. 120, without change.

§ 341. Roads so acquired to be part of highway system.—A plankroad, turnpike or bridge acquired pursuant to this article shall become a part of a highway system of such county and of the towns, cities and villages in which the same is located, and shall thereafter be repaired and maintained in the same manner as the other highways or bridges therein.

Source.—L. 1899, ch. 594, § 4, without change.

§ 342. When road is in two or more counties.—When a plankroad, turnpike, toll road or bridge is partly in one county and partly in another, the boards of supervisors of the said counties shall act together in the manner prescribed above, and determine the amount to be paid to said plankroad, turnpike, toll road or bridge company, by each county, and such amount against each county, after such determination, shall be paid by each county.

Source.—L. 1899, ch. 594, § 5, without change.

§ 343. Albany post road; railroad tracks thereon.—The old established road along the valley of the Hudson river from the city of New York to the city of Albany, known as the Albany post road, shall be a public highway for the use of the traveling public forever. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel. No trustees of any village or corporation of any city upon its route, or town superintendents of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect. This section shall not apply to any portion of said road within the city of New York or the city of Yonkers, south of Main street, nor shall it apply to the road of the president, directors and company of the Rensselaer and Columbia turnpike nor to the town of Cortlandt or the village of Sing Sing, in Westchester county. (*Amended by L. 1910, ch. 658.*)

Source.—L. 1896, ch. 423, §§ 1-3, 4, as amended by L. 1900, ch. 576.

Power of local officers over New York and Albany post road.—The power conferred upon town officers by colonial laws and state statutes, prior to the enactment of the above statute, to alter and improve the New York and Albany post road is not restricted or taken away by this section and the only limitation contained therein applies to the construction of railroad tracks upon the highway. *People ex rel. Dinsmore v. Vandewater* (1903), 176 N. Y. 500, 68 N. E. 876, revg. (1903), 83 App. Div. 54, 82 N. Y. Supp. 627.

§ 344. Lighting roads, highways and bridges.—The town board of any town, subject to the approval of the commissioner of highways, may from time to time provide for lighting dangerous portions of any road or high-

way defined by section three of this chapter or constructed or improved under the provisions of section three hundred and twenty of this chapter, and of bridges located thereon. The initial action of the board shall be in the form of a proposal for submission to the commissioner. The roads and portions thereof to be lighted, and the manner of lighting, shall be set forth in such proposal. Such proposal shall be embodied in a resolution. The lighting of one or more such roads, highways or bridges, or either, may be proposed in a single resolution. The board may provide for such lighting, if its proposal is so approved, or, if modifications are suggested by the commissioner, may adopt such modifications and provide for such lighting in conformity therewith. The expense of installing, maintaining and caring for such lights shall be a town charge, and the moneys therefor shall be provided and appropriated in the same manner as for other town expenses. The furnishing of light under this section may be provided for by contract or otherwise; but nothing herein contained shall be deemed to authorize the town board to acquire, construct or establish a gas or electric lighting plant for the above purposes. The installation of lights, fixtures and connections shall be done under the supervision of the county superintendent of highways. The town board may provide for the care of such lights in such manner as it may deem proper. The board may, in its discretion, at any time discontinue the lighting of any road, highway or bridge, or portion thereof, provided for under this section. (*Added by L. 1917, ch. 367, in effect May 4, 1917.*)

ARTICLE XIII.

SAVING CLAUSES; LAWS REPEALED; WHEN TO TAKE EFFECT.

- Section 350. Transfer of powers and duties of state engineer.
 351. Transfer of records; eligibility of present employees.
 352. County engineers and superintendents of highways to be continued in office.
 353. Pending actions or proceedings.
 354. Saving clause.
 355. County highway maps preserved.
 356. Construction.
 357. When to take effect.
 358. Laws repealed.

§ 350. Transfer of powers and duties of state engineer.—On and after the taking effect of this chapter, and the appointment and qualification of the state commission as herein authorized, all the powers and duties of the state engineer in respect to highways and bridges, conferred and imposed by any statute of this state, shall be transferred to the department of highways to be exercised and performed by the state commission of highways as provided herein.

Source.—New.

§ 351. **Transfer of records; eligibility of present employees.**—The state engineer shall transfer and deliver to the state commission of highways all contracts, books, maps, plans, papers and records of whatever description, in his possession when such commission is appointed and have qualified, pertaining to the construction, improvement, maintenance and supervision of highways and bridges and such commission is authorized at such time to take possession of all such contracts, books, maps, plans, papers and records. The commission may also retain in its employment resident and other engineers, levelers, rodmen, clerks and employees engaged or connected with the department of highways in the office of the state engineer, or employed by him in connection with the powers and duties exercised and performed by him in respect to highways and bridges, and all such engineers, clerks and employees shall be eligible to transfer and appointment to positions under the commission.

Source.—New.

The language of this section is permissive only and therefore it is discretionary with the commission whether it shall retain in its employ any of the employees of the State Engineer enumerated therein. Rept. of Atty. Genl. (1909) 598.

Veterans employed in positions transferred to the new Highway Commission are entitled to appointment, and any other veterans for which there will not be a corresponding position under the new Highway Commission are entitled to be retained in any other position which may be vacant and which they may be fitted to fill, receiving the same compensation therefor. Rept. of Atty. Genl. (1909) 413.

§ 352. **County engineers and superintendents of highways to be continued in office.**—County engineers and superintendents of highways in office when this chapter takes effect shall be continued in office during their present term of office and until the district or county superintendents shall have been appointed and have qualified as provided in this chapter. Such county engineers and superintendents of highways shall exercise the powers and perform the duties hereby conferred and imposed upon district or county superintendents until the appointment and qualification of a district or county superintendent as above provided. Upon the appointment and qualification of a district or county superintendent for the county for which such county engineer or superintendent of highways is appointed all contracts, books, maps, plans, papers, and records pertaining to the construction, improvement, maintenance and supervision of highways in such county shall be transferred to such district or county superintendent.

Source.—New.

§ 353. **Pending actions or proceedings.**—This chapter shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, improvement, maintenance, supervision or control of highways and bridges, brought by or against the state engineer, or county engineer or a county superintendent of highways, or a commissioner of highways, under the provisions of any statute hereby repealed, but the same may be prosecuted or defended in the same manner by the commission or by the

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Saving clauses; laws repealed.

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officer having jurisdiction in respect thereto. Any investigation, examination or proceeding undertaken, commenced or instituted by the state engineer, county engineer or highway commissioner or either of them relating to highways or bridges may be conducted or continued to a final determination by the proper officer hereunder, in the same manner, and under the same terms and conditions, and with the same effect as though this chapter had not been passed.

Source.—New.

§ 354. **Saving clause.**—The repeal of a law, or any part of it specified in the annexed schedule shall not affect or impair any contract, or any act done, or right accruing, accrued or acquired, or any penalty, forfeiture, or punishment incurred prior to the time when this chapter or any section thereof takes effect, under or by virtue of the laws so repealed, but the same may be asserted, enforced, prosecuted, or inflicted, as fully and to the same extent, as if such laws had not been repealed. The provisions of this chapter shall not affect or impair any act done or right accruing, accrued or acquired under or in pursuance of any resolution adopted by the board of supervisors of a county, on or before the thirty-first day of December, nineteen hundred and eight, requesting the construction or improvement of a highway therein, as provided in chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, or under or in pursuance of any resolution adopted on or before such date by a board of supervisors, under such act and the acts amendatory thereof, providing for the construction or improvement of a highway in a county in accordance with maps, plans and specifications submitted to such board by the state engineer, or under or in pursuance of any contract for the construction or improvement of a highway, awarded as provided in such chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof. All further proceedings in respect to such highway shall be taken in accordance with the provisions of this chapter.

Source.—A provision similar to this was inserted in former Highway L. (L. 1890, ch. 568) § 201.

§ 355. **County highway maps preserved.**—The county highways to be selected by the commission for construction or improvement, as provided in this chapter, shall be the highways in the respective counties designated upon the map of the highways of the state, prepared by the state engineer as provided by law, and approved by the legislature by chapter seven hundred and fifteen of the laws of nineteen hundred and seven; except the highways on such map which have been designated and described as state highways by section one hundred and twenty of this chapter. Such map shall remain in full force and effect notwithstanding the repeal of such chapter seven hundred and fifteen of the laws of nineteen hundred and seven by this chapter; except that the board of supervisors of any

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county is hereby authorized to modify the designation of county highways on such map by resolution duly adopted by a majority vote of the members of such board, provided the total mileage as originally designated upon the county map in such county is not thereby materially increased. A certified copy of such resolution shall be transmitted to the commission, or to the state engineer if the same be adopted prior to the appointment and qualification of the commission.

Source.—New.

Application of Skene map.—The intention of the provision of this section that county highways to be selected by the Highway Commission shall be those designated upon the Skene map, "except the highways on such map which have been designated and described as State highways by section one hundred and twenty of this chapter," was to restrict the applicability of the Skene map solely to such highways shown thereon as were laid upon routes not designated and described as State highways. *People ex rel. Wauful v. Reel* (1913), 157 App. Div. 128, 141 N. Y. Supp. 988.

Authority to amend a contract for state road already let and containing provision for making a portion of a road not on the official map is vested in the board of supervisors. Rept. of Atty. Genl. (1909) 604.

Improvement of state highway.—Where a road is fully described in a route laid down in section 120 as a state highway, it may not be improved under the system provided for county highways. Rept. of Atty. Genl. (1915) 84; (1915) 143.

§ 356. Construction.—Wherever the term "state engineer" shall occur in any law, contract or document such term shall be deemed to refer to the state commission of highways as established by this chapter so far as such law, contract or document pertains to matters which are within the jurisdiction of such commission of highways. Wherever the term "county engineer" or "county superintendent of highways" is used in any such law, contract or document such term shall be deemed to refer to and include the county or district superintendent having jurisdiction of the matter contained in such law, contract or document.

The provisions of this chapter so far as they are substantially the same as those existing at the time they shall take effect, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter, and not as new enactments. References in laws not repealed to provisions of law incorporated in this chapter and repealed, shall be construed as applying to the provisions so incorporated.

Source.—Former Highway L. 1890, ch. 568) § 202.

§ 357. When to take effect.—This chapter shall take effect the first day of January, nineteen hundred and nine, except as to the provisions specified as follows:

1. The provisions of sections forty-three, ninety, ninety-one, ninety-four, ninety-five, ninety-nine, and one hundred, relating to highway commissioners, estimates of expenditures, duties of town board in respect thereto, levy of taxes, the limitation of amounts to be raised, submission of propositions at town meetings, assessments of village property and statements by

the clerk of the board of supervisors to the comptroller, shall take effect immediately.

2. The provisions of sections one hundred and thirty and one hundred and thirty-one of this chapter, pertaining to the award of contracts for the construction of county highways shall take effect immediately and shall apply to contracts to be awarded under chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and the acts amendatory thereof, prior to January first, nineteen hundred and nine; and until the commission shall have been appointed and have duly qualified, the state engineer and surveyor shall exercise the powers and perform the duties conferred upon the said commission by the foregoing sections.

3. The provisions of section one hundred and seventy-nine, relating to the sprinkling of state and county highways and the removal of refuse therefrom; the provisions of section three hundred and twenty, relating to the construction or improvement of highways at the joint expense of a county and town, and the provisions of section three hundred and fifty-five relating to the modification of maps by boards of supervisors and the provisions of this section shall take effect immediately.

Source.—New.

§ 358. Laws repealed.—Of the laws enumerated by the schedule hereto annexed that portion specified in the last column is hereby repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part I, chapter 16, titles 1, 2.....	All
Revised Statutes.....	Part I, chapter 20, title 13	All
LAWS OF	CHAPTER	SECTION
1797	43	All
1797	63	2
1797	64	All
1798	35	1-9, 11-16
1801	186	1-27,
30, 32, 34, 40, 41		
1802	32	All
1802	75	All
1803	14	All
1804	49	All
1807	50	All
1808	205	1-5, 7
1810	163	2, 3
1811	97	All
R. L. 1813	33	1-43, 45, 47
R. L. 1813	64	All
1817	43	All
1817	83	All
1819	127	1
1820	227	All
1821	128	All
1821	183	All
1823	262	62
1826	45	5
1826	198	All
LAWS OF	CHAPTER	SECTION
1826	222	All
1827	224	All
1828	21	1,
139, 147, 156, 223, 279, 311, 325,		
331, 398, 476, 478, 512 (2d Meet.)		
1830	56	107
1832	107	All
1832	274	All
1833	149	All
1834	267	All
1835	154	All
1836	122	All
1836	281	All
1837	431	All
1839	274	All
1840	300	All
1841	225	All
1845	70	7-10
1845	180	5-14
1846	324	9
1847	455	2-12,
15, 18-23, 25-27		
1848	77	All
1853	63	All
1853	135	All

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Laws repealed.

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LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1853	174	All	1878	377	All
1854	324	All	1879	31	All
1855	255	All	1879	67	All
1857	383	All	1880	114	All
1857	491	All	1880	305	All
1857	615	All	1880	308	All
1857	639	All	1880	503	All
1858	51	All	1881	233	All
1858	103	All	1881	344	All
1859	373	All	1881	513	All
1860	61	All	1881	644	All
1860	468	All	1881	696	All
1861	30	All	1881	700	All
1861	311	All	1883	99	All
1862	243	All	1883	196	All
1863	93	All	1883	254	All
1863	444	All	1883	346	All
1864	395	All	1883	371	All
1865	442	All	1883	398	All
1865	522	1-5, 7, 8	1884	220	All
1866	180	All	1884	251	All
1866	770	All	1884	344	All
1868	791	All	1884	359	All
1868	843	All	1884	396	All
1869	24	All	1884	479	All
1869	131	All	1885	267	11
1869	322	All	1886	269	All
1869	593	All	1886	291	All
1870	125	All	1886	344	All
1870	311	All	1886	422	All
except part relating to division of streets on boundary lines between villages and other municipal corporations			1886	452	All
1870	461	All	1887	471	All
1870	595	All	1887	526	All
1871	171	All	1887	604	All
1871	245	All	1887	704	All
1872	274	1	1888	240	All
1872	315	All	1888	260	All
1872	519	All	1888	428	All
1873	63	All	1889	120	All
1873	69	All	1889	146	All
1873	315	All	1889	259	All
1873	395	All	1890	210	All
1873	448	All	1890	268	All
1873	477	All	1890	291	All
1873	773	All	1890	493	All
1874	169	All	1890	558	All
1874	570	All	1890	568	All
1874	613	All	1891	192	All
1875	22	All	1891	212	All
1875	196	All	1891	309	All
1875	215	All	1892	493	All
1875	341	All	1893	833	All
1875	431	All	1893	412	All
1876	271	All	1893	419	All
1876	340	All	1893	468	All
1876	348	All	1893	582	All
1877	197	All	1893	607	All
1877	344	All	1893	655	All
1877	465	All	1894	334	All
1878	44	All	1894	727	All
1878	49	All	1895	181	All
1878	114	All	1895	330	All
1878	245	All	1895	375	All
			1895	386	All
			1895	411	All
			1895	416	All

§ 358.

Laws repealed.

L. 1909, ch. 30.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1895	508	All	1902	105	All
1895	579	All	1902	129	All
1895	586	All	1902	156	All
1895	606	All	1902	166	All
1895	611	All	1902	242	All
1895	716	All	1902	258	All
1895	717	All	1902	305	All
1896	423	All	1902	331	All
1896	464	All	1902	323	All
1896	973	All	1902	321	All
1896	987	All	1902	379	All
1897	204	All	1902	396	All
1897	227	1	1902	510	All
1897	286	All	1903	4	All
1897	334	All	1903	27	All
1897	344	All	1903	57	3, 4
1897	782	All	1903	136	All
1898	106	All	1903	172	All
1898	115	All	1903	228	All
1898	127	All	1903	269	All
1898	155	All	1903	460	All
1898	350	All	1903	610	All
1898	351	All	1903	625	All
1898	352	All	1903	643	All
1898	353	All	1904	51	All
1898	641	All	1904	109	All
1899	78	All	1904	111	All
1899	84	All	1904	153	All
1899	92	All	1904	183	All
1899	152	All	1904	192	All
1899	232	All	1904	297	All
1899	285	All	1904	298	All
1899	344	All	1904	299	All
1899	345	All	1904	324	All
1899	594	All	1904	342	All
1899	622	All	1904	353	All
1899	681	All	1904	387	All
1899	703	All	1904	426	All
1900	25	All	1904	443	All
1900	153	All	1904	456	All
1900	293	All	1904	478	All
1900	300	All	1904	495	All
1900	313	All	1904	536	All
1900	399	All	1904	538	All
1900	516	All	1904	540	All
1900	576	All	1904	608	All
1900	640	All	1904	609	All
1901	35	All	1904	611	All
1901	54	All	1904	612	All
1901	60	All	1904	646	All
1901	109	All	1904	683	All
1901	125	All	1905	108	All
1901	129	All	1905	120	All
1901	150	All	except part amending last sentence of L. 1899, ch. 594, § 1.		
1901	162	All	1905	293	All
1901	168	All	1905	417	All
1901	239	All	1905	605	All
1901	240	All	1905	672	All
1901	437	All	1906	67	All
1901	441	All	1906	101	All
1901	464	All	1906	123	All
1901	531	All	1906	149	All
1902	52	All	1906	265	All
1902	53	All	1906	311	All
1902	75	All	1906	363	All
1902	96	All			

HIGHWAY LAW.

3677

L. 1909, ch. 30.

Laws repealed.

§ 358.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1906	423	All	1907	270	All
1906	468	All	1907	382	All
1906	530	All	1907	404	All
1907	50	All	1907	453	All
1907	104	1,	1907	648	All
part amending first two sentences of			1907	715	All
L. 1899, ch. 594, § 1			1907	716	All
1907	127	All	1907	717	All
1907	128	All	1907	719	All
1907	191	All	1907	743	All
1907	246	All	1908	380	All

HIGHWAYS.

Injury to boundary marks, mile posts, etc.; Penal Law, § 1423. Putting noisome or unwholesome substances in; Penal Law, § 1754. Placing substances injurious to bicycles in; Penal Law, § 1434. Dangerous animals in; Penal Law, § 1425, subd. 11. Obstructing with railroad train; Penal Law, § 1985.

1. State bonds for improvement of highways	3678
2. Moneys appropriated before May 27, 1913	3685
3. County roads in certain counties	3685
4. Confirmation of highway taxes	3687
5. Miscellaneous acts	3687

(1) *State Bonds for Improvement of Highways.*

L. 1906, ch. 469.—“An act to provide for issuing of bonds of the state for the improvement of highways, and making appropriation therefor.”

§ 1. There shall be issued in the manner and at the times hereinafter provided, bonds of the state pursuant to the provisions of section twelve of article seven of the constitution, which bonds shall be sold by the state and the proceeds thereof paid into the state treasury, and so much thereof, as may by law be appropriated from time to time, shall be expended for the improvement of highways in the manner provided by chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and acts amendatory thereof. Such bonds shall be known as bonds for the improvement of highways, shall be exempt from taxation, and shall declare that they are issued pursuant to said provisions of the constitution and pursuant to this act. (*Thus amended by L. 1907, ch. 718.*)

§ 2. The comptroller is hereby authorized and directed to cause such bonds of the state to be prepared and may make a separate contract for engraving the plates for such bonds and printing such bonds therefrom with such person, firm or corporation as he may deem to be for the best interest of the state. The principal and interest of said bonds shall be payable as they become due at the transfer office in the city of New York designated by the commissioners of the canal funds for the issue and transfer of bonds for canal improvement. No bond issued either originally or upon a transfer or to supply the loss of a bond shall be valid unless it shall be signed by the comptroller of the state, sealed with his seal of office and countersigned by an officer designated for such purpose at such transfer office. (*Thus amended by L. 1907, ch. 718.*)

§ 3. (*Repealed by L. 1907, ch. 718.*)

§ 3. The bonds shall be sold in such lot or lots as in the judgment of the comptroller may be required for the purpose of making partial or final payment for the improvement of highways, but the amount of such bonds shall

not exceed the aggregate amount authorized for such purpose. They shall be of such denomination as the comptroller may determine, and run for a period of fifty years, and any or all of such bonds shall bear interest at either three, three and one-half or four per centum per annum as in the judgment of the comptroller may be necessary to effect a sale of said bonds and shall be sold for not less than par. The comptroller shall sell said bonds to the highest bidder after advertisement for a period of twenty days, Sundays and holidays excepted, in at least two newspapers printed in the city of New York and one in the city of Albany. Such advertisement shall provide that the comptroller may in his discretion reject any or all bids, and in the event of such rejection the comptroller may readvertise in the same manner as many times as in his judgment may be necessary to effect a satisfactory sale. The bonds shall be issued in coupon or registered form at the option of the purchaser. Registered bonds may be issued in exchange for coupon bonds upon request of the owner of said bonds but coupon bonds shall not be issued in exchange for registered bonds. There is hereby imposed upon the real and personal property subject to taxation in this state, an annual tax of two cents for each one dollar of bonds issued under the provisions of this act and outstanding, to provide a sinking fund to redeem said bonds at maturity, and in like manner, a tax of four cents for each one dollar of bonds issued and outstanding which bear interest at the rate of four per centum per annum to provide for the payment of interest upon said bonds; a tax of three and one-half cents for each one dollar of bonds issued and outstanding which bear interest at the rate of three and one-half per centum per annum to provide for the payment of interest upon such bonds and a tax of three cents for each one dollar of bonds issued and outstanding which bear interest at the rate of three per centum per annum to provide for the payment of interest upon such bonds. The amount of such tax shall be annually computed by the comptroller and shall be assessed, levied and collected in each of such years in the manner prescribed by law for the assessment, levy and collection of state taxes and shall be paid by the several county treasurers into the treasury of the state at the times and in the manner prescribed by law for the payment of state taxes to the state treasurer and the proceeds of such taxes after paying the interest due upon such outstanding bonds shall be invested by the comptroller in securities in which he is authorized by law to invest the trust and sinking funds of the state. Such sinking fund shall be used solely for the purpose of paying the principal on the bonds issued in accordance with the provisions of this act, provided, however, that in case the legislature shall hereafter in any fiscal year appropriate out of funds in the treasury moneys to provide a sum equal to the amount which would otherwise have been raised by taxation as hereinbefore provided in such fiscal year for such sinking fund and interest on such bonds, no direct state tax for such year shall be imposed or collected as above provided, and provided also that when the payments to the sinking fund of premiums upon bonds sold, interest upon

§ 4. State bonds for improvement of highways. L. 1906, ch. 469.

investments made from the sinking fund and the moneys received from the towns and counties as and for their share of the cost of highways improved with funds made available under the provisions of this act, shall amount to a sum equal to the amount of any annual tax herein required to be levied to provide payment of the interest upon bonds outstanding and the annual payment to the sinking fund, then the comptroller shall make a special recommendation to the legislature asking that the legislature shall direct that so much of the said accumulation as may be sufficient to pay the interest due in that year and provide the amount due to the sinking fund shall be used for such purposes and that no state tax shall be levied for that year as herein provided. (*Renumbered and amended by L. 1907, ch. 718.*)

§ 4. Whenever the construction or improvement of a county highway or section thereof under a contract shall be completed and final payment therefor shall have been made the highway commission shall prepare a statement of the cost of such construction or improvement including engineering expenses, inspection and all charges and expenses properly chargeable thereto, showing in detail the date of each payment, and the purpose and amount of such payment. Such payments shall be grouped as far as practicable by dates and the total thus obtained shall be deemed the cost of such improvement, and a certified copy of said statement shall be filed by the commission in the office of the comptroller. If a highway or section thereof so constructed or improved shall be situate in two or more towns or in two or more counties, the commission shall apportion such expense to such towns and counties according to the cost of such construction or improvement in each of such towns or counties. Such statement when audited and approved by the comptroller shall be filed in his office and shall be final, and a duplicate thereof shall be filed with the county treasurer of each county wherein the highway or section thereof has been constructed or improved. If the board of supervisors of any county shall have theretofore provided funds to pay two per centum of the cost of such improved highway as thus determined, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said county for each mile of public highway within such county to be ascertained and determined by dividing the total assessed valuation of taxable property in said county as equalized for state purposes by the total mileage of highways in said county, exclusive of the streets and highways within any incorporated city or village in said county, and if the board of supervisors of any county shall have theretofore provided funds to pay, on behalf of any town, one per centum of the cost of such improved highway as thus determined, for each one thousand dollars of assessed valuation of real or personal property liable to taxation in said town for each mile of public highway within said town to be ascertained and determined by adding to or deducting from the total assessed value of taxable property in said town as equalized for county

purposes, the percentage of value, if any, added or deducted by the state board of equalization to equalize between counties for state purposes, and dividing the sum thus obtained by the total mileage of public highways in said town, exclusive of the streets and highways within any incorporated city or village in said town, but not exceeding thirty-five per centum of the cost for the county and fifteen per centum of the cost for the town or towns, as shown by such statement, it shall be the duty of the county treasurer to pay the amount thereof upon the requisition of the commission as provided in section one hundred forty-one of chapter thirty of the laws of nineteen hundred nine and thereafter the county and town shall be deemed to be fully discharged of its obligation to the state on account of the construction of such improved highway, except the obligation to pay their proportionate amount of the state tax for the state's share of the cost of construction. If such payment shall not be so made, the comptroller shall subsequent to October first and prior to November first of each year, charge to each of such counties an amount equal to two per centum of the sinking fund required to provide payment for the bonds issued under the provisions of this act to provide the funds to improve such highway, and two per centum of the interest, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said county for each mile of public highway in said county, to be ascertained and determined by dividing the total assessed valuation of taxable property in said county, as equalized for state purposes, by the total mileage of highways in said county, exclusive of the streets and highways within any incorporated city or village in said county, and to each town in like manner, an amount equal to one per centum of the sinking fund required to provide payment for the bonds issued under the provisions of this act to provide the funds to improve such highway, and one per centum of the interest, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said town for each mile of public highway within said town, to be ascertained and determined by adding to, or deducting from, the total assessed value of taxable property in said town as equalized for county purposes, the percentage of value, if any, added or deducted by the state board of equalization to equalize between counties for state purposes, and dividing the sum thus obtained by the total mileage of public highways in said town, exclusive of the streets and highways within any incorporated city or village in said town, but no county shall be charged more than thirty-five per centum of such sinking fund and thirty-five per centum of such interest, and no town shall be charged more than fifteen per centum of such sinking fund and interest. The comptroller shall notify each board of supervisors of such counties of the amounts so charged and the amounts of such sinking fund and interest so charged shall be included by the board of supervisors in their next annual tax levy as county and town charges. The tax so levied on account of the said county

and town charges, when collected, shall be paid to the county treasurer and be by him paid over to the state treasurer at the times and in the manner prescribed by law for the payment of state taxes to the state treasurer, and shall be used for paying interest due upon bonds and creating a sinking fund as hereinbefore provided. The mileage of highways to be used in determining the amounts to be charged to a county or town under this section shall be the tables of mileage prepared by the highway commission, which said tables shall be filed with the state comptroller. It shall be the duty of the commission from time to time, whenever requested by the comptroller, to certify to the comptroller the apportionment of the cost of construction or improvement of any such highway or section thereof, between the state, county and town. (*Amended by L. 1907, ch. 718, and L. 1910, ch. 179, in effect Apr. 28, 1910.*)

Maximum rate of interest on bonds under this act increased to four and one-half per centum by L. 1913, ch. 787. See Interest.

§ 5. The sum of five million dollars is hereby appropriated, payable out of the moneys realized from the sale of bonds as provided by this act for the improvement of highways in the manner prescribed by chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and acts amendatory thereof, and the remaining part, if any, of the five million dollars not heretofore realized from the sale of bonds as provided in such section of such act for the improvement of highways shall be subject to the provisions of this act as now amended and shall be sold in accordance with the provisions of this act. (*Renumbered and amended by L. 1907, ch. 718.*)

L. 1912, ch. 298.—An act making provision for issuing bonds to the amount of not to exceed fifty million dollars for the purpose of constructing and improving state and county highways, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twelve. (*Approved by the people, pursuant to § 9.*)

§ 1. Bonds authorized.—There shall be issued, in the manner and at the times hereinafter recited, bonds of the state in an amount not to exceed fifty million dollars, which bonds shall be sold by the state and the proceeds thereof paid into the state treasury, and so much thereof as shall be necessary expended for the purpose of constructing and improving the state and county highways as defined in the highway law. Said bonds when issued shall be exempt from taxation.

§ 2. Sale; interest; tax to pay; sinking fund.—The comptroller is hereby directed to cause to be prepared the bonds of this state to an amount not to exceed fifty million dollars, said bonds to bear interest at the rate of not to exceed four per centum per annum, which interest shall be payable semi-annually in the city of New York. Said bonds shall be issued for a term of fifty years from their respective dates of issue, and shall be sold for not less than par. The comptroller is hereby charged with the duty of selling

said bonds to the highest bidder after advertising for a period of twenty consecutive days, Sundays excepted, in at least two daily newspapers printed in the city of New York and one in the city of Albany. Advertisements shall contain a provision to the effect that the comptroller, in his discretion, may reject any or all bids made in pursuance of said advertisements, and, in the event of such rejection, the comptroller is authorized to readvertise for bids in the form and manner above described as many times as in his judgment may be necessary to effect a satisfactory sale. Said bonds shall be sold in such lots and at such times as may be required for the purpose of making partial or final payments on work contracted for in accordance with the provisions of this act, and for other payments lawfully to be made under the provisions thereof. There is hereby imposed a direct annual tax to pay and sufficient to pay the interest on each bond issued under this act as it falls due, and to pay and sufficient to pay and discharge the principal of each of such bonds within fifty years from the date thereof. The rate of such annual tax shall be five one-thousandths of a mill on each dollar of valuation of real and personal property in this state subject to taxation, for each and every one million dollars, or fraction thereof, in par value of said bonds issued under this act, and outstanding or to be outstanding during the fiscal year during which the amount of such tax is computed. The tax imposed, as herein provided, shall be assessed, levied and collected in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of the state. The proceeds of such tax shall be invested by the comptroller in securities in which he is authorized by law to invest the trust and sinking funds of the state, and together with the interest arising therefrom, any premiums received on the sale of said bonds, and interest accruing on deposits of money received from the sale of said bonds or from miscellaneous sources shall constitute a sinking fund which is hereby created. Said fund shall be used solely for the purpose of paying the principal and interest of bonds issued in accordance with the provisions of this act.

Maximum rate of interest increased to four and one-half per centum by L. 1913, ch. 787. See Interest.

§ 3. **Moneys divided between state and county highways.**—The sum of twenty million dollars of the moneys hereby authorized to be raised shall be used solely for the construction and improvement of state highways as defined by section three of the highway law, and the sum of thirty million dollars of the aforesaid moneys shall be used solely for the construction and improvement of county highways as defined by section three of the highway law.

§ 4. **Apportionment of moneys.**—The state commission of highways is hereby directed, immediately after this law shall take effect, to equitably apportion among the counties containing towns the total amount of money hereby authorized. Said apportionment for each of said counties shall be

computed on the following basis: On the population as fixed by the federal census of nineteen hundred and ten; on the aforesaid measured mileage of public highways outside of cities and villages as obtained pursuant to section sixty-nine of chapter thirty of the laws of nineteen hundred and nine, and on the total area; and the sum of one-third of each of these three factors thus obtained for each of said counties shall constitute such equitable apportionment.

§ 5. **Routes of state highways.**—The routes of the state highways to be constructed and improved hereunder are those specifically set forth and described in section one hundred and twenty of the highway law, being chapter thirty of the laws of nineteen hundred and nine, and the acts amendatory thereof and supplemental thereto.

§ 6. **Routes of county highways.**—The routes of county highways to be constructed and improved hereunder are such as shall be determined by the state commission of highways with the approval of the boards of supervisors of the respective counties as set forth and prescribed by the highway law.

§ 7. **Control of construction.**—The work of construction and improvement of the aforesaid highways shall be under the management, supervision and control of the state commission of highways, and the provisions of articles six and seven of chapter thirty of the laws of nineteen hundred and nine, known as the highway law and the acts amendatory thereof and supplemental thereto, so far as they may be applicable and not inconsistent herewith, shall apply to and govern the work authorized by this act. The maps, plans, routes, specifications, resolutions and act heretofore prepared or adopted for use in the improvement and construction of state and county highways shall be applicable to the work authorized under this act.

§ 8. **Surplus.**—Any surplus arising from the sale of bonds over and above the cost of the work herein provided for shall be applied to the sinking fund for the payment of said bonds.

§ 9. **Submission of law to people.**—This law shall not take effect until it shall at a general election have been submitted to the people and have received a majority of all the votes cast for and against it at such election; and the same shall be submitted to the people of this state at the general election to be held in November, nineteen hundred and twelve. The ballots to be furnished for the use of the voters upon the submission of this law shall be in the form prescribed by the election law and the proposition or question to be submitted shall be printed thereon in substantially the following form, namely: "Shall chapter (here insert the number of the chapter) of the laws of nineteen hundred and twelve, entitled 'An act making provision for issuing bonds to the amount of not to exceed fifty million dollars for the purpose of constructing and improving state and county

L. 1910, ch. 564.

Moneys appropriated; county roads.

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highways, and providing for a submission of the same to the people to be voted upon at the next general election to be held in the year nineteen hundred and twelve,' be approved?''

(2) *Moneys heretofore appropriated.*

L. 1913, ch. 768.—An act relative to the expenditure of moneys heretofore appropriated for the construction and improvement of certain state highways.

Section 1. The sums appropriated by chapters ninety-two, one hundred and thirty-five, one hundred and fifty-four, one hundred and fifty-five, three hundred and forty-eight, four hundred and twenty-six, four hundred and sixty-three, four hundred and sixty-seven, four hundred and ninety-six, five hundred and fifty-nine, six hundred and fifty-seven, seven hundred and fifteen, seven hundred and twenty-six, seven hundred and thirty-three, seven hundred and forty-one, seven hundred and forty-two, seven hundred and forty-three, seven hundred and fifty-three and seven hundred and fifty-four of the laws of nineteen hundred and eleven for the construction and improvement of all or portions of state routes as specified or described therein, which appropriations have been ascertained by the state commission of highways to be insufficient for the completion of the said state routes or portions thereof as contemplated by said acts, are hereby authorized to be expended by the said commission in the construction and improvement of such portions of the state routes or portions thereof so specified in such acts as in the judgment of the said commission are in most need of construction and improvement. The appropriations so made shall be expended by the commission according to the provisions of article six of the highway law.

(3) *County Roads in Certain Counties.*

L. 1910, ch. 564.—An act to provide for county roads in certain counties. (Title thus amended by L. 1911, ch. 254.)

Section 1. **County road system of working highways.**—In a county adjacent to a city of the first class or containing a city of the second class, the board of supervisors of such county may, by a concurring vote of at least a majority of the members thereof, by resolution adopt the county road system and at any time and from time to time cause to be designated as county roads such portions of the public highways in such county as they shall deem advisable, outside of the limits of any city in such county, provided that any such public highway so designated as a county road is not a state or county highway, as defined in section three of the highway law, and shall cause such designation and a map of such county road to be filed in the clerk's office of such county; the roads so designated shall, as far as practicable, be leading market roads in such county. (*Amended by L. 1911, ch. 254, in effect June 6, 1911.*)

§ 2. **Construction and maintenance of county roads.**—County roads as

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defined in subdivision three of section three of the highway law and as designated pursuant to this act shall be exclusively under the jurisdiction of the board of supervisors and exempt from the jurisdiction of the highway officers of the several towns and villages in which said county roads are located. The expenses of constructing, maintaining and improving the county roads of such county shall be a county charge. The board of supervisors shall, upon the receipt of the county superintendent's report as provided for by subdivision two-a of section thirty-three of the highway law, consider the estimate in such report. It may by a majority vote of the members thereof approve such estimate or increase or reduce the amount of any of the estimates contained therein. The statement as thus approved, increased or reduced shall be signed in duplicate by a majority of the members of the board, one copy of which shall be filed in the office of the county clerk and the other delivered to the county treasurer. The county clerk shall make and transmit a copy of such statement to the highway commission and to the county superintendent. The board of supervisors shall thereupon cause the amounts therein to be raised by the issuance of county bonds therefor or to be assessed, levied and collected in such county in the same manner as other county charges, and such amounts shall be expended only for the purpose specified in such statement. The warrant for the collection of such taxes in such county shall direct the payment of the moneys so collected to the county treasurer to be held by him and paid out for the purpose or purposes specified in such statement, as provided in subdivision two-a of section thirty-three. The construction and maintenance of such county roads shall be under the supervision of the board of supervisors.

§ 3. **Bonding county for county roads.**—The board of supervisors of such county may borrow money from time to time for the construction, improvement, maintenance and repair of the county roads in such county, and may issue the bonds or other evidences of indebtedness of the county therefor; but such bonds or other evidences of indebtedness shall not bear a rate of interest exceeding five per centum per annum, and shall not be for a longer term than twenty years, and shall not be sold for less than par.

§ 4. **Acquisition of lands for right of way and other purposes.**—If a county road proposed to be constructed, improved, widened or otherwise altered, shall deviate from the line of a county road already existing, or shall necessitate the acquiring of a right of way for such purpose, the board of supervisors of the county where such county road is or shall be located, shall acquire land for the requisite right of way, prior to the actual commencement of the work of construction. The board of supervisors may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction, improvement or maintenance of county roads, or for spoil banks, together with a right of way to such spoil bank, and to any bed, pit, quarry or other place where such gravel,

L. 1914, ch. 33.

Miscellaneous acts.

§ 1.

stone or other material may be located. The expenses of acquiring lands for such purposes shall be a county charge. (*Added by L. 1913, ch. 473, in effect May 9, 1913.*)

(4) *Confirmation of Highway Taxes.*

L. 1910, ch. 482.—An act to legalize and confirm the taxes levied for the repair of highways upon the assessment rolls of the several towns for the year nineteen hundred and nine.

Omitted as temporary.

L. 1915, ch. 115.—An act to legalize and confirm the tax levied for the repair of highways upon the assessment rolls of the several towns for the year nineteen hundred and fourteen.

Omitted as temporary.

L. 1890, ch. 555.—“An act to provide for the improvement and maintenance of the public roads in certain counties as county roads.”

Omitted as local and probably obsolete. Originally applied to counties of not more than 200 square miles. There are no counties of less than that outside of the city of New York.

(5) *Miscellaneous Acts.*

L. 1915, ch. 261.—An act in relation to certain work done or materials furnished in the construction or improvement of state highways.

Section 1. If work shall have been heretofore done or materials shall have been heretofore furnished since January first, nineteen hundred and thirteen, on existing contracts, under the direction of the state commissioner of highways or a division engineer, in the construction or improvement of a state highway, which work or materials by inadvertence were not included in the proposal on which the contract for such construction or improvement was let, but were essential to the completion of the construction or improvement of such highway and would have been the proper subject of a supplemental contract before such work was done or materials furnished, the state commissioner of highways may, if justice requires, enter into a supplemental contract, subject to the approval of the comptroller, for such work or materials as of the date of the original contract for such construction or improvement, with the same force and effect as if such supplemental contract had been made before the work was done or materials furnished.

L. 1914, ch. 33.—An act in relation to the charge, maintenance, control and repair of certain public highways within the territory occupied by Letchworth Park, in the county of Wyoming.

§ 1. That portion of the town highways of the town of Genesee Falls, in the county of Wyoming, which lies within Letchworth Park, in such county, shall hereafter be under the jurisdiction, charge and control of the American Scenic and Preservation Society, and no board or official of such town shall hereafter exercise any authority with respect to such highways. No part of the expense of maintenance or repairs of such portion

of highways within such park shall be borne by such town, but shall be defrayed by such society from moneys appropriated therefor or from other funds in the hands of such society lawfully applicable to such purpose.

L. 1915, ch. 703.—An act to create a commission to investigate the conditions relative to the construction of a highway bridge over the Mohawk river and Barge canal between the city of Schenectady and the village of Scotia.

Omitted as temporary. A plan for such bridge was proposed by the commission. See L. 1917, ch. 735.

L. 1895, ch. 499.—“An act to authorize certain town boards and commissioners of highways to expend a sum of money in additon to that authorized by the highway law, and to incur an indebtedness for the grading, macadamizing and improving of highways in said town.”

Omitted as local and temporary.

HIGHWAY TRAFFIC LAW.

See General Highway Traffic Law.

HISTORICAL PLACES.

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(1) Trustees of Scenic and Historic Places.

L. 1895, ch. 166.—“An act to incorporate the trustees of scenic and historic places and objects and to provide for the care of certain property of the state.”

§ 1. Incorporation; property.—The following persons: William H. Webb, Samuel D. Babcock, John M. Francis, Andrew H. Green, Charles A. Dana, Oswald Ottendorfer, Chauncey M. Depew, Horace Porter, William Allen Butler, Morney Williams, George G. Haven, Elbridge T. Gerry, Walter S. Logan, Henry E. Howland, Edward P. Hatch, William L. Bull, James M. Taylor, J. Hampden Robb, Ebenezer K. Wright, Alexander E. Orr, William M. Evarts, Wagar Swayne, Charles R. Miller, Frederick W. Devoe, Elbridge S. Spaulding, Frederick S. Tallmadge, Thomas V. Welch, S. Van Rensselaer Cruger, Frederick J. de Peyster, Morgan Dix, John A. Stewart, Charles C. Beaman, Francis Vinton Greene, Peter A. Porter, M. D. Raymond, George N. Lawrence, Benjamin F. Tracy, Augustus Frank, Charles Z. Lincoln, John Hudson Peck, Sherman S. Rogers, William Hamilton Harris, Lewis Cass Ledyard, Alexander B. Crane, John Hodge, Robert L. Fryer, J. S. T. Stranahan, Samuel Parsons, junior, Charles A. Hawley, Henry E. Gregory, Frederick D. Tappen, Henry J. Cookinham, Henry R. Durfee, H. Walter Webb and such others as shall become associated with them in the manner and upon the terms and conditions prescribed by the by-laws of the corporation hereby created, are hereby constituted a body politic and corporate by the name of The American Scenic and Historic Preservation society with all the powers and subject to the provisions of the eleventh section of chapter thirty-five

of the general corporation law as amended by chapter six hundred and eighty-seven of the laws of eighteen hundred and ninety-two, except as otherwise provided by this act, and shall be capable of purchasing, taking, receiving and holding by gift, grant, devise, bequest, or otherwise, in trust, or perpetuity, real and personal estate for the uses and purposes of said corporation, the value of which shall not exceed one million dollars. (*Amended by L. 1898, ch. 302, and L. 1901, ch. 385.*)

§ 2. **Objects.**—The objects of said corporation shall be to make recommendations to any municipality in the state of New York, or its proper officers, respecting improvements in the scenic or material conditions thereof, to acquire by purchase, gift, grant, devise or bequest, or in any other lawful manner, historic objects or memorable or picturesque places in the state or elsewhere in the United States, hold real and personal property in fee or upon such lawful trusts as may be agreed upon between the donors thereof and said corporation, or as may be constituted by a court of competent jurisdiction and accepted by said corporation, and to improve the same; admission to which shall be free to the public under such rules for the proper protection thereof as said corporation may prescribe, and which property shall be exempt from taxation, within the state of New York. (*Amended by L. 1901, ch. 385, and L. 1902, ch. 501.*)

§ 3. **Trustees.**—The affairs and business of said corporation shall be conducted by a board of not less than five nor more than thirty-five trustees, a quorum of whom for the transaction of business shall be fixed by the by-laws. The persons now constituting the board of trustees of said corporation, shall continue to hold office until others are elected in their stead, as provided by the said by-laws. Vacancies in the board of trustees may be filled in the manner prescribed by the said by-laws. (*Amended by L. 1898, ch. 302, and L. 1901, ch. 385.*)

§ 4. **Interest in contracts prohibited.**—None of the trustees or members of said corporation shall receive any compensation for services or be pecuniarily interested directly or indirectly in any contract relating to the affairs of said corporation, nor shall said corporation make any dividend or division of its property among its members, managers or officers.

§ 5. **Officers; membership.**—The board of trustees shall annually, at a time to be fixed by the by-laws, elect or appoint from their number the following officers: a president, four vice-presidents, and treasurer, who shall hold office for one year and until their respective successors are elected or appointed, and shall perform such duties as are provided by the by-laws. The board of trustees may also appoint a secretary and define his duties, and shall have the power to manage, transact, and conduct all business of the corporation, to prescribe the terms of admission of its members, and to appoint and fix the compensation of, and remove its employees at pleasure. The said corporation shall have no capital stock, and shall have no

L. 1900, ch. 391.

Battle of Lake George.

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power to sell, mortgage, or otherwise encumber any of its property.
(*Amended by L. 1901, ch. 385.*)

§ 6. **Reports; joint action with other persons.**—Said corporation shall annually make to the legislature a statement of its affairs and from time to time report to the legislature by bill or otherwise such recommendations as are pertinent to the objects for which it was created and may act jointly or otherwise with any persons appointed by any other state for similar purposes as those intended to be accomplished by this act whenever the object to be secured or purpose sought to be accomplished is within the jurisdiction of this and any other state or can only be attained by such joint action.

(2) *Battle of Lake George.*

L. 1897, ch. 279.—“An act to provide for acquiring lands to commemorate the battle of Lake George.”

§ 1. The comptroller of the state is hereby authorized and empowered to purchase such lands as he may deem proper, not to exceed fifty acres, at or near where the battle of Lake George was fought, in Warren county, at such point as he may deem just, and at a price not exceeding five thousand dollars, and acquire title thereto in the name of the people of the state according to law.

§ 2. The sum of five thousand dollars or so much thereof as may be necessary, is hereby appropriated out of any moneys not otherwise appropriated, to carry into effect the intents and purposes of this act.

§ 3. The lands acquired under this act shall be exempt from taxation, and shall belong to the state forever, and shall be under the care of the comptroller of the state.

L. 1900, ch. 391.—“An act to provide for acquiring and care of lands to commemorate the battle of Lake George and making an appropriation therefor.”

§ 1. **Purchase of lands.**—The comptroller of the state of New York is hereby authorized and empowered to purchase such lands as he may deem proper, not to exceed twenty-five acres, to include the place where the battle of Lake George was fought in Warren county, state of New York, at such point as he may deem just, and at a price not exceeding fourteen thousand dollars, and acquire title thereto in the name of the people of the state of New York according to law.

§ 2. **Improvement of lands.**—After the title to said lands shall have been acquired, the comptroller shall take measures to lay out, improve, and care for the same as a public park, at an expense not exceeding one thousand dollars, carefully preserving the fortifications and other historic features.

§ 3. **Appropriation.**—The sum of fifteen thousand dollars, or so much

§§ 1-3.

Stony Point.

L. 1897, ch. 764.

thereof as may be necessary, is hereby appropriated out of any moneys not otherwise appropriated to carry into effect the intents and purposes of this act.

§ 4. **Control and custodian of property.**—The comptroller of the state of New York shall have control over such lands and may appoint a custodian to take charge of such property at an expense not to exceed two hundred and fifty dollars per annum.

§ 5. **Exemption from taxation.**—The lands acquired under this act shall be exempt from taxation and shall belong to the state of New York forever.

(3) *Stony Point.*

L. 1897, ch. 764.—“An act to provide for acquiring the site of the battle of Stony Point, in Rockland county, and making an appropriation therefor.”

§ 1. **Acquisition of title to land.**—The commissioners of the land office may, on the recommendation of the “trustees of scenic and historic places and objects,” a corporation duly incorporated by chapter one hundred and sixty-six of the laws of eighteen hundred and ninety-five, by agreement with the owner or owners, upon such price and terms as they may deem just, not exceeding the amount heretofore appropriated, acquire title, on behalf, and in the name of, the people of the state, to the following described land commemorative of the battle of Stony Point, namely: All that plot and parcel of land in the town of Stony Point, county of Rockland, known as the “Stony Point peninsula,” which is bounded on the west by the easterly side of lands of the New York, West Shore and Buffalo Railroad company, and on all other sides by the Hudson river; containing about thirty-six acres of land. (*Amended by L. 1898, ch. 202.*)

§ 2. **Control and jurisdiction of trustees.**—After title to said lands shall have been acquired as aforesaid, said trustees shall have control and jurisdiction thereof for the purposes mentioned in said chapter one hundred and sixty-six of the laws of eighteen hundred and ninety-five.

§ 3. **Payment by comptroller.**—Upon the requisition of said commissioners of the land office, and upon a voucher or vouchers certified by said commissioners, or by such officer or officers thereof as they may designate for that purpose, in form to be approved by the comptroller, the comptroller shall pay the sum or sums that may be necessary to pay for the lands authorized to be acquired by the authority of this act.

Section 4 appropriates \$25,000.

L. 1900, ch. 408.—“An act to provide for the improvement, care and protection of lands known as the ‘Stony Point peninsula,’ the title to which has been acquired in the name of the people of the state, and making an appropriation therefor.”

§ 1. **Improvement, care, etc., of lands.**—The Society for the Preservation of Scenic and Historic Places and Objects is hereby authorized to lay out, improve, manage and maintain the lands and premises known as the

L. 1910, ch. 116.

Stony Point.

§ 1.

"Stony Point peninsula," of which it has control and jurisdiction by authority of chapter seven hundred and sixty-four of the laws of eighteen hundred and ninety-seven and chapters two hundred and two and three hundred and two of the laws of eighteen hundred and ninety-eight; to make, publish and enforce ordinances, by-laws, rules and regulations for the care and protection of the same; and without expense to the state to employ such person or persons as may be needed, one or more of whom, to be designated by the trustees of such society, shall have the power and perform the duties of a police constable in criminal cases.

Section 2 appropriates \$3,500.

L. 1904, ch. 641.—"An act to provide for continuing the improvement and maintenance of the lands known as the Stony Point peninsula, and making an appropriation therefor." (*In effect May 9, 1904.*)

Section 1. The American scenic and historic preservation society (formerly the society for the preservation of scenic and historic places and objects) is hereby authorized to continue the work begun and carried on pursuant to the provision of chapter four hundred and eight of the laws of one thousand nine hundred, and of chapter five hundred and ninety-nine of the laws of one thousand nine hundred and three, by laying out, improving and maintaining the lands and premises known as the Stony Point peninsula of which it has control and jurisdiction by authority of chapter seven hundred and sixty-four of the laws of one thousand eight hundred and ninety-seven and chapters two hundred and two and three hundred and two of the laws of one thousand eight hundred and ninety-eight.

Section 2 appropriates \$6,600.

L. 1910, ch. 116.—An act to provide for acquiring, without expense, an additional portion of the battlefield of Stony Point and a right of way thereto, in the town of Stony Point and the county of Rockland. (*In effect Apr. 20, 1910.*)

Section 1. The commissioners of the land office are hereby authorized, on behalf and in the name of the people of the state of New York, and without expense to the state, to accept a conveyance of and acquire title to the following described lands and premises situated in the town of Stony Point and the county of Rockland, being an additional portion of the battlefield of Stony Point and adjoining the present state lands on the Stony Point peninsula, viz.: All that piece or parcel of land situated in the town of Stony Point, county of Rockland, and state of New York, bounded and described as follows: Beginning on the west line of the West Shore railroad lands at a point where said west line intersects the line between the lands late of John Ten Eyck and the lands late of Watson and Frederick Tomkins, and running thence along the said west line of the West Shore railroad lands south nine degrees west, three hundred and twenty-five feet; thence north sixty-one degrees thirty minutes west,

§ 1.

John Brown Farm.

L. 1896, ch. 116.

two hundred and thirty-nine feet; thence north seventeen degrees east eighty feet, thence north thirty-seven degrees twelve minutes east, one hundred and sixty-one feet to the south line of the said lands late of John Ten Eyck; thence south forty-one degrees twenty minutes east, ninety-four and seven-tenths feet; thence north forty-one degrees forty-five minutes east, one hundred and seven feet to the place of beginning, containing one hundred and six-hundredths acres of land.

§ 2. The commissioners of the land office are also authorized, on behalf and in the name of the people of the state, and without expense to the state, to acquire a right of way leading from, at or near the Mud Bridge so called at the peninsula of Stony Point, in the county of Rockland, eastwardly to the state reservation and property mentioned and described in section one of this act.

§ 3. When the property described in section one of this act and the said right of way shall have been acquired as herein provided, said additional lands and right of way shall form and become a part of the Stony Point battlefield state reservation acquired pursuant to chapter seven hundred and sixty-four of the laws of eighteen hundred and ninety-seven, entitled "An act to provide for acquiring the site of the battle of Stony Point in Rockland county and making an appropriation therefor," and in accordance with any acts amendatory thereof or supplementary thereto.

(4) *John Brown Farm.*

L. 1896, ch. 116.—"An act to accept a deed of gift from Henry Clews and Lucy Madison Clews to the people of the state of New York for land within the Adirondack park."

Section 1. The deed of gift or conveyance made and executed the twenty-ninth day of March, eighteen hundred and ninety-five, by Henry Clews and Lucy Madison Clews, his wife, to the people of the state of New York, conveying to the said people certain land in the Adirondack park, known as the John Brown farm, in the town of North Elba, in the county of Essex, being the greater part of lot number ninety-five, Thorn's survey of township number twelve, old military tract, which deed was delivered by the grantors to the comptroller of this state, is hereby accepted upon the terms and conditions therein mentioned, namely, that the land therein and thereby conveyed shall be and continue to be dedicated and used for the purposes of a public park or reservation forever, and that the said Henry Clews, or his agents, may enter upon the said land and erect thereon, near the grave of John Brown, a tablet with such inscription as they, in their discretion, may deem proper; and the land in said conveyance described is hereby declared to be and shall be deemed to be in the actual possession of the comptroller, but subject to the care, custody, control and superintendence of the fisheries, game and forest commission.

L. 1906, ch. 681.

Johnson Mansion and Blockhouse.

§ 1.

(5) *Fort Brewerton.*

L. 1904, ch. 653.—“An act to provide for acquiring the site of Fort Brewerton in the town of Hastings, Oswego county, and making an appropriation therefor.” (*In effect May 9, 1904.*)

Section 1. The commissioners of the land office, shall, on the recommendation of the American scenic and historic preservation society, a corporation incorporated by chapter one hundred and sixty-six of the laws of eighteen hundred and ninety-five, as amended by chapter three hundred and eighty-five, of the laws of nineteen hundred and one, if able to agree with the owner upon a price not exceeding the amount hereby appropriated, acquire title, on behalf of and in the name of the people of the state, to the site of Fort Brewerton, in the town of Hastings, Oswego county, together with such adjoining land as they may deem desirable in connection therewith.

§ 2. After title to such land shall have been acquired as provided by this act, the trustees of scenic and historic places and objects shall have control and jurisdiction thereof for the purposes mentioned in chapter one hundred and sixty-six of the laws of eighteen hundred and ninety-five.

Section 3 appropriates \$2,000.

(6) *Johnson Mansion and Blockhouse.*

L. 1906, ch. 681.—“An act to provide for the acquisition and preservation of the historic mansion and blockhouse, formerly owned by Sir William Johnson, in the city of Johnstown, and making an appropriation therefor.” (*In effect June 1, 1906.*)

§ 1. Acquisition of title to land.—The commissioners of the land office may, on the recommendation of the Johnstown historical society, a corporation duly incorporated under the laws of the state of New York, by agreement with the owner or owners, upon such price and terms as they may deem just, not exceeding the amount hereinafter appropriated, acquire title, on behalf and in the name of the people of the state, to the following described land, namely, all that tract or parcel of land situate in the city of Johnstown, Fulton county and state of New York, bounded and described as follows: Commencing at the northwest corner of lands owned by the city of Johnstown, upon which the monument of Sir William Johnson has been erected and at a distance of four hundred and twenty-six feet from the angle formed by the intersection of the easterly line of West State street and the westerly line of Hall avenue, and running thence easterly along the north line of said lands one hundred and sixty-two and five-tenths feet to the westerly line of Hall avenue, thence in a northeasterly and a northwesterly direction along the westerly line of Hall avenue fourteen hundred and sixty-four feet more or less to the corner formed by the intersection of the westerly line of Hall avenue and the southerly line of the

§ 1.

Seneca Indian Council Rock.

L. 1905, ch. 69.

road running to Bennett's corners, thence westerly along the southerly line of said road running to Bennett's corners two hundred and ninety feet more or less to the corner formed by the intersection of West State street and said road running to Bennett's corners, and thence in a southerly direction thirteen hundred and twenty feet more or less along the easterly line of West State street to the point and place of beginning, containing nine and sixty-two one-hundredths acres more or less. Also that other tract or parcel of land, situate in the city aforesaid and bounded and described as follows: Commencing on the east side of Hall avenue at the angle formed by the intersection of Hall avenue and the road running to Bennett's corners and running thence in a southerly direction along the east side of Hall avenue six hundred and forty-five feet more or less to the post at the corner of the gate and sidewalk, thence in a southerly direction one hundred and eighty-five feet to a post with three marks upon it, thence easterly six hundred and forty-nine feet more or less to and across the creek and thence westerly four hundred and seventy-four feet more or less to lands of one Argersinger, thence southerly along said Argersinger's land one hundred and twenty-five feet to the southwest corner thereof, thence westerly along Argersinger's land two hundred and twenty-three feet to the highway leading to Bennett's corners and from thence along the highway four hundred and twenty-eight feet more or less to the point and place of beginning, containing eight and five-tenths acres more or less, including the mansion and blockhouse formerly owned by Sir William Johnson and the barn and other buildings pertaining thereto.

§ 2. After title to said premises shall have been acquired, as aforesaid, said corporation, the Johnstown historical society, shall have control and jurisdiction thereof for the purposes of preserving the same for the benefit of the people of the state of New York as an historic landmark and for educational and patriotic purposes.

§ 3. Upon the requisition of said commissioners of the land office, and upon a voucher or vouchers certified by said commissioners, or by such officer or officers thereof as they may designate for that purpose, in form to be approved by the comptroller, the comptroller shall pay the sum or sums that may be necessary to pay for the lands authorized to be acquired by the authority of this act.

Section 4 appropriates \$25,000.

(7) *Seneca Indian Council Rock.*

L. 1905, ch. 69.—“An act to provide for the care, preservation and protection of the rock known as the ‘Seneca Indian council rock,’ in the town of Brighton, Monroe county, New York, and legalizing its existence in its present location.”

Section 1. Edwin C. Smith, A. Emerson Babcock, John T. Caley, Maria Hagaman and T. Franklin Crittendon, and their successors are hereby

constituted a commission to be known as "The Seneca Indian council rock commission of Brighton, New York."

§ 2. The commission herein provided for is vested with the power to maintain, protect and control the rock located in the highway known as East avenue in the town of Brighton, Monroe county, New York, and is authorized to take such action and expend such moneys as may be necessary to secure the title and ownership of said rock and the lands upon which the same is now located; to establish, erect and maintain such fences, guards, rails or other structures as may in their judgment be necessary for the preservation of said rock and its protection from injury and defacement, and to compile and obtain a complete history of said rock. Said commission is authorized to accept and receive such bequests, gifts, devises or contributions as may be made, to an amount not exceeding five hundred dollars, the income from which said commission may expend in the care, preservation and protection of such rock in such manner as shall be, in their judgment, best suited for that purpose.

§ 3. Vacancies in the membership of such commission shall be filled by the survivors thereof at an election by the surviving members of such commission to be held at a meeting called for that purpose. Such commission is authorized to enact such by-laws and rules as may be suitable for the government of its affairs, and shall annually elect a president, and a secretary and treasurer thereof.

§ 4. The town board of the town of Brighton, Monroe county, New York, may appropriate such moneys of the town of Brighton for the use and benefit of such commission in carrying out the provisions of this act as said town board may from time to time deem necessary and proper.

§ 5. The existence of said rock and its retention in its present location is hereby legalized and ratified, and neither the town of Brighton nor said commission shall be liable in any manner for any damages which may occur by reason of the continuance of said rock in said highway, or for any acts of said commission in preserving and protecting said rock.

(8) *Philipse Manor House.*

L. 1908, ch. 168.—"An act to provide for the acquisition by the people of the state of New York of the Philipse manor house and grounds in the city of Yonkers, Westchester county."

Section 1. The city of Yonkers is hereby authorized and empowered to convey by its deed, to the people of the state of New York, all that certain parcel of land situated in the city of Yonkers, Westchester county, New York, with the buildings and improvements thereon, known as the Philipse manor house property, or the manor hall property, which is bounded on the east by Warburton avenue; on the south by Dock street; on the west by Woodworth avenue, and on the north by the southerly line

§ 1.

Hamilton Grange.

L. 1908, ch. 220.

of the property of the Warburton Hall Association, upon payment to said city, at any time within two years after the passage of this act, by any citizen or citizens of this state, of the sum of fifty thousand dollars, contributed and given for the purpose.

§ 2. Upon delivery of such deed, duly executed, to the comptroller of this state, in form approved by him, title to such said premises shall be and is hereby accepted by the people of the state of New York; the purpose and object of such deed and acceptance being that the said manor house and grounds shall be preserved and maintained forever intact as an historical monument and a museum of historical relics and for such historical and patriotic uses.

§ 3. The American Scenic and Historical Preservation Society shall be and is hereby constituted and appointed custodian of said property for the state upon conveyance thereof to the state as herein contemplated; and said society, as such custodian, shall have control of and jurisdiction over said property to preserve and maintain the same in accordance with the purpose and object stated in section two of this act, until the legislature shall otherwise direct.

§ 4. The city of Yonkers is authorized to use and occupy the said property as it is now used and occupied, until the completion of the new municipal building, or city hall, now in course of construction in said city, unless other provision shall sooner be made for the public business now transacted therein, and during such occupation and use shall maintain and preserve the property.

(9) *Hamilton Grange.*

L. 1908, ch. 220.—“An act to authorize the city of New York to acquire the Alexander Hamilton mansion, known as Hamilton Grange, and move it to a site in that portion of Saint Nicholas park, formerly constituting a part of the Alexander Hamilton farm.”

Section 1. The corporation known as “The Rector, Churchwardens and Vestrymen of Saint Luke’s Protestant Episcopal Church” is hereby authorized to transfer and convey to the city of New York, either with or without consideration, the Alexander Hamilton mansion, known as Hamilton Grange, now owned by such church and located on the church property adjoining the church at the northeast corner of One Hundred and Forty-first street and Convent avenue in the city of New York. The city of New York is hereby authorized to acquire such property, either by purchase or as a gift and the board of estimate and apportionment is hereby authorized in its discretion to appropriate sufficient funds for the purchase of such grange and the removal of the same to a site in that portion of Saint Nicholas park, which was formerly part of the Alexander Hamilton farm. Such site shall be selected by the board of estimate and apportionment

L. 1913, ch. 217.

Spy Island; Herkimer Homestead.

§ 1.

and such authority as may be necessary for the utilizing of such park lands for such purpose is hereby granted. If such grange be given without consideration to the city of New York and accepted by it, the city of New York shall bear the expense of restoring the premises from which it is removed in such manner as may be agreed upon by the board of estimate and apportionment and such church corporation.

§ 2. Upon the removal of such grange to Saint Nicholas park, the same shall be under the jurisdiction of the commissioner of parks, who is authorized in his discretion to transfer the custody thereof to the Sons of the American Revolution or any similar society of the war of the revolution, for such a period of years and on such terms and conditions as he may deem advisable for the establishment therein of a public museum for the collection, preservation and exhibition of historical relics.

§ 3. The comptroller shall upon the requisition of the board of estimate and apportionment issue revenue bonds in such amount as may be needed to pay the expenses of purchasing and removing such grange and re-locating the same as provided by this act.

(10) *Spy Island.*

L. 1908, ch. 399.—“An act vesting the care and custody of ‘Spy Island’ in the town of Mexico, Oswego county, in Silas Town Chapter, Daughters of the American Revolution.”

Section 1. The care and custody of the island known as “Spy Island,” located at the mouth of Little Salmon river, in the town of Mexico, Oswego county, the title to which was heretofore acquired by the state in pursuance of chapter six hundred of the laws of nineteen hundred and three, are hereby vested in Silas Town Chapter, Daughters of the American Revolution, of Mexico, New York, and such chapter is hereby authorized and empowered to adopt and execute such plans, and make such rules and regulations for preserving, beautifying and regulating the use of such island as may be necessary, but without expense to the state.

(11) *Herkimer Homestead.*

L. 1913, ch. 217.—An act to provide for the acquisition and preservation of the historic house and grounds formerly owned and occupied by General Nicholas Herkimer, in the town of Danube, in the county of Herkimer, and making an appropriation therefor. (*In effect Apr. 5, 1913.*)

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L. 1913, ch 217
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Section 1. The commissioners of the land office may, upon the recommendation of the German American Alliance and a committee of the Daughters of the American Revolution of New York State, to be appointed by the state regents, by agreement with the owner or owners, upon such price and terms as they may deem just, not exceeding the amount herein-after appropriated, acquire title, on behalf and in the name of the people of the state, to the farm lands and buildings owned and occupied as a home

§ 1.

Bennington Battlefield.

L. 1913, ch. 716.

by General Nicholas Herkimer in his lifetime, now known as the Herkimer farm, situated in the town of Danube and county of Herkimer.

§ 2. After title to such premises shall have been acquired, as aforesaid, said German American Alliance and the committee of the Daughters of the American Revolution of New York State shall have control and jurisdiction thereof for the purpose of preserving the same for the benefit of the people of the State of New York as an historical land mark and for educational and patriotic purposes.

§ 3. Upon the requisition of such commissioners of the land office, and upon a voucher or vouchers certified by such commissioners, or by such officer or officers thereof as they may designate for the purpose, in form to be approved by the comptroller, the comptroller shall pay the sum or sums that may be necessary to pay for the lands authorized to be acquired by the authority of this act, and to build, construct and repair upon the said premises such buildings as may be necessary to properly and satisfactorily carry out the intent and purposes of this act.

Section 4 appropriates \$15,000.

(12) *Bennington Battlefield.*

L. 1913, ch. 716.—An act to provide for the acquisition and preservation of the historic tract or parcel of land known as the Bennington battlefield, situate in the town of Hoosick, in the county of Rensselaer, and making an appropriation therefor. (*In effect May 24, 1913.*)

Section 1. The commissioners of the land office may, by agreement with the owner or owners, upon such price and terms as they may deem just, not exceeding the sum of twenty-five thousand dollars, hereinafter appropriated, acquire title on behalf and in the name of the people of the state to the ancient historical tract or parcel of land known as the Bennington battlefield which was occupied by the American and British forces in the engagement known as the battle of Bennington, situate in the town of Hoosick and county of Rensselaer, and more particularly described as follows:

First parcel, known as the "Stevens farm," beginning at a point in the highway leading from Walloomsac, New York, to North Bennington, Vermont, marked "B"; thence north four and three-fourth degrees west, twenty and fifty-two one hundredths chains; thence north, twenty-eight and one-half degrees west, fourteen and four one hundredths chains to a point marked "C" on map; thence north, fifty-seven and one-half degrees east, thirty and twelve one hundredths chains to point "D"; thence south, thirty-four and one-half degrees east, twenty and thirty-four one hundredths chains to a point marked "E"; thence south, fifty-five and three-fourths degrees west, twenty-two and eighty-seven one hundredths chains to point "F"; thence south, thirty-eight degrees east, seventeen and seventy-six one hundredths chains to point "A"; thence across the track of the Boston and Maine railway to point "P," in center of the Walloomsac

river; thence *dwn the middle of said river, as it winds and turns, to a point in the Myron Cottrell west line; thence along the east line of the said Moses and Thomas Barnett farm, now "Stevens"; thence on said line to the north bank of said river; thence down along the same to a post in the east line of lands of John Flynn, now deceased; thence north, along said east line of Flynn, to the highway aforesaid near place of beginning; excepting a piece of land sold to and now occupied by the Boston and Maine railway and also a piece about one and seven twenty-fifths acres sold to the Bennington and Hoosick Valley railway; the estimated area of said Stevens farm contains about one hundred and seventy-three acres, be the same more or less, which does not include exceptions of Boston and Maine railway and Hoosick Valley railway. Also, second parcel, known as the "Cottrell" lands, commencing at a point in the center of the Walloomsac river, near the highway bridge on highway leading from Walloomsac, New York, to North Bennington, Vermont, marked "P" on Stevens' map; thence northerly, across track of Boston and Maine railway, to point "A," in railway fence in said map; thence northerly, along Stevens' line, to point "S," seventeen and seventy-six one hundredths chains; thence easterly, along Stevens' line, twenty-two and eighty-seven one hundredths chains to the west line of James A. Frazier; thence southerly, along said line, fourteen chains to center of said river; thence along the center of said river, as it winds and turns, to place of beginning, estimated as containing about thirty-five acres, be the same more or less; the description of both of said parcels, and the monuments and markings therein referred to, being according to a survey and map or maps thereof, made by Henry Q. Allen on or about the twenty-seventh day of April, nineteen hundred and eleven.

Said tracts or parcels of land, after title thereto is acquired, shall be preserved for the benefit of the people of the state of New York as an historic landmark and for educational and patriotic purposes, and the care and control thereof shall be vested in the New York State Historical Association, who under the direction of the state comptroller shall improve and care for the same as a public park. The said association may employ a caretaker therefor at an expense not to exceed two hundred and fifty dollars per annum, which sum shall be paid to the treasurer of said association annually by the state comptroller upon the submission of the proper vouchers, and said association may adopt rules and regulations, by and with the consent of the state comptroller, for the admission of visitors to such premises. But no charge or fee shall be exacted for such admission. The state comptroller shall include in his annual report to the legislature a detailed statement of his receipts and expenditures under this act and an estimate of the work necessary to be done and the expenses of maintaining the premises for the ensuing fiscal year, with such recommendations in respect thereto as he may deem proper.

* So in original.

§§ 1, 2.

Guy Park House.

L. 1917, ch. 316.

§ 2. Upon the requisition of said commissioners of the land office, and upon a voucher or vouchers certified by said commissioners, or by such officer or officers thereof as they may designate for that purpose, in form to be approved by the comptroller, the comptroller shall pay, from the moneys hereinafter appropriated, the sum or sums that may be necessary for the acquisition of the lands authorized to be acquired by this act.

Section 3 appropriates \$25,000.

§ 4. In case the commissioners of the land office cannot agree with the owner or owners of said land for the purchase thereof, the attorney-general is hereby authorized and directed to acquire title to said property by condemnation for the people of the state by proceedings taken under title one of chapter twenty-three of the code of civil procedure, known as the condemnation law, for the purposes aforesaid, which are hereby declared to be a public use.

(13) *Letchworth Park.*

L. 1915, ch. 496.—An act authorizing the American Scenic and Historic Preservation Society to acquire title to certain lands to be used as a part of Letchworth park.

§ 1. The American Scenic and Historic Preservation Society is hereby authorized and empowered to acquire title to lands formerly owned by Maria Davis situate in Letchworth park. In case such society is unable to agree with the owner on the purchase price to be paid for such property, the title thereto may be acquired by condemnation in the matter provided by the condemnation law. Such proceeding shall be brought by the attorney-general in the name of the state and the title to such lands, whether acquired by purchase or condemnation, shall vest in the state.

(14) *Guy Park House.*

L. 1917, ch. 316.—An act authorizing the repair, improvement and preservation of the building known as Guy Park house, and the grounds adjacent thereto, in the city of Amsterdam, county of Montgomery, making an appropriation therefor, and transferring the custody thereof to the Amsterdam Chapter of the Daughters of the American Revolution. (*In effect May 2, 1917.*)

Section 1. The superintendent of public works is hereby authorized to make such repairs and improvements to the building situated in the city of Amsterdam, county of Montgomery, and known as the Guy Park house, as will restore so far as may be possible such building to its original appearance and as may be necessary to preserve the same, and to improve the grounds immediately adjacent thereto; the said property having been appropriated by the state for canal purposes from the owner or owners thereof on or about February fourteen, nineteen hundred and seven, pursuant to the provisions of chapter one hundred and forty-seven of the laws of nineteen hundred and three.

§ 2. Upon the completion of the repairs and improvements author-

ized by this act, the superintendent of public works is hereby authorized to transfer to the Amsterdam Chapter of the Daughters of the American Revolution the custody and maintenance of such building and such portion of the grounds immediately adjacent thereto as may be necessary for the proper use and preservation of such building, upon the execution and filing in the office of the superintendent of public works of a proper instrument by said Daughters of the American Revolution, agreeing to preserve, protect and maintain such building in a suitable and proper manner without cost to the state, and releasing the state from any damage or claim for damages which may accrue to any person or persons by reason of the use of such building or any part thereof. Nothing in this act contained shall be deemed as divesting the state of title to such property, and the right of custody and maintenance hereby authorized to be conveyed by the superintendent of public works to said Daughters of the American Revolution shall not be transferred or assigned by them without the previous consent in writing of the superintendent of public works.

§ 3. The Amsterdam Chapter of the Daughters of the American Revolution may designate a caretaker to such premises, and adopt rules and regulations for the admission of visitors; but no charge or fee shall be exacted for such admission.

§ 4. The sum of five thousand dollars (\$5,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury, not otherwise appropriated, for the purpose of carrying into effect the provisions of this act, to be paid by the treasurer on the warrant of the comptroller on the order of the superintendent of public works.

(15) *Temple Hill Monument.*

L. 1917, ch. 326.—An act for the acceptance by the state of New York as a free gift from The Historical Society of Newburgh Bay and the Highlands of a parcel of land in the town of New Windsor in Orange county and the monument thereon which marks the location of the "temple" or "public building" of Revolutionary days, and providing for the fencing thereof and for the care and management thereof. (*In effect May 2, 1917.*)

Section 1. The conveyance to the state of New York from The Historical Society of Newburgh Bay and the Highlands of the title to that parcel of land in the town of New Windsor, Orange county, whereon the monument stands known as the Temple Hill monument, which marks the site where various important events occurred in connection with the war of the Revolution shall be accepted as a free gift from said historical society, and shall be perpetually cared for and preserved by the state of New York.

§ 2. The parcel of land so to be conveyed is to be a plot seventy-five feet square each side whereof shall run parallel to the corresponding side or face of said monument. And the conveyance shall include a free and

§§ 3-5.

Temple Hill Monument.

L. 1917, ch. 326.

unobstructed right of way along a parcel of land thirty feet wide running from the parcel above described westwardly to the nearest highway; and shall also include the monument now standing on said parcel of land.

§ 3. Said conveyance shall be by deed satisfactory in form to the attorney-general which shall be duly executed and acknowledged and shall be subject to no liens, covenants or restrictions whatever except the following, namely: the state shall keep the said right of way in good order and condition and passable at all times for vehicles and foot passengers, and shall build and maintain fences on each side of said right of way, and shall build and maintain a fence around the parcel of land first described in this act; and that said premises shall be maintained forever as a memorial of the historical events which occurred there and shall never be conveyed, used or occupied for any other purpose whatsoever; and that the title thereto shall cease and determine if said premises are abandoned or neglected for a period of one year.

§ 4. The state comptroller is hereby authorized and empowered to accept such conveyance in behalf of the state, and the trustees of Washington's Headquarters at Newburgh, New York, shall have the care and management of the said property when acquired.

§ 5. The sum of five hundred dollars (\$500) is hereby appropriated out of any moneys in the treasury not otherwise appropriated, payable on the warrant of the comptroller to the order of the president of the board of trustees of Washington's Headquarters at Newburgh, to be expended by the president of such board in the fencing of such parcel of land and said right of way and opening said right of way. But no part of this appropriation shall be available until the lieutenant governor and the comptroller shall certify in writing, to be filed in the office of the comptroller, that the contemplated improvements of said land and right of way will not cost more than the sum hereby appropriated; nor until the certificate of the attorney-general shall be filed with the comptroller to the effect that the title to such lot and the perpetual right to the free and unobstructed use of such right of way is vested in the state by sufficient grants or conveyances.

HISTORICAL SOCIETIES.

Incorporation and powers; Membership Corporations Law, §§ 3-48. Power to acquire and hold historical places; Membership Corporations Law, §§ 230, 231.

HOLIDAYS.

Enumerated; General Construction Law, § 24.

HOLLAND LAND COMPANY.

L. 1836, ch. 329, authorized the filing and recording in the office of the county clerks of Genesee, Orleans, Niagara, Erie, Chautauqua, Cattaraugus and Allegany counties of field notes, maps, books and other statistical information secured from

Cross-references.

the offices of the Holland Land Company, or of copies thereof, where originals could be procured; and provided that certified copies of such originals, or of such copies, shall, in the absence of the originals, be evidence with the same force as originals. L. 1839, ch. 295, authorized the secretary of state to receive and deposit for safe keeping the original title papers, books, surveys and maps of the company, and provided that certified copies shall be evidence with the same force as the originals. L. 1839, ch. 295, and L. 1850, ch. 221, also provided for proving copies of such records and for their use and force as evidence substantially as follows:

Whenever any of the field notes, surveys or maps of the tract of land formerly belonging to the Holland Land Company in this state, purporting to be originals made for such company, shall be produced before a justice of the supreme court, such justice may take evidence as to the genuineness thereof, and if the same is proved in such a manner as to entitle them to be read in evidence on a trial at law between parties claiming any of the lands therein referred to, such justice may certify them to have been approved, and thereafter they shall be received in all courts in this state as presumptive evidence of the facts therein stated.

Whenever any field notes, surveys or maps purporting to be copies of such originals, shall be produced before a justice of the supreme court, together with such originals, and the originals shall be so proved, and the former shall be proved to the satisfaction of such justice to be true copies of the whole, or any part of such originals, such justice shall certify such copies to have been so proved, and thereafter they shall be received in all courts as evidence in the same manner and to the same extent as such originals when proved and certified in the same manner as originals.

The board of supervisors of a county any part of which was included within the tract of land formerly belonging to the Holland Land Company, or any company by that name, or any portion of such company, may provide for having the field books, maps and surveys of such company heretofore filed in the office of the secretary of state, proved before a justice of the supreme court; and may also provide for having transcripts of such field books, surveys and maps and of all conveyances on record in the office of the secretary of state, relating to the title of such land made and certified by the secretary under his seal of office, and filed and recorded in the office of the clerk of the county where the lands affected may be situated, the expense thereof to be a county charge.

HOME RULE.

For cities, see Cities; L. 1914, ch. 444. See General City Law, §§ 19-24.

HOMESTEAD.

Exemption from execution; Code Civ. Pro. §§ 1397-1404-a.

HOMICIDE.

Penal Law, §§ 1040-1055.

HONEY.

Sale regulated; Agricultural Law, §§ 301, 302.

HOPS.

Regulation of sale; General Business Law, §§ 250-252.

HORACE GREELEY.

See Monuments.

3706 HORSES—HOSPITAL DEVELOPMENT COMMISSION.

§§ 1, 2. Hospital development commission; powers, etc. L. 1917, ch. 238.

HORSES.

Formation of corporations for improving the breed; **Membership Corporations Law**, §§ 280–299. Running on highways; **Penal Law**, § 194. Racing near courthouse; **Penal Law**, § 1080. Fraudulent racing entries; **Penal Law**, §§ 1081–1082. Disease of; **Agricultural Law**, §§ 90–114. Liens for service of stallions, **Lien Law**, §§ 160–163. Registration of stallions; **Agricultural Law**, §§ 120–130. Corporations for insurance of; **Insurance Law**, §§ 250–254.

HORTICULTURAL; SOCIETIES.

Formation and powers; **Membership Corporations Law**, §§ 190–197.

HOSPITAL FOR CONSUMPTIVES.

See **State Charities Law**, §§ 150–163.

HOSPITAL FOR CRIPPLED CHILDREN.

See **State Charities Law**, §§ 130–139.

HOSPITAL DEVELOPMENT COMMISSION.

L. 1917, ch. 238.—An act creating the hospital development commission, defining its powers and duties, authorizing contracts for new buildings in connection with the Utica state hospital and the Middletown state hospital, and making appropriations for such purpose and for the expense of the hospital development commission. (*In effect Apr. 23, 1917.*)

§ 1. **Hospital development commission created.**—A commission is hereby created consisting of the state engineer, the chairman of the state hospital commission, the state architect, the chairman of the senate finance committee, the chairman of the assembly ways and means committee, two members to be appointed by the governor and one member of the legislature who shall also be a minority member of one of the financial committees of the legislature to be named by the minority leaders of the senate and assembly. The appointment of the last named member of the commission shall be evidenced by certificate duly executed by said minority leaders of the legislature and filed in the office of the secretary of state.

§ 2. **Powers and duties of hospital development commission.**—Such commission shall

1. Examine each site of hospital development in the state, together with such other sites as the state now owns or which in the future may be developed for hospital purposes;

2. Make a complete investigation of the capacity of the present state hospital buildings;

3. Consider future policy of the state for the care of the insane, and whether advisable to make it part custodial and part hospital;

4. Adopt a general plan of hospital development taking into consideration proximity to centers of population, transportation of supplies, patients and their relatives and friends, healthfulness, water supply and drainage facilities;

5. Devise and adopt a plan to provide for the proper accommodation

of the present surplus of patients, both in the civil hospitals and in the hospitals for the criminal insane the normal increase and a moderate surplusage of accommodations at its completion at the end of ten years;

6. Estimate the probable cost of such plan in detail;

7. Consider each hospital site as an entity and submit a comprehensive plan for its development to a predetermined capacity, showing location, size and character of each building proposed;

8. Recommend to the legislature of each year on the date on which it convenes, an expenditure equal to one-tenth of the cost of the entire hospital plan when completed stating in detail which buildings coming within such appropriation in cost are most immediately necessary for relieving congestion for the proper care of patients and attendants and for the symmetrical and efficient development of the entire plan.

9. Investigate the problem of the proper care of the feeble-minded in the state with the purpose of devising a plan for its solution and when this problem is under consideration the fiscal supervisor of state charities shall take the place of the chairman of the state hospital commission on the commission hereby created and the secretary of the state board of charities shall take the place of the state engineer.

§ 3. **Expenses of commission; assistants.**—The members of the hospital development commission shall not be entitled to any compensation for their services, but shall be allowed their necessary traveling and hotel expenses incurred in the performance of their duties. Such commission may employ such assistants as may be needed, and may authorize the employment by the state engineer and state architect of such additional employees as may be needed in such offices for the purposes of this act.

§ 4. **Contracts for new building at Marcy site.**—The state hospital commission is hereby authorized to enter into a contract or contracts, in the manner provided by section sixty-five of the insanity law, for the construction and equipment of new buildings on the Marcy site in connection with the Utica state hospital, including necessary heating, water supply and sewage disposal systems, at a cost of not exceeding one million two hundred and fifty thousand dollars (\$1,250,000). The hospital development commission shall determine the character of development and buildings first to be constructed on such site pursuant to this act. The sum of two hundred and ninety-nine thousand two hundred and fifty-four dollars and eighty-five cents (\$299,254.85), being the unexpended balance of the sum of three hundred thousand dollars (\$300,000), appropriated by chapter seven hundred and thirteen of the laws of nineteen hundred and fifteen for the construction and equipment of the Mohansic state hospital, is hereby reappropriated and made available for commencing the work of construction at Marcy. The new buildings constructed by the hospital development commission on the Marcy site shall be known as Utica state hospital—Marcy division.

3708 HOSPITALS—HOUSES OF REFUGE FOR WOMEN.

§§ 5, 6. Hospital development commission; powers, etc. L. 1917, ch. 238.

§ 5. **Contracts for new building at Middletown.**—The state hospital commission is hereby authorized to enter into a contract or contracts, in the manner provided by sections sixty-five of the insanity law, for the construction and equipment of a new building at the Middletown state homeopathic hospital, including necessary heating, water supply and sewage disposal system, at a cost not exceeding three hundred and sixty-nine thousand dollars (\$369,000); but no such contract shall be entered into by the hospital commission until the character of the building to be constructed shall have been determined by the hospital development commission created by this act. The sum of one hundred thousand dollars (\$100,000) is hereby appropriated for the purposes of this section.

§ 6. **Appropriation for expenses of the hospital development commission.**—The sum of twenty thousand dollars (\$20,000), or so much thereof as may be needed, is hereby appropriated out of any money in the treasury, not otherwise appropriated, for the expenses of the hospital development commission as authorized by this act, including the necessary hire of an automobile or automobiles, the payment of experts and other assistants, and such additional employees as may be needed in the offices of the state engineer and state architect, but no such additional employees shall be so employed without the approval of the hospital development commission. The money hereby appropriated for the expenses of the commission shall be payable by the treasurer on the warrant of the comptroller on the approval of the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

HOSPITALS.

State hospitals for insane, see **Insanity Law**. Consents required for establishment of, for tuberculosis; **Public Health Law**, § 319. County hospitals for tuberculosis; **County Law**, §§ 45–49-e. Establishment in municipalities; **General Municipal Law**, §§ 126–135-a. Privileges of medical students in; **Public Health Law**, § 333. Fire escapes; **Public Health Law**, § 334. Hospital corporations, incorporation; **Membership Corporations Law**, § 130.

HOTELS.

Limited liability; **General Business Law**, §§ 200–203. Register to be kept; **General Business Law**, § 204. Rates to be posted; **General Business Law**, § 206. Fire escapes; **General Business Law**, § 205. Failure to provide; **Penal Law**, § 1905. Sale of unclaimed articles; **General Business Law**, §§ 207–209. Equal accommodations to guests; **Civil Rights Law**, §§ 40, 41. Refusing to receive guests; **Penal Law**, § 513. Defrauding; **Penal Law**, § 925. Refusing to receive guests, **Penal Law**, §§ 513, 514. Lien of hotel keeper; **Lien Law**, § 181. Sanitary conditions; bedding, size of sheets, supply of towels, **Public Health Law**, §§ 354–356.

HOURS OF LABOR.

See **Labor Law**.

HOUSES OF REFUGE FOR WOMEN.

See **State Charities Law**, §§ 220–233.

Cross-references.

HOUSING COMMISSION.

L. 1914, ch. 313.—An act to create a commission to investigate the housing of the people in cities of the second class and making an appropriation therefor.
Omitted as temporary.

HOUSING LAW.

L. 1913, ch. 774, relating to housing in cities of second class repealed by L. 1915, ch. 32.

HUDSON-FULTON COMMISSION.

L. 1906, ch. 325.—“An act to establish the Hudson-Fulton Celebration Commission, and to prescribe the powers and duties thereof and making an appropriation therefor.” (*Amended by L. 1909, ch. 448.*)
L. 1908, ch. 217.—“An act to increase the number of members and trustees of the Hudson-Fulton Celebration Commission.”
L. 1909, ch. 277.—“An act to increase the number of the members and trustees of the Hudson-Fulton Celebration Commission.”
The three above acts omitted as temporary.

HUSBAND AND WIFE.

Compulsory prostitution of wife; Penal Law, § 1090. Presence of husband no defense; Penal Law, § 1092. Each competent witness against the other; Penal Law, § 2445. Wife as witness; Penal Law, § 1091. See Domestic Relations Law, Decedent Estate Law.

HYDRAULIC DEVELOPMENT.

See Conservation Law, §§ 400, 401, 430-472.

HYDROPHOBIA.

Pasteur Institute for prevention of; Public Health Law, §§ 340-343.

ICE.

On Hudson River, cutting and harvesting; General Business Law, §§ 260-263. Cutting in front of premises of another; Penal Law, § 1100. Malicious injury to; Penal Law, § 1425. Ice cutting and ice bridges; Penal Law, § 1904.

ICE GORGE.

Removal; Navigation Law, §§ 40-a, 54.

IDIOTS.

Rome Custodial Asylum; State Charities Law, §§ 90-94. Criminal irresponsibility; Penal Law, § 1120. Unlawful confinement; Penal Law, § 1121. See Insanity Law.

IMMIGRANTS.

Bureau of immigration, Labor Law, §§ 151 ff. Licensing of lodging places; Labor Law, §§ 156 and 156-a. Soliciting the surrender of tickets; Penal Law, § 1572.

IMMUNITY.

Waiver of; Penal Law, § 2446.

IMPRISONMENT.

See Penal Law, §§ 2180-2197.

INCEST.

Definition and punishment; Penal Law, § 1110.

3710 INCOMPETENT PERSONS—INDEPENDENCE DAY.

Cross-references.

INCOMPETENT PERSONS.

See Insanity Law.

INDECENT EXPOSURE.

Definition and punishment; Penal Law, § 1140.

INDEPENDENCE DAY.

Made public holiday; General Construction Law, § 24.

INDIAN LAW.

L. 1909, ch. 31.—“An act in relation to Indians, constituting chapter twenty-six of the consolidated laws.”

[In effect Feb. 17, 1909.]

CHAPTER XXVI OF THE CONSOLIDATED LAWS.

INDIAN LAW.

- Article 1. Short title (§ 1).
 2. General provisions (§§ 2-16).
 3. The Onondaga tribe (§§ 20-28).
 4. The Seneca Indians (§§ 40-60).
 5. The Seneca Indians on the Allegany and Cattaraugus reservations (§§ 70-77).
 6. The Seneca Indians on the Tonawanda Reservation (§§ 80-90).
 7. The Tuscarora nation (§§ 95-99).
 8. The Saint Regis tribe (§§ 100-114).
 9. The Shinnecock tribe (§§ 120-122).
 10. Laws repealed; when to take effect (§§ 125, 126).

ARTICLE I.

SHORT TITLE.

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the “Indian Law.”
 Source.—Former Indian L. (L. 1892, ch. 679) § 1.

Consolidators' note.—The Indian Law, although a part of the scheme of general laws, is but a collection of special statutes relating to the several tribes of Indians remaining in the state. Following this plan an examination has been made of all statutes relating to Indians, and such as were found to be unrepealed but superseded or obsolete have been placed in the schedule for repeal, and those remaining have been added to the law under the article relating to the particular tribe to which they apply.

Constitutionality.—The provisions of the Indian Law purporting to regulate the ownership of property by Indians in this state, and to create and provide courts for the trial of controversies between them are constitutional. *Silverheels v. Maybee* (1913), 82 Misc. 48, 143 N. Y. Supp. 655.

Indians are not citizens.—It seems the citizenship can only be conferred by naturalization and abandonment of tribal rights and relations. *Elk v. Wilkins* (1884), 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. 41; *Paul v. Chilsoquie* (Cir. Ct. D. of Ind.) (1895), 70 Fed. Rep. 401. See, also, note, 7 L. R. A. 126.

Status of the Indian nations or tribes is anomalous, they are not citizens of the

§ 1.	Short title.	L. 1909, ch. 31.
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state and their tribes, although not treated as independent foreign nations, are not subject to the jurisdiction of the state to the same extent as citizens of the state or other states. It is well settled law that neither the tribe nor its individual members can maintain an action to recover the property of the tribe without special legislative authority. *Seneca Nation of Indians v. Appleby* (1909), 196 N. Y. 318, 89 N. E. 835, revg. (1908), 127 App. Div. 770, 112 N. Y. Supp. 177.

Wards of nation.—Except so far as relates to police regulations and to preserve the peace and to preventing intrusion upon the reservation, the legislative power in respect to the Indians and the lands occupied by them, is exclusively in congress. The relation of the Indians is in the nature of wards of the general government. *Baker v. Johns* (1886), 38 Hun 625, 628.

Relation of Indians to state and federal governments.—As long as the United States recognizes their national character, the Indians are wards of the nation, under the protection of treaties and the laws of Congress. See *The Cherokee Nation v. The State of Georgia* (1831), 5 Pet. 1, 8 L. ed. 25; opinion of Justice Marshall in *Worcester v. State of Georgia* (1832), 6 Pet. 520, 8 L. ed. 483; *The Kansas Indians* (1866), 5 Wall. 737, 757, 18 L. ed. 667; *United States v. Kagama* (1886), 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. 1109; *Choctaw Nation v. United States* (1886), 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. 75; *United States v. Thomas* (1893), 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. 426; *Stephens v. Cherokee Nation* (1894), 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. 722; *Benson v. United States* (1890), 44 Fed. Rep. 178. Power of tribe or individual to lease is valid only as authorized or ratified by Congress. *Shongo v. Miller* (1899), 45 App. Div. 339, 61 N. Y. Supp. 281; *Buffalo, etc., R. R. Co. v. Lavery* (1894), 75 Hun 396, 27 N. Y. Supp. 443, affd. (1896), 149 N. Y. 576, 43 N. E. 986. In *Seneca Nation v. Cristie* (1891), 126 N. Y. 122, 27 N. E. 275, affd. 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. 828, the extinguishment of certain Indian titles was upheld, a United States commissioner being present when the contract was made. Congress may confer right of eminent domain on railroad company to take Indian lands, *Cherokee Nation v. Kansas Ry. Co.* (1889), 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. 965.

Jurisdiction of Federal courts.—While the state of New York has enacted laws conferring upon Indian tribes certain powers to regulate their own affairs, and to protect their lands from invasion, the Federal government has never relinquished its suzerainty over them. Congress has always asserted and exercised the right to legislate in all Indian affairs, and its power to do so has been upheld by the Supreme Court. The jurisdiction of our state courts must give way before the higher authority which this statute vests in the Federal courts. *People ex rel. Cusick v. Daly* (1914), 212 N. Y. 183, 105 N. E. 1048.

Obligation to obey state laws.—The Indians of this state are bound to obey the Game Laws notwithstanding a reservation in conveyances made by them of the right to hunt and fish. *People v. Pierce* (1896), 18 Misc. 83, 41 N. Y. Supp. 858.

An Indian violating police regulations of the state may be arrested and subjected to the jurisdiction of the state courts, where both the violation and the arrest occur outside of any reservation. *People ex rel. Kennedy v. Becker* (1915), 215 N. Y. 42, 109 N. E. 116.

Liability of State for profits on sale of lands purchased from Indians.—The Cayuga Nation of Indians which in 1795 granted certain lands to the State for four shillings per acre, which the State soon afterwards disposed of at a large profit, did not thereby have a claim against the State upon the theory that the Indians were wards of the State and that the State should not realize a profit from the purchase and subsequent sale of their lands. *People ex rel. Cayuga Nation v. Commissioners* (1911), 74 Misc. 154, 131 N. Y. Supp. 937, revd. (1912), 152 App. Div. 545, 137 N. Y. Supp. 393, affd. (1912), 207 N. Y. 42, 100 N. E. 735.

Rights of individual Indians.—See article by Professor Thayer, 1 Har. L. Rev. 149; article by Austin Abbott, 2 Har. L. Rev. 167; articles by Professor Thayer in *Atlantic Monthly* for October and November, 1891; paper, William B. Hornblower, *Proceedings Am. Bar Assn.*, Boston, 1891.

ARTICLE II.

GENERAL PROVISIONS.

Section 2. Power to contract.

3. Marriage and divorce.
4. Pawns or pledges for liquor.
5. Actions in state courts.
6. Exemption of reservation lands from taxation.
7. Partition of tribal lands.
8. Intrusions on tribal lands.
9. Residence of other Indians on tribal lands.
10. Licenses to reside upon tribal lands.
11. Trespasses on tribal lands.
12. Highways on tribal lands.
13. Powers of commissioners of land office in relation to Indians.
14. Trust funds for Indians.
15. Freedom from toll and ferriage.
16. Supervision of bridges on reservations.

§ 2. **Power to contract.**—An Indian shall be liable on his contracts not prohibited by law; and a native Indian may take, hold and convey real property the same as a citizen. Upon becoming a freeholder to the value of one hundred dollars he shall be subject to taxation. No person shall maintain an action on a contract against any Indian of the Tonawanda nation, the Seneca nation or Onondaga tribe, nor against any of their Indian friends residing with them on their reservations in this state, and every person who prosecutes such an action shall be liable to treble costs to the party aggrieved.

Source.—Former Indian L. (L. 1892, ch. 679) § 2, as amended by L. 1893, ch. 229; originally revised from L. 1813, ch. 92, § 2; L. 1843, ch. 87, § 4.

References.—Purchases of land from Indians, void, Const., art. 1, § 15. Unlawful contract with Indians in relation to land, Penal Law, § 2030. Prohibited contracts, see §§ 4, 23, 56, 85, 98, 105. Leases authorized, §§ 24, 83, post. Contracts for sale of gypsum by Tonawanda Band, § 85.

Construction.—Even if the clauses of the statute which declares that no person shall sue an Indian upon a contract has been omitted, and the legislature had merely enacted the latter clause, declaring the inability for bringing such a suit, it would, upon a well settled principle of interpretation have amounted to a prohibition. *Hastings v. Farmer* (1850), 4 N. Y. 293. An Indian may appear and plead his exemption from suit upon his contracts, but he is not obliged to do so. *Dana v. Dana* (1817), 14 Johns. 181; *Hastings v. Farmer* (1850), 4 N. Y. 293.

Applicaton.—This section, permitting a native Indian to take, hold and convey real estate the same as a citizen, has no reference to the right of an Indian tribe to convey or allot lands of its reservation. *Terrence v. Gray* (1916), 171 App. Div. 11, 156 N. Y. Supp. 916.

Judgment by default against Indian, void. *Hastings v. Farmer & Ellis* (1850), 4 N. Y. 293, revg. (1848), 3 Barb. 492.

Action of replevin to recover a sewing machine sold to an Indian of the Seneca Tribe under a conditional sale, held to be not an action on contract, but one sounding in tort, and therefore not within the terms of this section. *Singer Mfg. Co. v. Hill* (1891), 60 Hun 347, 15 N. Y. Supp. 27.

Right to hold, etc., real estate.—Native Indians may not only hold and convey real estate, but are liable upon their contracts. *Matter of Printup* (1907), 121 App. Div. 322, 106 N. Y. Supp. 74.

The rights of a native Indian to take, hold and convey real property, the same as a citizen, where such property has been given under allotments allowed by special acts or by §§ 7 and 90 (now 95), post, have been recognized and protected by the state courts. *Peters v. Tallchief* (1907), 121 App. Div. 309, 106 N. Y. Supp. 64. Compare *Terrance v. Crowley* (1909), 62 Misc. 138, 116 N. Y. Supp. 417.

§ 3. **Marriage and divorce.**—The laws of the state relating to the capacity to contract marriage, the solemnization of marriage, the annulment of the marriage contract, and divorce, are applicable to Indians; and subject to the jurisdiction of the peacemakers' courts of the Seneca nation to grant divorces, the same courts shall have jurisdiction of actions arising thereunder as if such Indians were citizens. But Indians who have heretofore or shall hereafter contract marriage according to the Indian custom or usage, and shall cohabit as husband and wife, shall be deemed lawfully married. Indian marriages may be solemnized by peacemakers within their jurisdiction with the same force and effect as by a justice of the peace.

Source.—Former Indian L. (L. 1892, ch. 679) § 3; originally revised from L. 1849, ch. 420, §§ 3, 4.

Reference.—Divorces may be granted by peacemakers' court of Seneca Nation, § 46, post.

Marriage according to Indian custom is valid. *People ex rel. La Forte v. Rubin* (1905), 98 N. Y. Supp. 787.

A marriage solemnized by a clergyman without a license cannot be regarded as a marriage contracted "according to the Indian custom or usage" within the meaning of this section. *Rept. of Atty. Genl.* (1912) 73.

§ 4. **Pawns or pledges for liquor.**—Any person who shall receive from any Indian, any article of personal property in payment or exchange, or in pawn or pledge for payment, wholly or partly, for any spirituous liquor or intoxicating drink, sold or delivered to any Indian, shall be liable to a penalty of ten times the value of such article, recoverable by the agent or attorney of the nation, tribe or band to which such Indian belongs, or with which he resides, in the name of such nation, tribe or band, or of the people of the state. If there be no such agent or attorney, such action may be maintained in their name of office, by the overseers of the poor of the town in which the Indian resides.

Any such article or the value thereof may be recovered by the Indian selling, exchanging or pawning the same, within twenty days thereafter, from any person having possession thereof. If such action shall not be brought within twenty days from the sale or pledge of such article, the

peacemakers, if any, of the reservation to which such Indian belongs, and if none, the overseers of the poor of the town in which he resides, may recover such article in their name of office.

Source.—Former Indian L. (L. 1892, ch. 679) § 4; originally revised from L. 1817, ch. 143; L. 1845, ch. 150, § 5; L. 1849, ch. 420, § 2.

References.—Selling or giving liquor to an Indian, a misdemeanor, Liquor Tax Law, §§ 29, 36; U. S. Rev. Stat., § 2139. But this provision does not apply to Salamanca. *Benson v. U. S.*, 44 Fed. Rep. 178 (1890).

§ 5. **Actions in state courts.**—Any demand or right of action, jurisdiction of which is not conferred upon a peacemakers' court, may be prosecuted and enforced in any court of the state, the same as if all the parties thereto were citizens.

Source.—Former Indian L. (L. 1892, ch. 679) § 5; originally revised from L. 1813, ch. 92, § 2; L. 1847, ch. 365, § 14; L. 1863, ch. 90, § 13.

References.—Jurisdiction of peacemakers' courts, §§ 46, 88, post.

Jurisdiction.—Action for assault and battery. *Jemmisson v. Kennedy* (1889), 55 Hun 47, 7 N. Y. Supp. 296. The courts have jurisdiction of tort actions against Tuscaroras. *Bates v. Printup* (1900), 31 Misc. 17, 64 N. Y. Supp. 561. Indians cannot maintain an action to recover personal property. *Onondaga Nation v. Thatcher* (1900), 53 App. Div. 361, 65 N. Y. Supp. 1014, *affd.* (1902), 169 N. Y. 554, 62 N. E. 1098.

Right to resort to the state courts is given to all Indians where a redress cannot be obtained through the jurisdiction conferred upon a Peacemakers' Court. *Hatch v. Luckman* (1909), 64 Misc. 508, 118 N. Y. Supp. 689, *affd.* (1913), 155 App. Div. 765, 140 N. Y. Supp. 1123.

A tribe of Indians has no corporate name by which it can institute a suit in ejectment in the courts of the State. *Montauk Tribe v. Long Island R. R. Co.* (1898), 28 App. Div. 470, 51 N. Y. Supp. 142.

An Indian nation, or tribe, cannot sue as such in the courts of the State, but individual members thereof may sue in all cases where jurisdiction of the matter has not been conferred by statute upon a peacemaker's court. *Onondaga Nation v. Thacher* (1899), 29 Misc. 428, 61 N. Y. Supp. 1027, *affd.* (1900), 53 App. Div. 561, 65 N. Y. Supp. 1014, *affd.* (1902), 169 N. Y. 596, 62 N. E. 1098.

Action by Montauk tribe in state courts was authorized by L. 1906, ch. 177. An individual of the Montauk tribe cannot bring an action of ejectment in behalf of all. *Johnson v. Long Island R. R. Co.* (1900), 162 N. Y. 462, 56 N. E. 992; *Montauk Tribe v. Long Island R. R. Co.* (1898), 28 App. Div. 470, 51 N. Y. Supp. 142.

Right of Tuscaroras to resort to state courts.—A Tuscarora Indian may resort to the courts of this state in an action in which the title for possession of real property on the Tuscarora reservation is in question, in the absence of peacemakers' or tribal courts such as are provided for for other of the Indian tribes. *Peters v. Tallchief* (1907), 121 App. Div. 309, 106 N. Y. Supp. 64.

The Tuscarora Indians having no peacemakers' or other tribal court in which the estate of a deceased member of the tribe can be administered, the surrogate courts of Niagara county in which the reservation is situate has jurisdiction. *Matter of Printup* (1907), 121 App. Div. 322, 106 N. Y. Supp. 74.

The courts of this state have no power to try an Indian for the offense of assault with intent to kill committed upon the person of another Indian within the boundaries of the reservation of the tribe of which both are members. By virtue of the provisions of the 9th section of the Federal act of 1885 (23 U. S. Stat. at Large, 385, now section 328 of the U. S. Crim. Code) the courts of the United States

have been vested with exclusive jurisdiction of that crime. There is no difference as to the application of this rule between Indians whose reservations are the direct gift of the Federal government and those whose reservations have been derived from the state or from other sources. *People ex rel. Cusick v. Daly* (1914), 212 N. Y. 183, 105 N. E. 1048.

Jurisdiction of Supreme Court in action for replevin between members of St. Regis tribe.—An informal council of chiefs of the St. Regis tribe of Indians does not constitute a Peacemakers' Court within the meaning of this section, providing that "Any demand or right of action, jurisdiction of which is not conferred upon a Peacemakers' Court, may be prosecuted and enforced in any court of the State, the same as if all the parties thereto were citizens." Hence, the Supreme Court has jurisdiction of an action for replevin between the members of the St. Regis tribe. *Terrance v. Gray* (1915), 165 App. Div. 636, 151 N. Y. Supp. 136.

A suit to recover possession of wampum belts of the ancient Indian League of the Six Nations may be maintained, where the belts have a peculiar interest not measurable by money damages; but where a *bona fide* purchaser of them has not acquired possession wrongfully, a demand of him is a condition precedent to the maintenance of the action. *Onondaga Nation v. Thacher* (1899), 29 Misc. 428, 61 N. Y. Supp. 1027, *affd.* (1900), 53 App. Div. 561, 65 N. Y. Supp. 1014, *affd.* (1902), 169 N. Y. 596, 62 N. E. 1098.

Disputes over individual Indian ownership of reservation lands should be decided by the courts and not by the Land Board. *Rept. of Atty. Genl.* (1902) 400.

Under this section the courts of the state have jurisdiction to try and determine disputes between Onondaga Indians as to the possession of lands lying within the boundaries of the Onondaga reservation to which they have a perpetual right of occupancy, and on which there is no court of any kind. *George v. Pierce* (1914), 85 Misc. 105, 148 N. Y. Supp. 230.

An action of replevin may be maintained against an Indian to recover an article sold on a conditional sale, but not paid for. *Singer Mfg. Co. v. Hill* (1890), 60 Hun 347, 15 N. Y. Supp. 27.

A suit for an injunction may be maintained by the Seneca Nation against one who threatens to interfere with the discharge of the duties of the office of president by one who is *de facto* president and discharging such duties. *Seneca Nation v. Jameson* (1909), 62 Misc. 91, 114 N. Y. Supp. 401.

Action of ejectment by Indian tribe, see *Seneca Nation v. Christie* (1891), 126 N. Y. 122, 27 N. E. 275, *affg.* (1888), 49 Hun 524, 2 N. Y. Supp. 546; *Seneca Nation v. Hugaboom* (1892), 132 N. Y. 492, 30 N. E. 983.

Action for trespass upon lands occupied by plaintiff separately and not in common with the rest of the Seneca Nation. *Blacksmith v. Fellows* (1852), 7 N. Y. 401.

The Surrogate's Court of Erie county has power to grant letters of administration of a deceased Tonawanda Indian residing upon the reservation within said county. *Hatch v. Luckman* (1909), 64 Misc. 508, 118 N. Y. Supp. 689, *affd.* (1913), 155 App. Div. 765, 140 N. Y. Supp. 1123.

The Surrogate's Court of Niagara county is without jurisdiction to admit to probate the will of a Tuscarora Indian residing upon the Tuscarora reservation in that county. *Matter of Jack* (1907), 52 Misc. 424, 102 N. Y. Supp. 383.

§ 6. Exemption of reservation lands from taxation.—No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same.

Source.—Former Indian L. (L. 1892, ch. 679) § 6; originally revised from L. 1857, ch. 45, § 4; L. 1860, ch. 491, § 4.

Taxation.—A state law taxing tribal lands is void. *Fellows v. Denniston* (1861), 23 N. Y. 420, *affd.* (1862), 72 U. S. 761, 18 L. ed. 708.

§ 7. **Partition of tribal lands.**—Any nation, tribe or band of Indians which owns and occupies land in this state as the common property of such nation, tribe or band may, by the act of its Indian government, divide such lands into lots, and distribute and partition the same, quantity and quality relatively considered, among the individuals and families of such nation, tribe or band, so that the same may be held in severalty and in fee simple, according to the laws of this state. No lands occupied and improved by any Indian according to the laws, usages or customs of the nation, tribe or band shall be set off to any person other than the occupant or his family. The officers, agents or commissioners to execute the deeds to effect such partition shall be appointed by the nation, tribe or band, whose lands are to be distributed, subject to the approval of the commissioners of the land office. They shall go before the county judge of the county in which such lands are situated, and prove to his satisfaction that they are authorized to effect such transfers and shall acknowledge before him the deeds necessary therefor. The county judge shall examine such deeds, and his indorsement thereon that he has examined the same, and that they are executed in pursuance of authority duly conferred, shall authorize the county clerk to record such deeds.

Lands partitioned or distributed in pursuance of this section shall not be subject to any lien or incumbrance, by way of mortgage, judgment or otherwise, or be alienable by the grantee or his heirs, for twenty years after the recording of the deed effecting the partition; but may be partitioned among the heirs of a grantee who dies.

Source.—Former Indian L. (L. 1892, ch. 679) § 7; originally revised from L. 1849, ch. 420, §§ 7-10.

References.—Allotment of Seneca's lands, § 55, *post*; of Tuscarora's, § 95, *post*; of St. Regis tribe, § 102, *post*.

Application.—Although this section permits a tribe owning lands in common to divide the same among the individuals and families of the tribe so that it may be held in severalty and in fee simple, said section does not contemplate the granting of a certain lot to a certain individual, but on the contrary authorizes a general division among the members of the tribe of lands which have been held in common. *Terrence v. Gray* (1916), 171 App. Div. 11, 156 N. Y. Supp. 916.

It will be presumed that tribal lands continue to be held in common where there is no evidence that a partition under section 7 of the Indian Law has been made. *Terrence v. Gray* (1916), 171 App. Div. 11, 156 N. Y. Supp. 916.

Title to Indian reservations.—*Rept. of Atty. Genl.* (1893) 375.

The Indian's right of possession is a substantial right entitling him to exclusive possession and is sanctioned by the statute which authorizes a native Indian to take, hold and convey real property the same as a citizen. So a conveyance made by an Indian, possessing all the formalities sufficient to give a good and sufficient title under the laws of the state, is sufficient to pass the Indian title. The fact that in a majority of cases transfers of property upon the Tonawanda Reservation have been made without the instrumentality of a written conveyance, does not preclude the validity of making a transfer by a written conveyance, especially

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where it is shown that the Indian custom has not been uniformly used. *Hatch v. Luckman* (1909), 64 Misc. 508, 118 N. Y. Supp. 689, *affd.* (1913), 155 App. Div. 765, 140 N. Y. Supp. 1123.

Half-breed descendants.—Rights to allotted lands. *Seneca Nation v. Lehlly* (1889), 55 Hun 83, 8 N. Y. Supp. 245.

Partition of land among heirs.—The word "heirs" as used in this section in connection with the partition of lands of a grantee among his heirs includes the widow of a deceased Indian. It was competent for the legislature to provide that an Indian upon the Cattaraugus Indian reservation should acquire and hold in severalty and in fee lands upon such reservation according to the laws of the state, and that such lands might be partitioned among his heirs at his death. *Jameson v. Pierce* (1902), 78 App. Div. 9, 79 N. Y. Supp. 3.

Allotments have been recognized and directed by our state courts. *Peters v. Tallchief* (1907), 121 App. Div. 309, 106 N. Y. Supp. 64.

Allotment in severalty by the chiefs or head men of the nation is not the partition of tribal lands provided for in this section. *Terrance v. Crowley* (1909), 62 Misc. 138, 116 N. Y. Supp. 417.

§ 8. **Intrusions on tribal lands.**—Except as otherwise provided by law, no person shall settle or reside upon any lands owned or occupied by any nation, tribe or band of Indians, except the members of such nation, tribe or band; and any lease, contract or agreement permitting such residence shall be void. The county judge of the county in which such lands are situated, upon complaint made to him, of such illegal residence, shall, if he thinks there is reasonable ground therefor, issue a notice directed to the person against whom complaint is made, requiring him to appear before such judge at a time and place therein specified, to answer the complaint. Such judge shall attend at the time and place mentioned in the notice, and upon proof of the personal service of such notice, shall take proof of the facts alleged in the complaint, and shall determine whether such person is an intruder upon the lands of such reservation. If he shall determine that such person is an intruder, he shall issue a warrant to the sheriff of the county commanding him, within ten days after the receipt thereof, to remove such person from such lands. If such judge shall determine that such person has been removed from such lands on a previous occasion, he shall issue his warrant commanding the sheriff, within ten days from the receipt thereof, to remove such person and commit him to the county jail for the space of thirty days, without being entitled to the limits or the liberties of such jail; and such judge shall cause such conviction to be drawn up and filed in the office of the county clerk, which conviction shall be final. In the execution of either of such warrants the sheriff shall have the same powers as in the execution of criminal process, and shall be paid by the state such compensation as the comptroller shall certify as reasonable. The district attorney of any county in which reservation lands are situated, upon the written application of a majority of the chiefs, councilors or head men of the nation, tribe or band owning and occupying such lands, shall make complaint of any intrusions on such lands, and cause the intruders to be removed.

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Source.—Former Indian L. (L. 1892, ch. 679) § 8, as amended by L. 1893, ch. 229; originally revised from L. 1821, ch. 204; L. 1845, ch. 150, § 8; L. 1860, ch. 491, § 5; L. 1863, ch. 90, §§ 25–27.

Tribal rights of Oneida Indians.—Rept. of Atty. Genl. (1907) 262.

Removal of intruders.—See *People ex rel. Waldron v. Soper* (1852), 7 N. Y. 428.

Summary removal is constitutional. *People v. Dibble* (1857), 16 N. Y. 203, *affd.* (1853), 21 How. (U. S.) 366, 16 L. ed. 149. **Assent of individual Indian to occupancy, no defense, *Id.*** See, also, *People ex rel. Blacksmith v. Tracy* (1845), 1 Den. 617.

In order to authorize the warrant of removal it must appear that lands intruded upon were owned or occupied by a known tribe or band of Indians. *People v. Soper* (1852), 7 N. Y. 428.

A native Indian of the Seneca nation in the actual and separate occupation of lands upon a Tonawanda reservation occupied pursuant to a treaty with the United States, may maintain an action for trespass upon the land so occupied by him separately and not in common with the rest of the nation. *Blacksmith v. Fellows* (1852), 7 N. Y. 401, *affd.* (1853), 19 How. U. S. 366, 15 L. ed. 684.

§ 9. **Residence of other Indians on tribal lands.**—The chiefs, head men or councilors of any nation, tribe or band of Indians other than the Seneca nation, in council assembled, may, by a majority vote, grant a written permit to any Indian not a member of such nation, tribe or band, to reside upon the tribal lands thereof, and may limit the time and regulate the terms upon which any Indians, not members of such nation, tribe or band, may settle or reside upon such tribal lands. The permit shall describe the boundaries of the land permitted to be occupied, the length of time and the terms upon which such Indian may reside upon such land, and shall be signed by the presiding officer and the secretary or clerk of the council. The council of the Seneca nation may admit an Indian of any other nation, tribe or band, to become an inhabitant of their reservations and to enjoy the same privileges with them. All leases, contracts and agreements, not authorized by this chapter, whereby any Indians not members of such nation, tribe or band, shall be permitted to reside on the tribal lands of such nation, tribe or band shall be void; and the Indians illegally occupying such lands shall be liable to removal as intruders.

Source.—Former Indian L. (L. 1892, ch. 679) § 9, as amended by L. 1893, ch. 229; originally revised from L. 1845, ch. 150, § 6; L. 1863, ch. 90, § 25.

Lands held by descendants.—The descendant of a member of the Seneca Nation to whom lands have been allotted may hold such lands, although such descendant is a white woman and her mother was also white. The section does not impose any restriction upon a half-breed to successorship and occupancy of allotted lands. *Seneca Nation v. Lehlly* (1889), 55 Hun 83, 8 N. Y. Supp. 245.

Title to lands of Tonawanda reservation, effect of marriage between Indians of different tribes. Rept. of Atty. Genl. (1896) 223.

§ 10. **Licenses to reside upon tribal lands.**—A county judge of a county in which lands of any nation, tribe or band of Indians are situated, may, upon the request of such nation, tribe or band, grant a written license to a schoolmaster, teacher or family of teachers, or minister of the gospel and his family, or priest, to reside upon such lands, and for that purpose to

occupy not to exceed fifty acres thereof, or may grant a written license to a person to reside upon such lands for the purpose of instructing the Indians in agriculture or the mechanic arts, or assisting them in erecting or in keeping in repair a mill or other machinery, or in the manufacture of salt. Such judge may revoke such license, and shall revoke it whenever it shall appear that the licensee has sold or given away to any Indian spirituous liquor or intoxicating drink. Upon the revocation of any such license, the licensee may be removed as an intruder. (*Amended by L. 1910, ch. 237.*)

Source.—Former Indian L. (L. 1892, ch. 679) § 10; originally revised from L. 1825, ch. 257, § 1.

§ 11. **Trespasses on tribal lands.**—An action may be brought, in the name of the people of the state, against any person other than an Indian, trespassing upon tribal lands, by the district attorney of the county in which such lands are situated, upon security for the payment of the costs of such action being given to his satisfaction, or in the name of the nation, tribe or band, by any three of the chiefs, head men or councilors thereof, upon security being given to the satisfaction of the county judge of the county in which such lands are situated, for the payment of the costs of such action. The security for the payment of costs, as provided by this section, shall be filed, if the action is before a justice of the peace, with him, and otherwise, in the office of the county clerk. The damages recovered, after paying expenses, shall be distributed among the Indians occupying such lands.

Source.—Former Indian L. (L. 1892, ch. 679) § 11; originally revised from L. 1841, ch. 234, §§ 8, 9.

References.—Cutting, etc., wood, trees, etc., on Indian reservation, a misdemeanor, Penal Law, §§ 1160, 1161; on Seneca reservation, § 56, post; on Tuscarora reservation, § 98, post; on St. Regis reservation, § 105, post. Prosecutions for trespass on Indian lands, Public Lands Law, § 8.

§ 12. **Highways on tribal lands.**—Commissioners of highways of towns in which an Indian reservation is wholly or partly situated shall have the same power and jurisdiction over the portion of the reservation in their respective towns, to improve highways already laid out therein, as is conferred upon such commissioners by the highway law, except that the written decision of the commissioners shall be served upon the agent, attorney or some other officer of the nation, tribe or band occupying such reservation; from which decision, such Indians may, within sixty days after the service thereof, appeal to the county judge of the county in which such lands are situated, whose decision shall be final. Such commissioners of highways may, with the consent of the tribal or national authorities of the nation, tribe or band occupying such reservation, lay out and establish as provided by law, highways on or across such reservation, and the highway commissioners of the town shall thereafter be charged with the maintenance

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of such road and the bridges thereon. This section shall not authorize the taxation of an Indian who is not a citizen.

Source.—Former Indian L. (L. 1892, ch. 679) § 12; originally revised from L. 1845, ch. 309; L. 1881, ch. 355.

References.—Powers of Seneca council in relation to highways, § 73, post; of Tuscarora council, § 99, post. Powers of highway commission as to highways and bridges on Indian reservations, Highway Law, §§ 157-159.

Repair of bridge.—A commissioner of highways is not bound to repair a bridge erected upon an Indian reservation. *Bishop v. Barton* (1874), 2 Hun 436, *affd.* (1876), 64 N. Y. 637.

Improvement of highways on Indian reservations. Rept. of Atty. Genl. (1904) 394.

§ 13. **Powers of commissioners of land office in relation to Indians.**—The commissioners of the land office, with the approval of the governor, shall hear and determine all questions which may arise in relation to moneys under the control of the state, belonging to any nation, tribe or band of Indians, or any individual Indian or his descendants, and all questions which may arise between the various parties of such tribe or nation in relation to any of their lands, or the avails thereof; and shall make such treaties, contracts and arrangements with any such nation, tribe or band, or individuals, who have any claim upon any land in this state, or any money belonging to them under the control of the state, or for the purchase of any portion of such lands, as they may deem just and proper, or in relation to the expense of laying out and keeping in repair any public road passing through any lands occupied by Indians. This section shall not apply to Seneca or Tonawanda nations.

Source.—Former Indian L. (L. 1892, ch. 679) § 13, as amended by L. 1893, ch. 229; originally revised from L. 1813, ch. 92, § 52; L. 1839, ch. 58; L. 1841, ch. 234, §§ 1-3.

References.—Powers as to trespasses on Indian lands, Public Lands Law, § 8. Power to grant right of way over Indian lands, Railroad Law, § 9.

Jurisdiction of commissioners to hear claims in relation to annuities. See *People ex rel. Cayuga Indians v. Com'rs* (1885), 34 Hun 588, *affd.* (1885), 99 N. Y. 235, 1 N. E. 770.

Powers of the commissioners of the land office to deal with the Indians. Rept. of Atty. Genl. (1906) 646.

Disputes as to disposition of moneys, paid by the State to Indians, may be heard and determined by the Commissioners of the Land Office. Rept. of Atty. Genl. (1893) 202.

Disputes over individual Indian ownership of reservation lands should be decided by the courts and not by the Land Board. Rept. of Atty. Genl. (1902) 400.

Controversies between Indians as to the avails of lands of deceased persons may be determined by the Commissioners of the Land Office. Rept. of Atty. Genl. (1893) 352.

§ 14. **Trust funds for Indians.**—The commissioners of the land office shall receive from any nation, tribe or band of Indians residing in the state, any sums of money which such Indians may wish to put in trust with the state of New York, upon condition that the interest or income

thereof shall be paid over and applied, under the direction and in the discretion of such commissioners, for the encouragement of religion and the promotion of education among the Indians, or for any other purpose of public interest, use and benefit, which is a proper subject of taxation. Such money shall be paid into the treasury and, under the direction of such commissioners, invested by the comptroller in safe securities or in bonds of the state bearing interest at the rate of five per centum, to be created and issued therefor, and called "The Indian loans."

Source.—Former Indian L. (L. 1892, ch. 679) § 14; originally revised from L. 1849, ch. 420, § 11.

§ 15. Freedom from toll and ferriage.—The Indians of the Six Nations may pass and repass free of toll and ferriage, at all seasonable times of the day, on any turnpike road, which shall have been established since April sixth, eighteen hundred and three, or which shall hereafter be established, leading from or through the town of Canandaigua to Buffalo creek or its vicinity, and over any toll bridge between those places, and at the ferry across the Niagara river at or near Black Rock, or at such place or places in its vicinity where any ferry shall have been established since such time, or shall hereafter be established.

Source.—Former Indian L. (L. 1892, ch. 679) § 15; originally revised from L. 1813, ch. 92, § 43.

§ 16. Supervision of bridges on reservations.—The state superintendent of public works shall have exclusive supervision and control of all bridges constructed or to be constructed by the state on any Indian reservation in the state and may make and enforce such reasonable rules and regulations concerning their use, or the use of any such bridge, as he shall deem necessary.

Source.—L. 1908, ch. 82, § 1.

References.—Highways and bridges constructed by state on Indian reservations under control of highway commission, Highway Law, § 157. Appointment and duties of reservation superintendent of highways to be appointed by commission, Id. § 158. Accounts and custody of money for improvement of highways and bridges on Indian reservations; inspections of bridges, Id. § 159.

The State Highway Commission, not the Superintendent of Public Works, has sole supervision and control over bridges on Indian reservations. Rept. of Atty. Genl. (1914) 209.

ARTICLE III.

THE ONONDAGA TRIBE.

Section 20. Appointment, terms of office and qualifications of the agents of the Onondaga Indians.

21. Duties of agents.
22. Cutting and removing timber.
23. Consent of agent to certain contracts.
24. Leases.

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25. Medical aid and attendance.
26. Plank-road on reservation.
27. Custody of wampums.
28. Keeping or pasturing of cattle; damages; penalty.

§ 20. **Appointment, terms of office and qualifications of the agents of the Onondaga Indians.**—The offices of agent of the Onondaga Indians residing on the Onondaga reservation, and of agent of the Onondaga Indians residing on the Allegany, Cattaraugus, Tuscarora and Tonawanda reservations are continued. Each of such agents shall be appointed by the governor, by and with the advice and consent of the senate. The term of office of the agent of the tribe on the Onondaga reservation shall be one year, and of such other agent, four years. The compensation of each agent shall be paid by the state as follows: To the agent of the tribe on the Onondaga reservation, an annual salary of two hundred dollars, and an amount equal to four per centum upon the annuity money distributed by him in pursuance of law; to such other agent, an annual salary of one hundred and fifty dollars. Neither of such agents shall be further reimbursed for his expenses. Each such agent shall, before receiving any annuity moneys from the comptroller, execute and file with the comptroller an official undertaking in double the amount of the annuity moneys payable to him, in a form and with securities approved by the comptroller. The agent of the Indians on the Onondaga reservation shall reside in Onondaga county, near such reservation.

Source.—Former Indian L. (L. 1892, ch. 679) § 20; originally revised from L. 1843, ch. 228; L. 1857, ch. 233, §§ 1, 4, 6, as amended by L. 1858, ch. 73.

References.—Compulsory education, Education Law, §§ 900-909.

§ 21. **Duties of agents.**—Each of such agents shall annually, on or before the first Monday of June, prepare and transmit to the comptroller a correct enumeration of such of the Indians of whom he is agent, as are entitled to receive annuity moneys from the state. The comptroller shall, upon receipt of such enumeration and undertaking, send to each such agent the annuity moneys payable by the state to the Indians of whom he is agent. Each agent shall thereupon distribute such moneys to the Indians of whom he is agent who are entitled thereto, paying the same to heads of families and individuals so far as practicable, and shall forthwith report such distribution to the comptroller. Each such agent shall protect the rights and interests of the tribe of which he is agent, and perform such other duties in relation to them as may be required by the governor.

Source.—Former Indian L. (L. 1892, ch. 679) § 21; originally revised from L. 1843, ch. 228, § 1; L. 1857, ch. 233, §§ 2, 3, 5; L. 1873, ch. 96, § 5.

§ 22. **Cutting and removing timber.**—No person other than an Onondaga Indian shall cut or remove from the Onondaga reservation any tree, timber, wood, bark or poles; and no Indian shall cut any tree, timber, wood, bark or poles for the purpose of sale or removal from such reservation, nor

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shall sell, remove, cause to be removed or aid in the removal from such reservation of any trees, timber, wood, bark or poles, except upon the written permission of a majority of the chiefs of the Onondaga tribe, particularly specifying the quantity and kind of trees, timber, wood, bark or poles to be cut or removed.

Source.—Former Indian L. (L. 1892, ch. 679) § 22; originally revised from L. 1873, ch. 96, §§ 1, 2.

Reference.—Violation of section, a misdemeanor, Penal Law, § 1161.

§ 23. **Consent of agent to certain contracts.**—Every contract which shall be made without the written consent of the agent of the Onondaga Indians, by any person other than an Indian, with any Indian of the Onondaga tribe, or with any Indian of any other nation or tribe residing or living with such Indians, for or concerning any stone, or any wood, timber or bark on the tribal lands of such nation, or that has been taken or removed from such lands, shall be void; and any person who, without such consent, shall receive from any such Indian or other person, any such stone, wood, timber or bark, on such reservation, or removed therefrom, knowing the same to have been taken or removed therefrom, shall be liable to a penalty of five times the value of such property, recoverable by the agent of such tribe, in the name of the people of the state, and payable upon recovery, after he has deducted his fees and the reasonable costs and expenses of collection, to the chiefs of such tribe for the benefit of the tribe.

Source.—Former Indian L. (L. 1892, ch. 679) § 23; originally revised from L. 1855, ch. 26, §§ 1, 2.

§ 24. **Leases.**—An Indian residing on the Onondaga reservation and a member of the Onondaga tribe, owning or possessed of improved lands therein, may lease such lands to white persons, for a term not to exceed ten years; but no individual Indian shall have the right to lease any lands to be used as a stone quarry. A majority of the chiefs of such tribe may, by a written contract drawn under the direction of the agent of such tribe and approved by his indorsement thereon, lease the stone quarries and national lands of the tribe, the expense of such contracts to be paid by the persons to whom the lands shall be leased. Any such contract without the consent of the agent shall be void.

Source.—Former Indian L. (L. 1892, ch. 679) § 24; originally revised from L. 1873, ch. 96, § 4; L. 1887, ch. 121.

Rents and proceeds of the farm.—L. 1847, ch. 178, § 2. The rents and proceeds of the farm containing about one hundred acres of land, together with the sawmill and stone quarry, owned by the Onondaga Indians, in common, shall be and remain under the control of the said Indians, to be applied first to the payment of their national debt, and the remainder, if any, distributed by them agreeably to the first section of this act.

The above section of the act of 1847 was not repealed by the consolidated law.

§ 25. **Medical aid and attendance.**—The board of supervisors of the county of Onondaga shall annually employ a competent physician to attend

upon and administer to the necessities of sick and indigent Indians residing on the Onondaga reservation, and to furnish them in addition to professional services, such necessary medicine, food and attendance as he may deem proper. The bills of such physician, when properly verified, shall be audited by the board of supervisors of such county, and, upon their order, paid by the county treasurer, out of any moneys in his hands provided for that purpose. There shall annually be paid out of the treasury of the state to the treasurer of such county the sum of six hundred dollars, to be kept by him as a fund for the payment of such bills. If in any year such sum shall not be appropriated by the legislature, or shall be inadequate, the board of supervisors of such county may appropriate such sum of money as they may think necessary out of any moneys which may come into the treasury of such county, arising from that portion of the moneys collected as fines for selling liquor to the Indians and for trespass upon Indian lands, which would otherwise be paid to the chiefs of the Onondaga Indians but all such moneys shall be directly appropriated by the board of supervisors, upon the recommendation of the supervisor of the town of Onondaga and the agent of the Onondaga Indians, to be applied and disbursed in the same manner by such physician. (*Amended by L. 1914, ch. 395.*)

Source.—Former Indian L. (L. 1892, ch. 679) § 25; originally revised from L. 1858, ch. 206, as amended by L. 1861, ch. 134.

References.—State support of Indian poor persons, State Charities Law, §§ 102, 103. Education of orphan Indian children, Education Law, §§ 340-346.

§ 26. **Plank-road on reservation.**—All Indians residing on the Onondaga reservation, or belonging to the Onondaga tribe, shall, as to the portion of the Syracuse and Tully plank-road constructed upon such reservation, and as to all gates erected within the bounds thereof, pass free of any charge or toll.

Source.—Former Indian L. (L. 1892, ch. 679) § 26; originally revised from L. 1848, ch. 36, § 2, as amended by L. 1858, ch. 369.

§ 27. **Custody of wampums.**—The university of the state of New York, which was duly elected to the office of wampum-keeper by the Onondaga nation on February twenty-sixth, eighteen hundred and ninety-eight, and which by unanimous action of its regents on March twenty-second, eighteen hundred and ninety-eight, accepted such election as authorized to do by law, and which accepted the custody of the wampums as formally transferred to the chancellor as part of the exercises and with the unanimous approval, both of the election and transfer, by the council of the Five Nations held in the senate chamber of the capitol at Albany on June twenty-second, eighteen hundred and ninety-eight, by duly chosen representatives of all the original nations of the Ho-de-no-sau-nee, shall hereafter be recognized in all courts and places, as having every power which has ever, at any time, been exercised by any wampum-keeper of the Onondaga nation, or of any of the Ho-de-no-sau-nee, otherwise known as the Five Nations, or the

Six Nations, or the Iroquois, and shall keep such wampums in a fireproof building, as public records, forever, and is hereby authorized to secure by purchase, suit, or otherwise, any wampums which have ever been in the possession of any of the Ho-de-no-sau-nee, or any preceding wampum-keeper, and which are now owned by any of them or to which any of them is entitled, or to which it is entitled, in law or in equity, and to maintain and carry on suit to recover any of such wampums in its own name or in the name of the Onondaga nation at any time notwithstanding that the cause of action may have accrued more than six years, or any time, before the commencement of any such suit.

The provisions of this section shall not apply to the subject matter of any litigation pending on March twenty-seventh, eighteen hundred and ninety-nine, in any court of this state.

Source.—L. 1899, ch. 153, §§ 1, 2.

§ 28. **Keeping or pasturing of cattle; damages; penalty.**—Any person who keeps, pastures, has in his possession, or under his control, any horses, cattle, or other animals, on lands contained in the Onondaga Indian reservation, unless the same are kept, pastured, or possessed, as provided in section twenty-four of this article, shall be guilty of a misdemeanor, and shall be liable for treble damages for any injury done by such cattle, horses, or other animals while on said reservation. Any person who shall keep, pasture, have in his possession, or under his control, any cattle, horses or other animals, on lands contained within the Onondaga Indian reservation and leased under the provisions of section twenty-four of this article, shall be liable to the person damaged for any injury done by such cattle, horses, or other animals, through trespass or otherwise; and the fact that the person damaged, or any other person, has failed to erect any fences, or has failed to keep any fences in repair, shall be no defense in an action brought under this section, for injury done by such cattle, horses or other animals. (*Added by L. 1915, ch. 463.*)

ARTICLE IV.

THE SENECA INDIANS.

Section 40. Use of terms.

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42. Time and place of annual election.
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51. Appeals from peacemakers' court of Tonawanda nation.
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56. Trees and timber on reservations.
57. Offering or giving bribes prohibited.
58. Acceptance of bribes prohibited.
59. Conveying bribes prohibited.
60. Offenders competent witnesses.

§ 40. Use of terms.—In this chapter the Seneca Indians residing on the Allegany and Cattaraugus reservations are designated the Seneca nation, and the Seneca Indians residing on the Tonawanda reservation are designated the Tonawanda nation. For the purposes of voting and holding office, the Seneca Indians residing on the Corn-planter reservation in the New York Indian agency shall be treated as residents of the Allegany reservation. The councilors of the Seneca nation, and the chiefs of the Tonawanda nation, in council assembled, are designated, in this chapter, the council of each of such nations, respectively.

Source.—Former Indian L. (L. 1892, ch. 679) § 40; originally revised from L. 1878, ch. 320.

Boundary of Cattaraugus reservation. See *Seneca Nation v. Hugaboom* (1892), 132 N. Y. 492, 30 N. E. 983.

§ 41. Enumeration of officers.—The government of the Seneca nation by chiefs is abolished. Each nation shall have as officers a clerk and a treasurer. The Tonawanda nation shall have a marshal and three peacemakers. The Seneca nation shall have a marshal, three peacemakers, and eight councilors for each of its reservations, and a president. Each officer of each nation now in office shall continue in office until the expiration of the term for which he was chosen and until his successor shall be chosen.

Source.—Former Indian L. (L. 1892, ch. 679) § 41; originally revised from L. 1847, ch. 365, § 1; L. 1863, ch. 90, § 1.

Reference.—Constitution of Seneca Nation adopted in 1898 ratified and confirmed by L. 1900, ch. 252, as follows:

§ 1. The amended constitution of the Seneca Nation of Indians, made and adopted by such Indians in convention assembled, at the council-house at Coldspring, on the Alleghany reservation, and also at the court-house on the Cattaraugus reservation, on the fifteenth day of November, eighteen hundred and ninety-eight, is hereby ratified and confirmed.

Seneca Nation is a corporation under § 1948 of the Code of Civil Procedure, authorizing the attorney-general to bring an action against a usurper in office. *Seneca Nation v. Johns* (1891), 16 N. Y. Supp. 40.

§ 42. Time and place of annual election.—There shall be a biennial election in the Seneca nation on the first Tuesday of November in each even numbered year. The voters residing on the Allegany reservation shall on each election day assemble at the council-house near Coldspring, and the voters residing on the Cattaraugus reservation shall assemble at the court

house near Versailles, and by ballot choose successors to the officers of such nation whose terms expire with such election and fill vacancies in any offices, which have not been filled by a special election. The peacemakers of each reservation shall preside and constitute the board of inspectors of such election for their respective reservations. If any of such peacemakers are absent or refuse to serve, the electors present shall choose a person qualified to vote at such election to fill such vacancy. Before entering upon the discharge of their duties, such inspectors shall each take an oath, administered by one of the peacemakers, to support the constitution of the Seneca nation and to faithfully discharge the duties of their office according to the best of their ability. Each of such board of inspectors shall appoint a competent person as clerk, who shall keep a poll-list, containing the name of each person voting at such election and minutes of the proceedings and of the result of the election. The president of the nation shall provide for each of the Cattaraugus and Allegany reservations, a ballot-box with a lock and an opening in the top sufficient to admit of the insertion of a folded ballot. Such box shall be locked upon the opening of the polls and remain locked until the close of such election. Each ballot received by the inspectors of election shall be deposited in such box through the opening of the top thereof. Such inspectors shall see that such election is conducted with order and regularity. The polls of such election shall be opened at nine o'clock in the forenoon and shall be kept open until five o'clock in the afternoon, when each of such boards of inspectors shall immediately proceed publicly and before adjourning to count the votes cast, publicly announce the result thereof, and make and sign duplicate certificates containing a statement of the whole number of votes cast, and the number cast for each candidate. Each of such boards, within two days of such election, shall cause one of such duplicate certificates to be delivered to the clerk of the nation, who shall immediately record the same in the records of the nation. Such boards of inspectors and the president and clerk of the nation shall constitute the board of national canvassers; and, on the Tuesday following such election, shall meet at the court house on the Cattaraugus reservation at ten o'clock in the forenoon, examine such certificates, ascertain the results of such election, and declare such persons elected as have received the highest number of votes; and such board of national canvassers, or a majority of them, shall before adjournment, execute a certificate containing a statement of the whole number of votes cast for each candidate and the name of each candidate declared to be elected to any office; such certificate shall be attested by the clerk of the nation who shall immediately record the same in the records of the nation, and such certificate shall be evidence of the result of such election. The term of office of each officer elected at such election shall, unless elected to fill a vacancy, be two years, and shall commence on the completion of the canvass of the votes by the board of national canvassers. There shall be an annual election in the Tonawanda nation on the first Tuesday in June.

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At such election, successors shall be elected to the officers of such nation whose terms shall expire with such election, or during the calendar month next thereafter. The oldest peacemaker present at such election and the clerk of such nation shall be the president and clerk of the meeting, and shall keep minutes of the proceedings and results of such election. If either of such officers are absent from the meeting, the qualified voters present thereat shall choose a qualified voter to act in his stead. The officers elected at such meeting shall be chosen, upon the nomination of an elector, by ballot, or by the ayes and noes, as the meeting shall determine; and a plurality of votes shall be necessary to elect. The presiding officer and clerk of such meeting shall count the votes cast thereat and announce the result thereof. The result of such election shall be entered and certified by the president and clerk thereof in a book provided by such nation, called the register of election, which book shall be evidence of the result of elections entered therein. The terms of office of the officers elected shall be one year, and shall commence on the first Tuesday of July next after the election.

Source.—Former Indian L. (L. 1892, ch. 679) § 42, as amended by L. 1893, ch. 229; L. 1900, ch. 253; originally revised from L. 1847, ch. 365, §§ 1, 3, 5; L. 1863, ch. 90, §§ 1, 4.

§ 43. **Qualifications of voters and eligibility to office.**—Every male Seneca Indian of full age residing on the Allegany, Cattaraugus or Tonawanda reservations, whose name shall appear on the last preceding census taken for the purpose of distributing the annuities due to the said Indians, shall be a qualified voter at all elections or meetings of the electors of his nation; and shall be eligible to any office filled thereat, except that the marshals, peacemakers and councilors of the Seneca nation shall be residents of the reservation for which they were chosen, and the peacemakers of the Tonawanda nation shall be chosen from among the chiefs thereof. If any person offering to vote at any such election shall be challenged as unqualified, the presiding officer shall determine by an inspection of such last preceding census, upon his right to vote; and if he is challenged on the ground of not being twenty-one years of age, such officer shall ascertain the fact by the oath of the person offering his vote, or of any other Indian, which oath he is authorized to administer.

Source.—Former Indian L. (L. 1892, ch. 679) § 43, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 2; L. 1863, ch. 90, §§ 1, 2; L. 1878, ch. 320.

§ 44. **The treasurer.**—Within thirty days after his election and before performing any of the duties or exercising any of the powers of his office, the treasurer of each nation shall give a bond to such nation, with such sureties and in such amount as the attorney of such nation shall approve, conditioned for the faithful performance of the duties of his office. For any breach of the conditions of such bond, an action may be maintained

for the benefit of such nation, by their attorney, in the manner provided by law for the breach of an official bond given by a county treasurer. If such bond is not given within the time provided, the office shall be deemed vacant. The treasurer of the Seneca nation shall receive all moneys belonging to the nation, except the annuities paid by the government of the United States or the state of New York. The treasurer of the Tonawanda nation shall receive all moneys belonging to such band, which shall be deposited with him pursuant to any resolution of the council of such nation. The treasurer of each nation shall pay out moneys only upon a warrant, certified by the presiding officer and clerk of the council, to the effect that the amount to be paid by such warrant was appropriated by a resolution passed by a majority vote of the council, which warrant the treasurer shall retain as a voucher. The treasurer shall receive such compensation as the council shall determine. At least five days before the annual election, he shall report to the peacemakers an account of all moneys received and expended by him, with the vouchers for such expenditures, which account shall be settled by the peacemakers and read by the presiding officer at the next annual election.

Source.—Former Indian L. (L. 1892, ch. 679) § 44, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 6; L. 1863, ch. 90, § 5.

§ 45. The clerk.—The clerk of each nation shall act as clerk at every annual or special meeting thereof, and in the meetings of the council of the nation. He shall have the custody of all the books, papers and records belonging to such nation. The council of each nation shall furnish the clerk thereof with a book, at the expense of the nation, in which he shall enter all proceedings and the results of all elections at every annual or special meeting of such nation; and all orders, rules, regulations and certificates made or granted by the council of the nation, and if of the Tonawanda nation, the names of the chiefs thereof. Every certificate, order or other matter certified by the clerk to be a true extract from his minutes shall be evidence thereof. The clerk shall receive an annual salary of not exceeding fifty dollars, to be determined by the council. The clerk of the Tonawanda nation shall also act as clerk at all hearings before the peacemakers' courts, or any other tribunal established by law on their reservation, and shall enter in the record book of the peacemakers' courts all entries required to be made therein.

Source.—Former Indian L. (L. 1892, ch. 679) § 45; originally revised from L. 1847, ch. 365, § 7; L. 1863, ch. 90, §§ 6, 7 and 14, as amended by L. 1884, ch. 316.

Records of clerk would not be conclusive evidence in a direct proceeding within a proper time to attack directly action based upon them. But in a collateral action or proceeding to which the nation is not a party and which involves inquiry into the validity of the execution of a contract made pursuant to the record of the proceedings as entered, to which the nation is a party, and executed by the council by its president according to its established rules and custom, it is very questionable whether their proceedings as they appear on the record and the execution of such

contract, in fact so made, can be attacked in that manner. *Baker v. Johns* (1886), 38 Hun 625, 631.

§ 46. **Peacemakers' courts.**—The peacemakers for each of the three reservations, the Allegany, the Cattaraugus and the Tonawanda reservations, shall respectively constitute the peacemakers' courts thereof, and the eldest peacemaker of each of such courts shall be the presiding officer thereof. Any two of the peacemakers of any reservation shall be competent to perform any of the duties or exercise any of the powers assigned to the peacemakers of such reservation. The peacemakers' court of each such reservation shall have authority to hear and determine all matters, disputes and controversies between any Indians residing upon such reservation, whether arising upon contracts or for wrongs, and particularly for any encroachments or trespass on any land cultivated or occupied by any one of them, and which shall have been entered and described in the clerk's books of records; but they shall not take cognizance of any claim founded upon any debt or demand originally contracted with a white man. And said peacemakers shall have power to make all needful rules and by-laws for notifying and bringing the parties to such matters, disputes and controversies as may arise under the provisions of this section before them, and for the regulation of all proceedings thereon, and for the hearing and determination thereof, and for the enforcing obedience to such rules and by-laws. They shall publicly hear the proofs and allegations of the parties to such matter, dispute or controversy, and shall publicly declare and make known their determination therein within four days after such matter, dispute or controversy shall be finally submitted to them by the parties. They shall have power to enforce obedience to such rules and by-laws, and shall have power to issue and enforce the observance of orders or notices for the appearance and attendance of witnesses before them to testify and give evidence in any such matter, dispute or controversy so pending before them, and may compel the appearance before them of such witness by attachment or by fine, for not appearing, in the same manner as is now provided by law for compelling the attendance of witnesses in courts of justices of the peace in this state. They may administer oaths to witnesses produced by the parties on any such hearing, and cause them to be examined on oath, and may examine any party to any such matter, dispute or controversy so pending before them, on oath as a witness, when such examination shall be required by an adverse party. A peacemakers' court of the Allegany or Cattaraugus reservation shall also have exclusive jurisdiction to grant divorces between Indians residing on such reservation and to hear and determine all questions and actions between individual Indians residing thereon involving the title to real estate on such reservations. If either of the parties to a controversy of which a peacemakers' court has jurisdiction resides on the Allegany reservation and either of the other parties resides on the Cattaraugus reservation, the peacemakers' court of

either reservation has jurisdiction thereof. (*Amended by L. 1915, ch. 560.*)

Source.—Former Indian L. (L. 1892, ch. 679) § 47, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 8; L. 1859, ch. 374; L. 1863, ch. 90, § 7.

Reference.—Jurisdiction vested in state courts, where not conferred on peacemakers' court, § 5, ante, and notes.

Jurisdiction of peacemakers' court.—Jurisdiction is conferred upon the peacemakers of the Seneca Indians to partition real estate in the Cattaraugus reservation among the heirs of a deceased Indian. *Jimeson v. Pierce* (1902), 78 App. Div. 9, 79 N. Y. Supp. 3.

Jurisdiction of the Peacemakers' Court of the Seneca Nation of the Cattaraugus Reservation does not include an action to determine the rights of contending parties to the office of trustee of a corporation. *People ex rel. Jamerson v. John* (1913), 80 Misc. 418, 141 N. Y. Supp. 225.

Jurisdiction of state court to punish Indians for violation of Conservation Law. *People ex rel. Kennedy v. Becker* (1915), 215 N. Y. 42, 109 N. E. 116.

The supreme court has no jurisdiction to restrain the peacemakers' court from carrying into effect a judgment declaring a defendant to be the owner of certain real estate. *Jones v. Gordon* (1906), 51 Misc. 305, 99 N. Y. Supp. 958; *People ex rel. Jimeson v. Shongo* (1913), 83 Misc. 325, 144 N. Y. Supp. 885, *affd.* 164 App. Div. 908, 148 N. Y. Supp. 1137, amended 164 App. Div. 965, 149 N. Y. Supp. 1104.

A court of equity is without jurisdiction to interfere with letters of administration granted by the Indian Surrogate's Court of the Seneca Nation. *Jimeson v. Lehley* (1906), 51 Misc. 352, 101 N. Y. Supp. 215.

No court can be recognized as having any authority or standing to deal with Indian affairs except such as have been created expressly for that purpose. The only court on the Tonawanda Reservation existing by authority of law is the Peacemakers' Court. The jurisdiction of that court is determined by such powers as are expressly granted to it, and where no authority has been expressly given to that court to deal with the estates of decedents it can exercise no jurisdiction over them. In such a case the Surrogates' Court of Erie county may grant letters of administration and has jurisdiction over the estate of a decedent. The ancient custom of the tribesmen to appoint administrators and distribute the property of a deceased Indian at the Tenth Day or Dead Feast, if it exists, is without authority of law and will not supersede the jurisdiction of the Surrogate. *Hatch v. Luckman* (1909), 64 Misc. 508, 118 N. Y. Supp. 689, *affd.* (1913), 155 App. Div. 765, 140 N. Y. Supp. 1123.

§ 47. **Record of peacemakers.**—The peacemakers of each reservation shall be furnished by the council of the nation, with a record book, in which they shall cause an entry to be made by the clerk, of all matters heard and determined by them. Each such entry shall state the names of the parties to the action or proceeding, a brief statement of the subject thereof, the finding and determination of the peacemakers in reference thereto, the amount of the award, the amount of costs and to whom allowed, the time within which the decision is to be complied with, and the date of such decision.

Source.—Former Indian L. (L. 1892, ch. 679) § 48, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 8; L. 1863, ch. 90, § 7.

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§ 48. **Costs and fees.**—The fees of surrogates, peacemakers and marshals shall be fixed and determined by the council. In every controversy before the peacemakers they shall award the costs to be paid by the party against whom their determination shall be made; the costs allowed shall be ascertained and specified by them in their determination.

Source.—Former Indian L. (L. 1892, ch. 679) § 49, as amended by L. 1893, ch. 229, and L. 1900, ch. 253; originally revised from L. 1847, ch. 365, § 11; L. 1863, ch. 90, § 10.

Application.—Sections 47, 48 and 53 contemplate that the Council of the Nation shall fix certain costs and fees applicable to all cases, and that, such costs and fees having been fixed by the Council, the peacemakers in each case tried before them are to fix the costs and fees, using as a basis the schedule fixed by the Council of the Nation. *Shongo v. Shongo* (1915), 158 N. Y. Supp. 99.

§ 49. **Incompetency of peacemakers.**—A peacemaker shall not act in any case where he shall be related to either of the parties within the fourth degree by the common law, or has any interest in the action or proceeding. If two members of a peacemakers' court shall be incompetent to act, the remaining peacemaker shall associate with himself any two members of the council residing on the reservation not disqualified by such relationship or interest, for the hearing and determination of the action or proceeding, and such peacemaker and members of the council or any two of them shall have all the power and authority conferred upon peacemakers in relation to such action or proceeding.

Source.—Former Indian L. (L. 1892, ch. 679) § 50, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 9; L. 1863, ch. 90, § 8

§ 50. **Appeals to council of Seneca nation.**—Within twenty days after the decision of a peacemakers' court of the Seneca nation, an appeal may be taken to the council of such nation, by serving upon the adverse party and upon the peacemakers before whom the action or proceeding was heard a notice of such appeal. The peacemakers shall certify the evidence taken before them to the council. The appeal shall be heard by at least a quorum of the council, and shall be decided upon the evidence taken in the peacemakers' court, and such additional evidence as the council may determine to hear. Upon the hearing any party shall have the right to appear either in person or by counsel and argue the merits of the case. The decision of the council shall be conclusive. (*Amended by L. 1914, ch. 508, and L. 1915, ch. 561.*)

Source.—Former Indian L. (L. 1892, ch. 679) § 51, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 10.

L. 1915, ch. 561, § 2. This act shall not affect any pending appeals.

Amendment of 1914, permitting an appeal to the County Court, is a valid enactment of the Legislature. *Shongo v. Shongo* (1915), 158 N. Y. Supp. 99.

Costs on appeal.—See *Shongo v. Shongo* (1915), 158 N. Y. Supp. 99.

Notice of appeal signed by two defendants and by the attorney for the defendants is sufficient as to the defendants who did not sign, where it shows a desire of the defendants to have a review. *Shongo v. Shongo* (1915), 158 N. Y. Supp. 99.

The decision of the council is conclusive as to the rights of the parties and the

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supreme court cannot interfere. *Jones v. Gordon* (1906), 51 Misc. 305, 99 N. Y. Supp. 958.

The Council of the Seneca Nation has the power to determine whether or not an appeal has been taken. *Shongo v. Shongo* (1915), 158 N. Y. Supp. 99.

§ 51. Appeals from peacemakers' court of Tonawanda nation.—An appeal may be taken from the decision of a peacemakers' court of the Tonawanda nation, or of a tribunal of such nation consisting of a peacemaker and one or more associate chiefs, to a court consisting of six chiefs of such nation, selected as follows: The party appealing shall give security, approved by the tribunal before which the action or proceeding was tried, for the payment of the amount awarded by such appellate court. Upon such security being given, such trial court shall direct the marshal to summon twelve chiefs, designated by such trial tribunal, to appear at a time and place specified, not more than ten days thereafter. At such time the names of such chiefs shall be drawn by lot, and the first six whose names are drawn, and who are not disqualified because of interest or relationship, shall constitute a court for the hearing and determination of such appeal. Such court shall hear the appeal, and examine the witnesses and parties under oath in the same manner as the peacemakers in a determination before them. Upon such hearing, the chiefs constituting the court shall be entitled to receive twenty-five cents each for their services, to be paid in the first instance by the party appealing. In their final decision, they shall determine which party shall pay the costs and expenses of the suit and of the appeal.

Source.—Former Indian L. (L. 1892, ch. 679) § 52; originally revised from L. 1863, ch. 90, § 9.

§ 52. Enforcement of judgments.—If any party shall fail to comply with, or fulfil the directions or finding of the peacemakers in any matter heard or determined by them in pursuance of law, within the time fixed by such determination, the party in whose favor such determination may be, shall be entitled to recover the amount awarded to him, by such determination with costs, in an action in justice's court before any justice of the peace of the county in which such reservation or a part thereof is situated, in which action, a copy of the record of such determination, certified to by said clerk, shall be conclusive evidence of the right of recovery, and of the amount of such recovery, and executions shall be awarded to enforce the collection of the judgment obtained thereon in the same manner and with the like effect as against white persons, and the property and person of the defendant in such action shall be liable to seizure and sale or imprisonment, as in like cases against white persons. In case the action or proceeding is one not within the jurisdiction of justice's courts, the application may be made to a court having jurisdiction of actions of the same nature.

Source.—Former Indian L. (L. 1892, ch. 679) § 53, as amended by L. 1893, ch.

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229; L. 1900, ch. 253; originally revised from L. 1847, ch. 365, § 8; L. 1863, ch. 90, § 7.

Enforcement of judgment of peacemakers' court in supreme court.—The widow of a deceased Seneca Indian who, by a judgment of the peacemakers' court, entered prior to the enactment of the amendment of 1900 to the above section, has had her dower in lands located on the Cattaraugus reservation set off to her, and who has been denied possession of such dower may maintain an action in the supreme court to enforce the judgment of the peacemakers' court. *Jameson v. Pierce* (1902), 78 App. Div. 9, 79 N. Y. Supp. 3.

The judgment rendered in an action brought in the Peacemaker's Court of the Allegany Reservation of the Seneca Nation of Indians to recover the possession of certain lands within the reservation awarded the title and possession of the property in question to the plaintiff in that action. On appeal to the council of the Seneca Nation of Indians said judgment was affirmed and a remittitur from said council was duly filed with the Peacemaker's Court and an order making the judgment of the council the judgment of the Peacemaker's Court was duly made and recorded, and by said order it was directed, ordered and adjudged that defendant in that action surrender the possession of the premises to the plaintiff therein, within twenty days. Defendant therein declined to surrender possession and resisted the execution of a writ of assistance duly issued to the proper marshal of the reservation. It was held, that in a suit in equity, under this section of the Indian Law, plaintiff was entitled to judgment confirming the judgment of the Peacemaker's Court on the remittitur from said council, and for the enforcement of said judgment by the delivery of the possession of the property to him. *Silverheels v. Maybee* (1913), 82 Misc. 48, 143 N. Y. Supp. 655.

Section cited.—*Peters v. Tallchief* (1907), 121 App. Div. 309, 106 N. Y. Supp. 64.

§ 53. **The marshal.**—The marshal shall execute all orders, summons and process issued or given to him by the peacemakers or any tribunal created according to the provisions of this chapter, and shall be entitled to receive for his services the same fees as are allowed by law to constables in courts held by justices of the peace.

Source.—Former Indian L. (L. 1892, ch. 679) § 54, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 13; L. 1863, ch. 90, §§ 12, 28, 29.

§ 54. **Prosecution of actions and disposition of recovery.**—The Seneca nation may prosecute by the name of "The Seneca Nation of Indians," actions and proceedings to protect their rights and interests to the Allegany, Cattaraugus and "oil spring reservations," and may maintain an action of ejectment to recover the possession of any part of such reservations unlawfully withheld from them, and an action for injury to the soil of such reservations, or for cutting down or removing or converting timber or wood growing or being thereon, or an action of replevin for timber or wood removed therefrom, and for the recovery of damage for injury to the common property or rights of such Indians, or for the recovery of money, property or effects, due or to become due, or belonging, or in any way appertaining to such Indians in common, or to the Seneca nation; and in every such suit, action or proceeding in relation to lands or real estate, situated within the said reservations, the Seneca nation may allege a seisin in fee; and every recovery in such action shall be as and for, and

in reference to a fee; but neither such recovery nor anything therein contained shall enlarge or in any way affect the rights, title or interest of the Seneca nation, or of such Indians in and to such reservations, as between them and the grantees or assignees of the pre-emption right of such reservations under the grants of the state of Massachusetts. And no such action shall be defeated or barred on the ground that any land in relation to which such action is brought, or from which any timber or wood, logs or other property may have been removed or taken, and which may be the subject of any such suit, was in the possession of any individual Indian, but the occupancy of any part of the said reservations by any individual Indian, shall be deemed to have been and to be the possession of the Seneca nation; nor shall any license, consent, lease, agreement or any interest whatever, made or given by any individual Indian or Indians, be received in evidence in any such action in bar, defense or mitigation of damages, and when it shall be necessary to bring any such action before a justice of the peace, the same may be brought and maintained before any such justice, residing in the county where the defendant may be found, whether the cause of action arose in such county or not. Actions or proceedings may be prosecuted by the Tonawanda nation by the name of "The Tonawanda Nation of Indians." If a bond or undertaking shall be necessary for the prosecution or defense of an action or proceeding, the attorney of either of such nations may execute a bond or undertaking in the name and in behalf of the nation, which nation shall be liable thereon. If any costs shall be recovered against either of such nations in any action prosecuted or defended by the attorney thereof, no execution shall be issued therefor, but such costs shall be paid by the treasurer of the state, out of any annuity or interest money payable by the state to such nation, upon producing to the comptroller a certificate of the attorney of such recovery, and a certified copy of the judgment awarding such costs. All sums recovered in any action brought by the attorney thereof for the benefit of either of such nations, after deducting such costs and expense as shall be certified to by the judge before whom the case was tried, shall be paid to the treasurer of the nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 55, as amended by L. 1893, ch. 229; originally revised from L. 1845, ch. 150, §§ 1, 2; L. 1863, ch. 90, § 22, as amended by L. 1873, ch. 394.

Reference.—Jurisdiction vested in state courts, if not conferred on peacemakers' courts, § 5, ante, and notes.

The purpose of this section is to enable the Seneca nation to protect the occupancy and possession of its lands and to recover indemnity from any persons who violate that right. This is the whole extent to which the statute goes. It is the settled law that neither a tribe of Indians nor its individual members can maintain an action to recover the property of the tribe without special authority and no general statute giving such a right and applicable to all Indians has been enacted. Therefore under this section plaintiff has no right to maintain an action to compel the determination of a claim to real property. *Seneca Nation of Indians v. Appleby* (1909), 196 N. Y. 318, 89 N. E. 835, revg. (1908), 127 App. Div. 770, 112 N. Y. Supp. 177.

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Action under section.—In an action of ejectment it was claimed on behalf of plaintiff that the Indians being wards of the nation, could not be bound by a practical location of a boundary line founded on acquiescence. The court held however that the Indians in adopting the remedy provided by the statute take it subject to the condition that it should be maintained in the same manner as if brought by citizens of the state. *Seneca Nation v. Hugaboom* (1892), 132 N. Y. 492, 30 N. E. 983. See also *Seneca Nation v. Christle* (1891), 126 N. Y. 122, 27 N. E. 275, affg. (1888), 49 Hun 524, 2 N. Y. Supp. 546.

Statute of limitations.—Where the plaintiff was an Indian tribe and elects to sue in ejectment under a statute of the state the statute of limitations will run in the same manner as if brought by citizens of the state in relation to their private property and rights. *Seneca Nation v. Christle* (1896), 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. 828, affg. (1891), 126 N. Y. 122, 27 N. E. 275.

Security.—The Seneca Nation is a public corporation within the meaning of § 1990 of the Code of Civil Procedure and is not required to give security for the purpose of procuring a preliminary injunction. *Seneca Nation Indians v. John* (1891), 16 N. Y. Supp. 40.

Judgment for costs.—Where a judgment for costs is recovered against an Indian in an action of trespass brought by him an execution can be issued against his property. *Crouse v. N. Y. Penn. R. R. Co.* (1888), 49 Hun 576, 2 N. Y. Supp. 453.

§ 55. **Allotment of lands.**—All lands on either the Allegany, Cattaraugus or Tonawanda reservations, except such as have been allotted by the national council, or lands on the Allegany and Cattaraugus reservations, appropriated, cultivated and improved by an Indian or Indian family or the heirs thereof, in accordance with the laws and usages of the Seneca nation, or lands on the Tonawanda reservation, to which the possessors have become entitled in pursuance of law without an allotment, shall be held in common by the Seneca and Tonawanda nations, respectively, and be subject to the control of the council thereof. The common land shall not be appropriated by any Indian to his own use without the consent of the council, who shall, on application, allot to any Indian or Indian family, so much of the common lands as they shall deem reasonable and an equitable proportion in reference to the whole number not possessing land. A description of the land desired shall be submitted to the council. Upon the approval of the council, certified by the presiding officer and clerk thereof, such description may be recorded in the clerk's book of records. A description of lands on the Tonawanda reservation, appropriated, cultivated and improved by any Indian or Indian family or the heirs thereof, after November fifteenth, eighteen hundred and forty-seven, may be recorded at any time in the clerk's book of records. The possessors of lands on the Allegany, Cattaraugus and Tonawanda reservations, descriptions of which are recorded, shall, from the time of recording only, be entitled to maintain suits for encroachment or trespass thereon.

Source.—Former Indian L. (L. 1892, ch. 679) § 56, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 22; L. 1863, ch. 90, §§ 16, 17; L. 1871, ch. 703, § 1.

Reference.—Partition of tribal lands, § 7, ante, and note.

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Half-breeds may succeed to allotted lands. *Seneca Nation v. Lehigh* (1889), 55 Hun 83, 8 N. Y. Supp. 245.

Rights of individual owners.—Where a member of the nation has occupied and been in undisputed possession of lands, purchased by his mother from the chiefs of the nation in 1859, for a period of more than twenty-two years, the presumption that the occupant holds the land under an allotment within the meaning of this section is controlling, and he must be deemed to be the owner in fee and has the right to the use thereof subject to the easement of the public. As such owner he may maintain an action of ejectment against the telephone company which has erected telephone poles and stretched wires upon his lands and along the highway without his consent. *Jemison v. Bell Telephone Co.* (1906), 186 N. Y. 493, 79 N. E. 728.

§ 56. **Trees and timber on reservations.**—Except as provided by this section, no person shall cut, remove, cause to be removed or assist in removing from the Allegany, Cattaraugus or Tonawanda reservations any wood, trees or timber thereon, nor shall any Indian sell or dispose of any timber or trees on such reservations, or any manufacture therefrom; and every such sale or disposition shall be void. Except as provided in this section, any person who shall cut, remove or cause to be removed from either of such reservations, or any Indian who shall sell or dispose of any trees or timber thereon, or any manufacture therefrom, shall be liable to a penalty of twice the value of such property, recoverable for the benefit of the nation occupying the reservation. An Indian residing on the Allegany or Cattaraugus reservation, may sell or dispose of, for his own benefit, any trees or timber, or the manufacture thereof, on any wild lands allotted to or entered by him; and, upon obtaining a permit from the council, signed by the presiding officer and clerk thereof, may manufacture shingles or staves from any trees or timber on any wild lands of the nation not allotted to or entered by any other Indian, and may dispose of the same for his own benefit. Any member of the Allegany, Cattaraugus or Tonawanda reservation, upon obtaining a permit signed by the presiding officer and the clerk thereof, may draw logs from such wild lands to be sawed into lumber and boards to be actually and in good faith used by him but not to be sold or disposed of by him. No person not a member of the nation occupying such reservation shall be employed by any Indian in manufacturing shingles or staves, or in cutting down trees for that purpose. The council of the Seneca nation may sell or dispose of any trees or timber on the wild lands of the Allegany or Cattaraugus reservation, and the proceeds of such sale or disposition shall be for the benefit of such nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 59, as amended by L. 1904, ch. 475; originally revised from L. 1847, ch. 365, §§ 20–22; L. 1863, ch. 90, §§ 18, 19, as amended by L. 1873, ch. 394, and §§ 20, 21; L. 1873, ch. 455, §§ 1, 2.

Reference.—Unauthorized cutting, etc., of timber, etc., a misdemeanor, Penal Law, § 1160.

See *Seneca Nation v. Hammond* (1875), 6 T. & C. 595.

§ 57. **Offering or giving bribes prohibited.**—Every person who shall

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promise, offer or give, or cause, or aid, or abet in causing to be promised, offered or given, or furnish, or agree to furnish, in whole or in part, to the president or to any councilor, peacemaker, or other officer of the Seneca nation of Indians, any money, goods, right in action, or other property or any thing of value, or any pecuniary or other individual advantage, present or prospective, with intent to influence his vote, opinions, judgment or action, upon any question, matter, cause or proceeding which may be pending, or may be brought before him in his official capacity, shall, upon such conviction, be imprisoned in the state prison not exceeding five years, or shall be fined not exceeding one thousand dollars, or both, in the discretion of the court.

Source.—L. 1880, ch. 184, § 1.

§ 58. **Acceptance of bribes prohibited.**—Every officer enumerated in the last section, who shall accept any such gift, thing of value or any promise to make the same, under any agreement that his vote, opinion, judgment or action, shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question, matter, cause or proceeding then pending, or which may be brought before him in his official capacity, shall, upon conviction, be forever disqualified from holding any office, trust or appointment under the constitution or laws of the Seneca nation of Indians, and shall forfeit his office and shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding two hundred dollars, or both, in the discretion of the court.

Source.—L. 1880, ch. 184, § 2.

§ 59. **Conveying bribes prohibited.**—Every person who shall knowingly bear or convey any such gift, gratuity or proposal, or shall in any manner negotiate between any other persons for any act in violation of the provisions of the two preceding sections shall, upon conviction, be punished in like manner and to the same extent as the principal offender, respectively, would be liable to be punished under the provisions of this article.

Source.—L. 1880, ch. 184, § 3.

§ 60. **Offenders competent witnesses.**—Every person offending against any of the provisions of the three preceding sections shall be a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate or grand jury or in any court in the same manner as other persons, but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.

Source.—L. 1880, ch. 184, § 4.

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ARTICLE V.

THE SENECA INDIANS ON THE ALLEGANY AND CATTARAUGUS RESERVATIONS.

Section 70. Confirmation of nationality.

71. Exclusion of villages from reservations; leases of lands therein; certification of copies of leases granted by the Seneca nation of Indians and recording thereof.
72. The president.
73. General powers and duties of the council.
74. The attorney.
75. Vacancies in elective offices.
76. Payment of annuities.
77. Policemen at annual fair.

§ 70. Confirmation of nationality.—The Seneca Indians residing on the Allegany and Cattaraugus reservations shall, subject to the limitations provided by law, hold and possess such reservations as a distinct community.

Source.—Former Indian L. (L. 1892, ch. 679) § 70; originally revised from L. 1845, ch. 150, § 1.

References.—Confirmation of Constitution of 1898. L. 1900, ch. 252. See note to § 41. Compulsory education of children, Education Law, §§ 900-909.

In an action of ejectment brought under L. 1845, ch. 150, a claim on behalf of the plaintiff that the Indians, being wards of the nation, cannot be bound by practical location of boundaries founded on acquiescence, is untenable. *Seneca Nation v. Hugaboom* (1892), 132 N. Y. 492, 30 N. E. 983.

Relation of nation to the state and federal governments considered. See *Seneca Nation v. Christie* (1891), 126 N. Y. 122, 27 N. E. 275.

§ 71. Exclusion of villages from reservations; lease of lands therein; certification of copies of leases granted by the Seneca nation of Indians and recording thereof.—Those parts of the Allegany reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, have been constituted parts of the several towns within which they are located, and all the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States. Lands in such villages held under lease from the Seneca nation of Indians, and which the holders thereof are entitled to have renewed by virtue of such act of congress, shall be for all purposes considered a freehold estate, and the right of dower and tenancy by the courtesy shall attach thereto, and such lands, upon the intestacy of the holder, shall descend the same as a freehold of inheritance. But the rights of the Indians in such leases shall descend as provided by the laws of the Seneca nation of Indians. When the original lease of any such lands already granted by the Seneca nation of Indians, pursuant to act of congress, and recorded in the books of Seneca national Indian leases kept by the clerk of said nation, or his

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successors or assigns in office, shall have been lost or destroyed without the same having been recorded in the office of the clerk of the county of Cattaraugus, the owner of such lease, or any person interested in the lands therein described, may apply to the clerk of said nation for a certified copy of such record of the same, and upon the payment of the fees therefor, it shall be the duty of said clerk to furnish such owner with a certified copy of said lease. Upon the presentation of a copy of any such lease, certified as aforesaid, to the clerk of Cattaraugus county, it shall be the duty of said clerk to record the same in the books provided in his office for the record of such Indian leases, upon the payment of the fees for recording the same. Such copy of a lease certified as aforesaid shall be presumptive evidence of the facts set forth therein and shall be received in evidence on the trial of any action or proceeding in all the courts of this state. The record of such a copy of a lease certified as aforesaid in the office of the clerk of the county of Cattaraugus shall have the same force and effect as the record of the original lease, had it been recorded. The said clerk shall receive for certifying the same the sum of one dollar and for making a copy of said lease the sum of twenty-five cents per folio, which fees shall belong to the said clerk. (*Amended by L. 1915, ch. 339.*)

Source.—Former Indian L. (L. 1892, ch. 679) § 71; originally revised from L. 1881, ch. 188, §§ 1, 3.

Leases as confirmed by act of 1875 considered. *Ryan v. Knorr* (1880), 19 Hun 540; *Baker v. Johns* (1886), 38 Hun 625; *Matter of McKay* (1893), 5 Misc. 123, 25 N. Y. Supp. 725. See, also, *Buffalo, etc., R. R. Co. v. Lavery* (1894), 75 Hun 396, 27 N. Y. Supp. 443, *affd.* (1896), 149 N. Y. 576, 43 N. E. 986.

Lease from Seneca Nation is real estate for the purposes of administration. *Matter of McKay* (1900), 33 Misc. 520, 68 N. Y. Supp. 925.

Jurisdiction of U. S.—The United States has no criminal jurisdiction over villages established by law in the lands of the Seneca Indians. *Benson v. United States* (1890), 44 Fed. 178.

§ 72. The president.—The president of the Seneca nation shall preside over the deliberations of the council and shall have only a casting vote therein. He shall from time to time give to the council information of the state of the nation, and recommend such measures as he shall judge necessary and expedient; and shall take care that the laws applicable to the nation be faithfully executed. He shall have power to convene the council in extra session as often as, in his judgment, the interests of the nation require, and to fill all vacancies that may occur therein until such vacancy be filled by election. In the absence of the president, the council shall choose from among their own number a presiding officer, *pro tempore*.

Source.—Former Indian L. (L. 1892, ch. 679) § 72; originally a part of the Constitution of the nation.

§ 73. General powers and duties of the council.—The council of the Seneca nation shall meet annually on the first Tuesday of December, and in extra session whenever called by the president. Ten of the councilors

* So in original.

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shall be necessary to constitute a quorum for the transaction of business. The council shall have power,

1. To appropriate the moneys of the nation for the purpose of discharging the debts thereof, but all appropriations of public moneys shall be by an affirmative vote of at least ten of the councilors elected.

2. To fix the salaries of all officers of the nation whose salaries are not defined by law.

3. To determine on the laying out and working of roads and highways, and to make by-laws for the regulation of such work.

4. To pass by-laws and ordinances, not inconsistent with law, for the protection and improvement of the common land of the nation, for the regulation of fences, for the prevention of trespass of cattle and other animals; and may provide a penalty of not exceeding five dollars, for the violation of any by-law or ordinances, recoverable by any officer of the nation for the benefit of the nation, before the peacemakers' court of the reservation in which the offender resides or in which the offense is committed.

Source.—Former Indian L. (L. 1892, ch. 679) § 73, as amended by L. 1893, ch. 229; L. 1900, ch. 253.

§ 74. The attorney.—The office of attorney of the Seneca nation of Indians shall continue. The governor shall appoint, by and with the advice and consent of the senate, to be such attorney, a person who shall have been an attorney and counselor of the supreme court for at least three years. The term of office of such attorney shall be three years and he shall be paid by the state an annual salary of one hundred and fifty dollars. He shall advise such Indians in relation to their affairs, and in relation to controversies between themselves, or with any other person; shall, with the assent of the council, prosecute such actions and proceedings as he may deem proper and necessary; and shall defend all actions brought against such nation of Indians, or any of them, by white persons. If any suit shall be brought by such attorney for such Indians, without the assent of the council, he shall not be entitled to demand of such nation the costs of such suit, if he shall fail to recover, or be unable to collect such costs, of the defendants.

Source.—Former Indian L. (L. 1892, ch. 679) § 74; originally revised from L. 1845, ch. 150, § 2; L. 1847, ch. 365, § 23.

In an action for an injunction against one who threatens to interfere with the discharge of the duties of the office of president by a *de facto* president, the plaintiff may appear by an attorney acting under a resolution of its governing council, and is not limited to representation by the attorney appointed under this section. *Seneca Nation v. Jameson* (1909), 62 Misc. 91, 114 N. Y. Supp. 401.

In an action for assault and battery Indians may employ an attorney other than the one appointed for the Nation. *Jemmison v. Kennedy* (1889), 55 Hun 47, 7 N. Y. Supp. 296.

§ 75. Vacancies in elective offices.—If a vacancy occur in the office of

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the president of the Seneca nation, such office shall be filled by the council by a majority vote thereof, and a meeting of the council for that purpose shall be called by the clerk of the nation upon a written petition presented to him, signed by at least ten electors of such nation. If a vacancy occur in any other office of such nation, such office shall be filled by appointment by the president of the nation, under his hand and the seal of the nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 75, as amended by L. 1893, ch. 229; originally revised from L. 1847, ch. 365, § 4.

§ 76. **Payment of annuities.**—The annuities due to such nation shall be payable to the council, or to an agent or committee appointed by the council, to be distributed according to the custom of such Indians.

Source.—Former Indian L. (L. 1892, ch. 679) § 76; originally revised from L. 1847, ch. 365, § 6.

See *Cayuga Nation of Indians v. The State* (1885), 99 N. Y. 235, 1 N. E. 770, revg. (1885), 34 Hun 588.

§ 77. **Policemen at annual fair.**—The board of commissioners of the Niagara frontier police district may, upon the written request of at least five of the councilors of the Seneca nation, detail two or more policemen of such district to attend and preserve peace and good order at the annual fair of the Iroquois agricultural society on the Cattaraugus reservation; the reasonable expenses of such policemen to be defrayed by such nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 77; originally revised from L. 1863, ch. 90, § 23.

ARTICLE VI.

THE SENECA INDIANS ON THE TONAWANDA RESERVATION.

Section 80. General powers and duties of council.

81. Attorney.
82. Vacancies in elective offices.
83. Leases to white persons.
84. Lease of common lands.
85. Sale of gypsum, sand and gravel.
86. Payment of annuity.
87. Indian trespasses on common land.
88. Encroachment by Indians on occupied lands.
89. Court of impeachment.
90. Poles and wires on reservation.

§ 80. **General powers and duties of council.**—The council of the Tonawanda nation may determine upon the laying out and working of roads and highways, and may make by-laws for the regulation of such work; may pass by-laws and ordinances, not inconsistent with law, for the protection and improvement of the common land of the nation; for the regulation of fences; and for the prevention of trespasses by cattle and other domestic animals; and may provide a penalty of not exceeding five dollars,

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for the violation of any such by-law or ordinance, recoverable for the benefit of such nation by any chief or officer thereof, in any justice's court of the county of Genesee.

Source.—Former Indian L. (L. 1892, ch. 679) § 80; originally revised from L. 1871, ch. 703, § 3.

References.—Highways and bridges on tribal lands, § 12, ante; Highway Law, §§ 157-159.

§ 81. **Attorney.**—The district attorney for the county of Genesee shall continue to be the attorney for the Tonawanda nation of Indians, and shall be paid by the state an annual salary of one hundred and fifty dollars. He shall advise such Indians in relation to their affairs, and in relation to controversies among themselves or with any other person; he shall prosecute such actions and proceedings for them, or any of them, as he may deem proper and necessary; and shall, on a written complaint of a majority of the chief of such nation, when any trespass has been committed on the lands of such reservation, or any timber, wood or logs have been cut, carried away or converted by any person, not an Indian, to his own use, immediately commence the proper suit for the recovery of such property or of damages for such injury.

Source.—Former Indian L. (L. 1892, ch. 679) § 81; originally revised from L. 1863, ch. 90, § 22, as amended by L. 1873, ch. 394.

§ 82. **Vacancies in elective offices.**—If a vacancy shall occur in any office of the Tonawanda nation, any chief of such nation may call a special meeting of the chiefs thereof residing on such reservation, to be held at one of their council houses, by a notice specifying the time and place thereof, served on such chiefs personally or left at their respective places of residence at least five days before the time of such meeting. At such meeting the chiefs present shall appoint a clerk, and by a majority vote shall elect a person to fill such vacancy for the remainder of the unexpired term. The clerk of such meeting shall enter and certify the result of such election in the register of elections.

Source.—Former Indian L. (L. 1892, ch. 679) § 82; originally revised from L. 1863, ch. 90, § 3.

§ 83. **Leases to white persons.**—Any Indian residing on the Tonawanda reservation who is a member of such nation, may lease on shares to any white person, improved land owned or possessed by him, by a written lease approved by the indorsement of the attorney of such nation thereon, and after having obtained a permit from a council of such nation signed by the presiding officer and clerk thereof. No permit shall be granted by such council, unless the Indian applying therefor, shall show to the satisfaction of such council, how much land he proposes to lease, that it is within the bounds of his occupied improvement, that it is inclosed by a lawful fence, that he has cultivated or is about to cultivate as much of his improvement as his ability will allow, and that the permit asked for only covers the leas-

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ing of such part of his improvement as he has not the ability or means to cultivate. Any such lease or contract made without such permit or without the approval of the attorney of such band shall be void. The person occupying under any such void lease shall be liable to be removed as an intruder. All rents due on any lease made in violation of this section, and all crops or produce raised thereunder shall be forfeited, and the value thereof shall be recoverable from the person violating this section, by the attorney of such nation, for the benefit thereof.

Source.—Former Indian L. (L. 1892 ch. 679) § 83; originally revised from L. 1863, ch. 90, § 24.

§ 84. **Lease of common lands.**—The attorney of such nation, for the benefit of such nation, may, with the consent of the council, lease to any white person any portion of the common lands of the nation which have not been allotted to individual Indians for the purpose of drilling thereon for gas or oil, together with the right, in case such gas or oil is discovered, of laying pipes for the purpose of conveying the same. No such lease shall be for a longer period than twenty years. Such attorney may require security from the lessees for the payment of the rent agreed upon. The money derived from such rentals shall be paid by such attorney, for the benefit of such nation, to the Indian agent appointed by the United States government for the state of New York. Such money shall be added to the annuity granted by the United States to such nation at the same time and in the same manner as such annuity. Such agent shall receive for his services in receiving, distributing and paying over such moneys five per centum of the amount received by him from the attorney of such nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 83-a, added by L. 1903, ch. 179.

§ 85. **Sale of gypsum, sand and gravel.**—The attorney of such nation, for the benefit of such nation, may contract for the sale of any gypsum, or plaster stone upon the Tonawanda reservation, on such terms as he may deem just, but for not less than one dollar a cord in the quarry for the first five hundred cords taken out each year, and fifty cents for each additional cord, which contract shall be in writing, to be performed within twenty years from the making thereof. He may also contract for the sale of sand, gravel and refuse stone at a rate of not less than one dollar per car for the same but this contract shall be ratified by the peacemakers of the said nation before it shall take effect. A person purchasing such gypsum, at the time of contracting, shall execute a bond, with sufficient sureties, approved by such attorney, conditioned for the faithful execution of such contract, and the payment of the purchase price of such gypsum or plaster stone. Upon executing such bond, such person may lawfully enter upon such reservation, at the place or places designated in such contract, whether upon the common lands, or upon the individual improvements of the members thereof, for the purpose of quarrying and removing such gypsum, sand, gravel or stone, doing no unnecessary damage or injury. Out of the moneys

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arising from such sale, the attorney shall pay to the persons entitled thereto, for any injury or damage necessarily done to individual improvements or property, by the quarrying or removal of such gypsum, sand, gravel or stone, which damages, in case of disagreement, shall be fixed by three commissioners appointed by the county court of Genesee county, upon the application of the party aggrieved, three days' notice of such application having been given to such attorney. The surplus moneys arising from such sale remaining in the hands of such attorney after the payment of such damages, shall be paid by him, for the benefit of such nation, to the Indian agent appointed by the United States government for the state of New York. Such money shall be added to the annuity granted by the United States to such nation, and distributed and paid over to such nation at the same time and in the same manner as such annuity. Such agent shall receive for his services in receiving, distributing and paying over such moneys, five per centum of the amount received by him from the attorney of such nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 84, as amended by L. 1899, ch. 315; L. 1902, ch. 329; originally revised from L. 1863, ch. 90, § 22, as amended by L. 1873, ch. 394.

§ 86. **Payment of annuity.**—The proportionate share of such nation to the annuity of five hundred dollars, agreed to be paid by the state of New York under a treaty dated September twelfth, eighteen hundred and fifteen, shall be paid by the treasurer of the state to the treasurer of the Tonawanda nation. Their proportionate share shall be determined by the ratio that their numbers bear to the whole number of Senecas residing in other parts of the state, having an interest in such annuity.

Source.—Former Indian L. (L. 1892, ch. 679) § 85; originally revised from L. 1863, ch. 90, § 30.

§ 87. **Indian trespasses on common land.**—If any Indian of the Tonawanda nation shall occupy any of the common lands of his nation without having obtained from the council an allotment thereof, as required by law, the council shall cause a notice to be served upon such Indian, signed by the presiding officer and clerk thereof, describing the land so occupied, and requiring such Indian to remove therefrom, or within ten days after the personal service upon him of such notice, to show cause at a time and place therein mentioned, before the council, why he should not be removed therefrom. If such Indian shall not remove from such lands as required by the notice, or shall not show sufficient cause to the council why he should not be removed therefrom, the council, upon due proof of the personal service of such notice on the person to whom it was directed, and that the lands occupied by such person are common lands of the nation not held by such person in pursuance of law, shall issue an order to the marshal, commanding him to forthwith remove such person, which order shall be signed by the presiding officer, and clerk of the council.

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Source.—Former Indian L. (L. 1892, ch. 679) § 86; originally revised from L. 1863, ch. 90, § 28. Enacted in 1892 as § 57 and made applicable to all Senecas. Repealed by L. 1893, ch. 229, as § 57 and re-enacted as § 86, applicable only to Tonawanda band.

§ 88. **Encroachment by Indians on occupied lands.**—Whenever complaint shall be made to the peacemakers of the Tonawanda reservation, by any Indians lawfully residing upon any cultivated lands of such reservation which shall have been entered and described in the clerk's books of records, that an encroachment is being made by other Indians on such lands, they shall issue a notice to the persons against whom complaint is made, stating the cause of complaint and requiring such persons to appear before them at a time and place therein specified to show cause why the complainant should not be put into full and peaceable possession of such lands; which notice shall be immediately served upon such persons. At the time and place mentioned in such notice the peacemakers, on proof of the personal service of such notice on the persons against whom complaint is made, shall hear the proofs of the parties, and shall forthwith determine whether an encroachment has been made and the extent thereof. If they shall determine that an encroachment has been made, they shall issue an order to the marshal of such reservation, commanding him to forthwith remove such encroachments and put the complainant into full possession of such lands.

Source.—Former Indian L. (L. 1892, ch. 679) § 87; originally revised from L. 1863, ch. 90, § 29. Enacted in 1892 as § 58 and made applicable to all Senecas. Repealed by L. 1893, ch. 229, as § 58 and re-enacted as § 87, applicable only to Tonawanda band.

§ 89. **Court of impeachment.**—The court of impeachment, as provided by the constitution of the Seneca nation, shall be called together by the clerk of the nation, upon a written petition, presented to him, signed by at least twenty electors of said nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 88, as added by L. 1900, ch. 253.

§ 90. **Poles and wires on reservation.**—Any company may erect poles and wires, and other necessary fixtures thereto, across the lands of the Seneca Indians on the Tonawanda reservation, provided the company shall pay to the Indians to whom allotments have been made, and on whose premises telephone or telegraph poles for the purpose of supporting wires have been or may hereafter be erected, damages therefor, which in case of inability to agree thereon, shall be ascertained in the manner provided in the condemnation law by commissioners to be appointed by the supreme court in the manner provided by said condemnation law. And in case the poles are erected on lands that have not been allotted to any Indian, then the said company shall pay a like sum to the district attorney of Genesee county, who shall distribute the same in accordance with the provisions of section eighty-six of this article. And in case any company may have already

erected poles, or in case any company may hereafter erect poles without paying therefor in accordance therewith, then the said Indians are authorized to maintain actions of ejectment against the company therefor, in the same manner as citizens of this state, and as if they were owners in severalty of the lands so allotted to them. In case the lands are not allotted, then such an action may be prosecuted in the name of the Tonawanda band of Seneca Indians. The provisions of this article shall not apply to the existing lines of any such company, which has heretofore obtained the consent of said Seneca Indians to the erection of such existing lines and shall have paid a valuable consideration for the same, so far as such existing lines have been erected upon lands that have not been allotted.

Source.—Former Indian L. (L. 1892, ch. 679) § 89, as added by L. 1902, ch. 296.

Constitutionality.—Under treaties existing between the Tonawanda nation of Seneca Indians and the United States government the state of New York exercises exclusive sovereignty and jurisdiction over the lands held by such nation and consequently the provisions of the United States statute enacted for the regulation of the commerce with the Indian tribes pursuant to § 8, subd. 3, of art. 1 of the Constitution are not violated by this section. *Jemison v. Bell Telephone Co.* (1906), 186 N. Y. 493, 79 N. E. 728.

ARTICLE VII.

THE TUSCARORA NATION.

Section 95. Allotment of lands.

- 96. Consent of chiefs to sales of timber.
- 97. Indian trespassers.
- 98. Illegal sales of timber and trees.
- 99. Highway labor.

§ 95. Allotment of lands.—The chiefs or head men of the Tuscarora nation of Indians in the county of Niagara, in council, shall allot and set apart for any Indian or Indian family, making application and not possessing land, so much of the tribal lands as they shall deem reasonable and just; and no tribal lands shall be appropriated by any Indian to his own use, without such consent and allotment. Such chiefs, in council, may appoint a clerk, who shall enter in a book kept for that purpose, every allotment of tribal lands, set apart for any Indian or Indian family, and of the part thereof from which such Indian or family may sell timber and trees, and of the part he is permitted to clear for the purposes of cultivation.

Source.—Former Indian L. (L. 1892, ch. 679) § 90; originally revised from L. 1854, ch. 175, §§ 1, 5.

Such allotments have been recognized and directed by our state courts. *Peters v. Tallchief* (1907), 121 App. Div. 309, 106 N. Y. Supp. 64.

§ 96. Consent of chiefs to sales of timber.—Any Indian having tribal lands allotted to him by the chiefs, with the consent of such chiefs entered in the clerk's book, may sell for his own benefit any timber or trees on

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that portion of such lands which he shall actually and in good faith clear for the purpose of cultivation.

Source.—Former Indian L. (L. 1892, ch. 679) § 91; originally revised from L. 1854, ch. 175, § 2.

§ 97. **Indian trespassers.**—Any Indian who shall cut or destroy timber or trees on any of the timbered lands of such nation, or without the consent of such chiefs, shall be liable to a penalty of twice the value of the timber so cut down or destroyed, recoverable by such chiefs, in the name of the nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 92; originally revised from L. 1854, ch. 175, § 6.

Application of section.—Where lands, a part of the Tuscarora Indian reservation, had been occupied and cleared by the ancestors of the present Indian owner prior to the enactment of chapter 175 of the Laws of 1854, now revised as sections 95-99 of the Indian Law, and another member of the tribe openly cut second growth timber on said lands under a claim of right with the knowledge and consent of the owner to whom a consideration was paid for the privilege, defendant is not subject to the provision of section 97 of the Indian Law. *Tuscarora Nation of Indians v. Williams* (1913), 79 Misc. 445, 141 N. Y. Supp. 207.

§ 98. **Illegal sales of timber and trees.**—Every sale or disposition without the consent of such chiefs, by any individual Indian or Indians, of any tree or timber on any of the tribal lands, or of any manufacture therefrom, shall be void. The chiefs may sell for the benefit of the nation any timber or trees on the wild lands of such nation, the proceeds of such sale to be paid to the chief whom the council shall appoint as treasurer. Such chiefs may bring an action against the person to whom such trees or timber are sold to recover the purchase price thereof, or against any person who shall have received any tree, timber or the manufacture therefrom, unlawfully sold, to recover the value thereof for the benefit of the nation. Any person who shall sell, take or carry from the lands of such nation any trees, lumber or articles manufactured therefrom, without the consent of such chiefs, in any other case than is provided for in this section, shall be liable to a penalty of twice the value of such trees, timber or manufactured articles, recoverable by such chiefs.

Source.—Former Indian L. (L. 1892, ch. 679) § 93; originally revised from L. 1854, ch. 175, §§ 3, 4.

References.—Trespasses on tribal lands, §§ 8-11, ante.

§ 99. **Highway labor.**—Such chiefs, in council, may annually, before the first day of July, assess such amount of highway labor as they shall deem just and reasonable, not exceeding fifteen days in any one year, upon each male Indian of full age. The number of days' work and the name of the individual assessed shall be entered upon the roll made and signed by such chiefs or by the president of the council, under their direction. Such chiefs may also designate suitable persons to superintend the highway labor, and the plan and manner of its application. The persons so designated shall

give notice to those assessed to perform such labor, and at least twenty-four hours' notice of the time of performance. If any person so assessed, after being notified, shall neglect or refuse to perform such labor, he shall be liable to a penalty of seventy-five cents for each day's labor assessed, to be recovered by an action in the name of the nation, in which action the assessment-roll shall be conclusive evidence of the regularity of the assessment. For the purpose of such action, such Indian shall be regarded as an inhabitant of the town of Lewiston, Niagara county, and the proceedings shall be the same as between citizens. Any paper may be served upon such nation as a party by delivering it to any two chiefs personally.

Source.—Former Indian L. (L. 1892, ch. 679) § 94; originally revised from L. 1854, ch. 175, § 8.

References.—Highways and bridges on tribal lands, § 12, ante, Highway Law, §§ 157-159.

ARTICLE VIII.

THE SAINT REGIS TRIBE.

Section 100. Appointment of attorney.

101. Powers and duties of attorney.
102. Allotment of lands.
103. Consent of chiefs to sale of timber.
104. Indian trespassers.
105. Illegal sales of timber, trees and stone.
106. Jurisdiction of council to determine disputes.
107. General powers of council.
108. Qualifications of voters.
109. Officers of tribes.
110. Election of officers.
111. Conduct of elections.
112. Canvass of votes.
113. Vacancies.
114. Medical aid and attendance.

§ 100. **Appointment of attorney.**—There shall continue to be an attorney of the Saint Regis Indians, who shall hold office for the term of three years and shall receive an annual salary of one hundred and fifty dollars, payable by the state. The attorney in office at the time this chapter takes effect shall hold office until the expiration of the term for which he was appointed. Upon the expiration of such term the governor shall appoint a successor to such attorney. Such attorney shall execute a bond in the sum of four thousand dollars.

Source.—Former Indian L. (L. 1892, ch. 679) § 100, as amended by L. 1893, ch. 229; originally revised from L. 1861, ch. 325, §§ 1, 5, 7; L. 1893, ch. 229, amended the article throughout, and repealed the provisions of original § 100, providing for the election of trustees and a clerk, and thus restored the government by chiefs.

§ 101. **Powers and duties of attorney.**—The attorney of the Saint Regis Indians:

1. Shall receive from the comptroller the annuities due from the state to the Saint Regis tribe of Indians;

2. Shall receive all other moneys belonging to the tribe;

3. Shall collect all moneys due on any of the tribal lands of the Saint Regis reservation, which are leased or otherwise disposed of by such tribe for its benefit;

4. Shall pay over to the heads of families of such tribe their equal shares of such annuities and other moneys received by him, belonging to such tribe;

5. May bring actions in the name of the people of the state for the recovery of any moneys due to such Indians for the lease of their lands; or, upon security for the payment of costs being given to his satisfaction, may bring an action for the recovery of the possession of such lands, the leases of which have expired, or for any trespass committed on lands possessed by any of such Indians; the damages recovered in such suits after deducting expenses to be paid to the persons entitled thereto;

6. Shall annually report to the comptroller on or before the first day of December, all his proceedings under this section.

Source.—Former Indian L. (L. 1892, ch. 679) § 101, as amended by L. 1893, ch. 229; originally revised from L. 1861, ch. 325, §§ 2, 3; L. 1875, ch. 226, § 5.

§ 102. Allotment of lands.—The chiefs or head men of the Saint Regis nation of Indians in the county of Franklin, in council, shall allot and set apart for any Indian or Indian family making application and not possessing land, so much of the tribal lands as they shall deem reasonable and just, and no tribal lands shall be appropriated by any Indian to his own use, without such consent and allotment. The clerk shall enter in a book, kept for that purpose, every allotment of tribal lands, set apart for any Indian or Indian family, and the part thereof from which such Indian or family may sell timber or trees or the part he is permitted to clear for the purposes of cultivation.

Source.—Former Indian L. (L. 1892, ch. 679) § 102, as amended by L. 1893, ch. 229; L. 1898, ch. 642. New in 1893.

Application.—Sections 102 and 103 of the Indian Law, authorizing the St. Regis tribe to allot tribal lands to individual Indians, etc., does not make an Indian to whom lands have been allotted the owner in fee; it merely entitles him to the possession and use of the lands allotted which continue to be tribal lands. Hence, where, after the death of an Indian to whom lands have been allotted under said section, his heirs convey all his interest to another Indian and the tribe itself subsequently confirms his title and allots the lands to the grantee, he is entitled to judgment in an action of ejectment brought against the heirs of the prior owner who have regained possession by a forcible entry. *Terrence v. Gray* (1916), 171 App. Div. 11, 156 N. Y. Supp. 916.

Indian lands in the St. Regis reservation are tribal lands but may be held in severalty under allotments by the chiefs or headmen of the Nation, pursuant to this section. *Terrance v. Crowley* (1909), 62 Misc. 138, 116 N. Y. Supp. 417.

The State courts have jurisdiction to determine an action of ejectment as between

members of the St. Regis tribe of Indians. *Terrence v. Gray* (1916), 171 App. Div. 11, 156 N. Y. Supp. 916.

§ 103. **Consent of chiefs to sale of timber.**—Any Indian having tribal lands allotted to him by the chiefs, if the consent of such chiefs is entered in the clerk's book, may sell for his own benefit any timber or trees on that portion of such lands which he shall actually and in good faith clear for the purposes of cultivation.

Source.—Former Indian L. (L. 1892, ch. 679) § 103, as amended by L. 1893, ch. 229; originally revised from L. 1875, ch. 226, §§ 3, 4, but amended materially by L. 1893, ch. 229.

§ 104. **Indian trespassers.**—Any Indian who shall cut or destroy timber or trees on any of the timbered lands of such nation, or without the consent of such chiefs, shall be liable to a penalty of twice the value of the timber so cut down or destroyed recoverable by such chiefs in the name of the nation.

Source.—Former Indian L. (L. 1892, ch. 679) § 104, as added by L. 1893, ch. 229.

§ 105. **Illegal sales of timber, trees and stone.**—Every sale or disposition without the consent of such chiefs, by any individual Indian or Indians, of any tree, timber or stone on any of the tribal lands, or of any manufacture therefrom, shall be void. The chiefs may sell for the benefit of the nation any timber, trees or stone on the wild lands of such nation, the proceeds of such sale to be paid to the chief whom the council may appoint as treasurer. Such chiefs may bring an action in the name of the nation against the person to whom such trees, timber or stone are sold to recover the purchase price thereof, or against any person who shall have received any tree, timber or stone or the manufacture therefrom unlawfully sold, to recover the value thereof, for the benefit of the nation. Any person who shall sell, take or carry from the lands of such nation, any trees, lumber, stone or article of manufacture therefrom, without the consent of such chiefs, in any other case than is provided for in this chapter, shall be liable to a penalty of twice the value of such trees, timber, stone or manufactured articles, recoverable by such chiefs in the name of the nation. The chiefs of such tribe, upon giving satisfactory security for costs, may sue in the name of the nation for the recovery of any penalty incurred under this section, and after paying the legal charges of such suit, shall pay over any penalty recovered by them to the treasurer of the tribe.

Source.—Former Indian L. (L. 1892, ch. 679) § 105, as added by L. 1893, ch. 229.

References.—Trespasses on tribal lands, §§ 8-11, ante.

§ 106. **Jurisdiction of council to determine disputes.**—The chiefs of such tribe in council assembled may hear and determine charges of encroachment or trespass on lands cultivated or occupied by any Indian, entered or described in the clerk's book of records; and controversies involving the

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title to property between individual Indians residing on such reservation. A chief shall not act in any such case where he is related by blood to either of the parties within the fourth degree by the common law, or has any interest in the action or proceeding.

Source.—Former Indian L. (L. 1892, ch. 679) § 106, as added by L. 1893, ch. 229.

Jurisdiction of Supreme Court in action for replevin between members of St. Regis' tribe. *Terrance v. Gray* (1915), 165 App. Div. 636, 151 N. Y. Supp. 136.

§ 107. **General powers of council.**—The council of the Saint Regis nation may pass by-laws and ordinances not inconsistent with law, for the protection and improvement of the common land of the nation, for the regulation of fences and for the prevention of trespasses by cattle and other domestic animals, and may provide a penalty of not exceeding five dollars for the violation or disobedience of any such by-law or ordinance recoverable for the benefit of such nation, by any chief or officer thereof in the name of the nation in any justice's court of the county of Franklin.

Source.—Former Indian L. (L. 1892, ch. 679) § 107, as added by L. 1893, ch. 229.

§ 108. **Qualifications of voters.**—All male Indians of the Saint Regis tribe, who are twenty-one years of age or upwards, who reside on the American side of the line dividing the United States from Canada, and who are entitled to draw the yearly annuity money, shall be entitled to vote for the chiefs or headmen, the subchiefs and clerk of the tribe at the elections of such tribe provided for by this article.

Source.—Former Indian L. (L. 1892, ch. 679) § 108, as added by L. 1898, ch. 642.

§ 109. **Officers of tribes.**—The chiefs or head men, the subchiefs and clerk of the Saint Regis tribe in office when this section takes effect shall continue in office until the expiration of the terms for which they were elected. Their successors shall be elected in the manner provided for by this article, and shall have all the powers conferred by this chapter upon such officers. A subchief shall have all the power and shall perform all the duties of the chief to whom he is elected as a subchief, in case of such chief's inability to act for any reason whatsoever.

Source.—Former Indian L. (L. 1892, ch. 679) § 109, as added by L. 1898, ch. 642.

§ 110. **Election of officers.**—The election of the Saint Regis tribe of Indians shall be held annually on the first Monday after the first Tuesday in June. At each election there shall be elected by a plurality of the votes cast by the qualified voters of such tribe, one chief and one subchief thereto, each of whom shall hold office for a term of three years.

At each third annual election dating from that held in the year eighteen hundred and ninety-eight, there shall be elected by a plurality of the votes cast by the qualified voters of said tribe, a clerk, who shall hold office for a term of three years.

A successor to such clerk shall be elected at the annual election occurring next prior to the expiration of his term of office. The terms of office of all officers of the Saint Regis tribe shall commence at twelve o'clock noon on the first day of July succeeding the election at which they are elected.

Source.—Former Indian L. (L. 1892, ch. 679) § 109-a, as added by L. 1898, ch. 642.

§ 111. **Conduct of elections.**—The clerk of the tribe shall provide a sufficient number of ballot-boxes so that there shall be a separate ballot-box for each officer to be elected, the expense for which shall be paid from the moneys due the tribe from the state. The attorney of the Saint Regis tribe of Indians and the clerk of the tribe shall preside at the election, receive the ballots presented by the voters and deposit them in the respective ballot-boxes. Such clerk and attorney shall each be entitled to receive for such services the sum of four dollars per day for each day during which they are actually employed with such duties, to be paid out of the moneys due such tribe from the state. The polls of such election shall be open between the hours of nine o'clock in the morning and five o'clock in the afternoon. A voter voting at such election must, if challenged, before depositing his ballot, solemnly swear that he is at least twenty-one years of age, that he resides on the American side of the line dividing the United States from Canada and that he is entitled to draw a share of the yearly annuity moneys, which oath shall be administered by the attorney of the tribe.

Source.—Former Indian L. (L. 1892, ch. 679) § 109-b, as added by L. 1898, ch. 642.

§ 112. **Canvass of votes.**—Upon the closing of the poll at such election, such attorney and clerk shall count the votes cast thereat and publicly declare the result of such election, specifying the number of votes cast for each person at such election, and the names of the persons elected. The clerk shall enter on the tribal book the names of each person voted for at such election, the number of votes cast for each such person, the names of the persons elected to office and the terms for which they are to serve.

Source.—Former Indian L. (L. 1892, ch. 679) § 109-c, as added by L. 1898, ch. 642.

§ 113. **Vacancies.**—If a vacancy shall occur for any reason in the office of chief or head man, subchief or clerk of such tribe, the chiefs or head men shall appoint a person to fill such vacancy, who shall hold office until the next succeeding annual election, at which a person shall be elected to such office to hold office until the expiration of the term for which his predecessor was elected.

Source.—Former Indian L. (L. 1892, ch. 679) § 109-d, as added by L. 1898, ch. 642.

§ 114. **Medical aid and attendance.**—The board of supervisors of the county of Franklin shall annually employ a competent physician to attend upon and administer to the necessities of sick and indigent Indians residing on the Saint Regis reservation, and to furnish them in addition to profes-

sional services, such necessary medicine, food and attendance as he may deem proper. The bills of such physician, when properly verified, shall be audited by the board of supervisors of such county, and, upon their order, paid by the county treasurer, out of any moneys in his hands provided for that purpose. There shall annually be paid out of the treasury of the state to the treasurer of such county, the sum of six hundred dollars, to be kept by him as a fund for the payment of such bills. If in any year such sum shall not be appropriated by the legislature, or shall be inadequate, the board of supervisors of such county may appropriate such sum of money as they may think necessary out of any moneys which may come into the treasury of such county, arising from that portion of the moneys collected as fines for selling liquor to the Indians and for trespass upon Indian lands, which would otherwise be paid to the chiefs of the Saint Regis Indians, to be applied and disbursed in the same manner by such physician. (*Added by L. 1914, ch. 395.*)

ARTICLE IX.

THE SHINNECOCK TRIBE.

Section 120. Election of trustees.

121. Powers of trustees.

122. Unlawful use of lands.

§ 120. **Election of trustees.**—The adult male members belonging to the Shinnecock tribe of Indians in Suffolk county, who for the preceding six months shall have resided on the reservation of said tribe, may meet on the first Tuesday in April in each year, at the place of holding town meetings in the town of Southampton, and by plurality of votes elect three persons, belonging to such tribe, as trustees. The town clerk of said town shall attend and preside at such meetings and shall enter in a book kept by him for that purpose the names of the trustees chosen. He shall also enter in such book the proceedings of such trustees and of the justices of such town in reference to the allotment or leasing of Indian lands.

Source.—Former Indian L. (L. 1892, ch. 679) §110, as amended by L. 1896, ch. 168; originally revised from L. 1816, ch. 133, § 1.

§ 121. **Powers of trustees.**—Such trustees may allot the tribal lands to the individuals or families thereof; may direct on what part of such lands firewood and timber may be cut by such tribe; and, with the consent of three justices of the peace residing in or near the town of Southampton, may lease so much of such lands as they may deem for the benefit of the tribe, for a term not longer than three years.

Source.—Former Indian L. (L. 1892, ch. 679) § 111; originally revised from L. 1816, ch. 133, § 2.

§ 122. **Unlawful use of lands.**—Any person, not of such tribe, who

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Laws repealed.

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shall hire, use or occupy any lands of such tribe, which have been allotted by the trustees thereof, or any person who shall occupy or use any of such lands without the consent of a majority of such trustees, and of at least two of such justices, obtained and entered in the book of the town clerk kept for such purpose, shall be liable to a penalty of twenty-five dollars for every acre hired, used or occupied. Any person belonging to such tribe, who shall cut any wood or timber on such lands, without the order and consent of such trustees and justices entered in such book, shall be liable to a penalty of ten dollars for each offense. One-half of any such penalty shall be for the use of the overseers of the poor of the town of Southampton, and the other half shall go to any person who shall sue for the recovery thereof.

Source.—Former Indian L. (L. 1892, ch. 679) § 112; originally revised from L. 1816, ch. 133, § 3.

References.—Trespasses on tribal lands, §§ 8-11, ante.

ARTICLE X.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 125. Laws repealed.

126. When to take effect.

§ 125. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 126. **When to take effect.**—This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1779	29	All	1803	106	15, 25
1783	48	All	1804	75	All
1784	22	All	1806	161	All
1788	47	All	1807	72	All
1788	85	2-4	1807	117	All
1789	21	All	1807	173	3
1790	2	All	1808	188	1-5, 7, 8
1790	29	All	1808	236	2
1791	13	All	1810	25	All
1792	15	All	1811	79	All
1792	63	7,	1811	171	1, 2
first sentence			1811	243	All
1792	73	All	1812	239	64
1794	59	All	1813	91	All
1795	17	All	R. L. 1813	92	All
1795	76	11	1816	39	All
1796	22	All	1816	114	All
1797	44	All	1816	133	All
1798	23	All	1817	143	All
1798	29	All	1817	152	All
1798	68	17	1818	93	All
1799	25	All	1818	283	1, 2
1800	115	All	1821	204	All
1801	147	2, 5-38	1822	122	All
1802	50	All	1822	204	1
1802	78	All	1822	205	All

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Laws repealed.

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LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1823	40	All	1859	294	All
1823	269	26	1859	364	All
1824	177	All	1859	374	All
1825	136	All	1860	265	All
1825	257	All	1860	491	All
1826	150	All	1861	134	All
1828	21	1,	1861	283	All
¶ 164, 357, 434 (2d Meest.)			1861	325	All
1830	70	All	1862	320	2, 3
1834	289	All	1863	90	All
1835	110	All	1864	81	All
1837	50	1	1865	124	All
1839	58	All	1865	346	All
1841	143	All	1867	839	All
1841	234	All	1868	359	All
1843	185	All	1869	635	All
1843	228	All	1869	651	All
1845	150	All	1870	90	All
1845	309	All	1871	703	All
1846	114	All	1873	96	All
1846	278	All	1873	394	All
1847	178	1	1873	454	All
1847	208	2	1873	455	All
1847	238	All	1874	603	All
1847	365	All	1875	162	All
1847	486	All	1875	226	All
1848	36	2	1876	393	All
1848	122	All	1878	307	All
1848	208	All	1878	320	All
1849	378	All	1880	184	All
1849	355	1, 3, 4	1881	188	All
1848	300	All	1881	355	All
1849	420	All	1884	316	All
1850	37	All	1887	121	All
1850	44	All	1887	255	All
1851	198	All	1887	316	All
1851	376	All	1888	84	All
1852	19	All	1889	473	All
1853	444	All	1889	554	All
1853	601	All	1890	423	All
1854	175	All	1892	679	All
1854	301	All	1893	229	All
1855	26	All	1896	168	All
1855	233	All	1898	642	All
1857	45	All	1899	153	All
1857	233	All	1899	315	All
1857	494	All	1900	183	All
1857	614	All	1900	253	All
1857	659	All	1901	188	All
1858	73	All	1902	296	All
1858	206	All	1902	329	All
1858	368	All	1903	183	All
1858	369	All	1904	475	All
1859	280	All	1908	82	All

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Where the foregoing statutes have been repealed by being amended to read as follows, except the section "This act shall take effect immediately," this section is included in the word "All" under the heading "Statutes Hereby Repealed."

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1779, ch. 29 (3d Sess.).—Act appointing commissioners to represent the state in treaties with the Indians. Obsolete.

L. 1784, ch. 22 (7th Sess.).—Authorizing the governor and commissioners on Indian affairs to enter into agreements and compacts with the Indians. Obsolete.

- L. 1788, ch. 47 (11th Sess.).—Commissioners to treat with Indians. Temporary.
- L. 1788, ch. 85, §§ 2-4 (11th Sess.).—Intrusion on Indian lands and contracts with Indians. Sections 2, 4 are repealed; § 3 obsolete.
- L. 1789, ch. 21 (12th Sess.).—Treaties with Indians. Temporary.
- L. 1790, ch. 2 (13th Sess., 2d meet.).—Treaties with Indians. Temporary.
- L. 1791, ch. 13 (14th Sess.).—Brothertown and New Stockbridge Indians. Repealed except last clause as to New Stockbridge Indians by L. 1792, ch. 73, § 14. Repealed as to Brothertown by L. 1796, ch. 22, § 21. Entire act now obsolete.
- L. 1792, ch. 63, § 7 (15th Sess.).—Indian annuities and expenses. L. 1796, ch. 39, § 21, repealed part of § 7. The whole section should be repealed. Obsolete.
- L. 1792, ch. 73 (15th Sess.).—Brothertown and New Stockbridge Indians. Repealed as to Brothertown Indians by L. 1796, ch. 22, § 21. Repealed as to New Stockbridge Indians by L. 1801, ch. 193. Foregoing repeals practically cover the entire act, although not in terms.
- L. 1798, ch. 23 (21st Sess.).—Commissioners to treat with Indians. Temporary and obsolete.
- L. 1798, ch. 29 (21st Sess.).—Entertainment of Indians visiting at the capitol. Temporary. Self limited to three years.
- L. 1798, ch. 68, § 17 (21st Sess.).—Entertainment of Indians at capitol. Self limited to three years.
- L. 1799, ch. 25 (22d Sess.).—Purchase of lands from Cayuga Indians. Obsolete.
- L. 1811, ch. 79.—Agent for Onondaga Indians. Obsolete.
- L. 1816, ch. 39.—Suspends the operation of an act which is repealed. Obsolete.
- L. 1818, ch. 93.—Trustees for St. Regis Indians. Obsolete.
- L. 1847, ch. 208, § 2.—Repealing section of L. 1892, ch. 679, § 113, repeals "all laws amendatory of the laws hereby repealed" and statute cited is amendatory L. 1846, ch. 114, which was repealed in said schedule.
- L. 1848, ch. 300.—Election of officers for Seneca Indians. Covered by L. 1892, ch. 679, § 42.
- L. 1849, ch. 355, §§ 1, 3, 4.—Annuities to Cayuga Indians. Temporary.
- L. 1850, ch. 44.—Roads and bridges on Indian Lands in Erie and Cattaraugus counties. Covered by L. 1892, ch. 679, § 12.
- L. 1851, ch. 376.—Salary of agent of Onondaga Indians. Covered by L. 1892, ch. 679, § 20.
- L. 1858, ch. 369.—Statute cited amends L. 1848, ch. 365, § 2, which act together with amendatory acts, was repealed by L. 1892, ch. 679, § 113.
- L. 1860, ch. 265.—Election in Cattaraugus and Allegany reservations. Superseded by L. 1892, ch. 679.
- L. 1862, ch. 320, §§ 2, 3.—Agent for Stockbridge Indians. This tribe has left the state. Obsolete.
- L. 1868, ch. 359.—Waste of timber on Indian lands. Superseded by L. 1892, ch. 679, § 56.
- L. 1869, ch. 635.—Annuity to Onondaga Indians. Superseded by L. 1892, ch. 679, §§ 20, 21.
- L. 1880, ch. 184.—Consolidated in Indian Law, §§ 57-60.
- L. 1889, ch. 473.—Annuities to Cayuga Indians. Amends L. 1888, ch. 84, § 6. Act amended was repealed by L. 1890, ch. 423. This act obsolete.
- L. 1892, ch. 679.—This statute, which is the "old" Indian Law, is recommended for repeal because its live provisions have been incorporated in the Indian Law.
- L. 1893, ch. 329.—So much of § 1 as amends L. 1892, ch. 679, §§ 2, 8, 9, 13, 43, 44, 47, 48, 50, 51, 54, 55, 56, 75. Consolidated in Indian Law, §§ 2, 8, 9, 13, 43, 44, 46, 47, 49, 50, 53, 54, 55, 75. Balance of § 1 amended to "read as follows," as appears in schedule.
- Section 2 consolidated in Indian Law, §§ 87, 88.
- Section 3, pt. amended "to read as follows," as appears in schedule. Balance consolidated in Indian Law, §§ 100, 101, 103-107.
- Section 4 is a repealing section, and § 5 when act takes effect.
- L. 1896, ch. 168.—Consolidated in Indian Law, § 120.
- L. 1898, ch. 642.—Consolidated in Indian Law, §§ 102, 108-113.
- L. 1899, ch. 153.—Consolidated in Indian Law, 27.
- L. 1900, ch. 253, §§ 1, 2.—Consolidated in Indian Law, §§ 42, 48, 52, 73, 89.
- L. 1902, ch. 296.—Consolidated in Indian Law, § 90.
- L. 1902, ch. 329.—Consolidated in Indian Law, § 85.
- L. 1903, ch. 183.—Consolidated in Indian Law, § 84.
- L. 1904, ch. 475.—Consolidated in Indian Law, § 56.

Cross-references.

INDIANS.

- L. 1909, ch. 255.—“An act to empower the commissioners of the land office to adjust the claim of the Cayuga Nation of Indians set forth in the memorial of said nation bearing date February twenty-seventh, nineteen hundred and six, and presented to said commissioners.”
- L. 1913, ch. 778.—An act making an appropriation for the payment of annuities and expenses on account of the settlement negotiated by the commissioners of the land office, pursuant to chapter two hundred and fifty-five of the laws of nineteen hundred and nine, with the Cayuga Nation of Indians.
- Two acts above omitted as temporary.

INDICTMENT.

Disclosing that same has been found; Penal Law, § 1782. Crimes prosecuted by; Code Crim. Pro. § 222. Finding and presentation; Code Crim. Pro. §§ 268–272. Form; Code Crim. Pro. §§ 273–292a. Amendment; Code Crim. Pro. §§ 293–295. Arraignment; Code Crim. Pro. §§ 296–312. Setting aside; Code Crim. Pro. §§ 313–320. Demurrer; Code Crim. Pro. §§ 321–331. Plea; Code Crim. Pro. §§ 332–342. Removal of action before trial; Code Crim. Pro. §§ 343–353.

INDUSTRIES AND IMMIGRATION.

Bureau established; Labor Law, §§ 151–156.

INDUSTRY.

State school at, managers, State Charities Law, § 180.

INEBRIATES.

Establishment of colonies in cities; General Municipal Law, §§ 136–139b.

INFANTS.

See Children.

INHERITANCE TAXES.

See Tax Law, §§ 220 *et seq.*

INJUNCTION.

When order may be granted; Code Civ. Pro. §§ 602–610. Security; Code Civ. Pro. §§ 611–625. Vacating or modifying; Code Civ. Pro. §§ 626–630.

INJURIES.

To property; Penal Law, § 1425.

INN.

See Hotels.

INQUEST.

See Coroners.

INSANE.

- L. 1914, ch. 7.—An act to create a commission to endeavor to secure appropriate federal legislation to remedy existing conditions in the state as to the alien insane.
- Omitted as temporary.
- L. 1914, ch. 272.—An act to create a commission to investigate provision for the mentally deficient and making an appropriation for its expenses.
- Omitted as temporary.

INSANE ASYLUM.

Maintaining without license; Penal Law, § 1122.

INSANITY LAW.

L. 1909, ch. 32.—“An act in relation to the insane, constituting chapter twenty-seven of the consolidated laws.”

[In effect February 17, 1909.]

CHAPTER XXVII OF THE CONSOLIDATED LAWS.**INSANITY LAW.**

- Article 1. Short title; definitions (§§ 1, 2).
2. State commission in lunacy (§§ 3–20).
 3. Institutions for the care, treatment and custody of the insane (§§ 40–66).
 4. Commitment, custody and discharge of the insane (§§ 80–99).
 5. Retirement of state hospital employees (§§ 110–122).
 6. Matteawan state hospital for insane criminals (§§ 130–145).
 7. Dannemora state hospital for insane convicts (§§ 150–163).
 8. Pathological hospital and institute (§§ 170–176).
 9. Laws repealed; when to take effect (§§ 190, 191).

ARTICLE I.**SHORT TITLE; DEFINITIONS.**

- Section 1. Short title.
2. Definitions.

§ 1. Short title.—This chapter shall be known as the “Insanity Law.”
Source.—New.

Common law and statutory provisions for the care of the insane reviewed. *Sporza v. German Savings Bank* (1908), 192 N. Y. 8, 84 N. E. 406, affg. (1907), 119 App. Div. 172, 104 N. Y. Supp. 260.

§ 2. Definitions.—Poor person. The term “poor person,” when used in this chapter, means a person who is unable to maintain himself and having no one legally liable and able to maintain him.

Indigent person. The term “indigent person,” when used in this chapter, means one who has not sufficient property to support himself while insane, and the members of his family lawfully dependent upon him for support.

Institution. The term “institution,” when used in this chapter, means any hospital, asylum, building, buildings, house or retreat, authorized by law to have the care, treatment or custody of the insane.

Commission. The term “commission,” when used in this chapter, means

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the state commission in lunacy, designated as the state hospital commission.

Patient. The term "patient," when used in this chapter, means an insane person committed to an institution according to the provisions of this chapter. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 2.

Consolidators' note.—This section has been slightly changed in form and dividing headlines have been introduced, but there is no change in meaning.

References.—The terms "lunacy" and "lunatic" are defined in General Construction Law, § 28. Definition of insanity as a defense to an indictment, Penal Law, § 1120. Poor person defined, Poor Law, § 2. Maintenance of poor persons who are insane by relatives, Code Civ. Pro. §§ 914-920.

Poor person defined, *Goodale v. Lawrence* (1882), 88 N. Y. 513.

Indigent person.—*Matter of Wesley* (1913), 156 App. Div. 403, 141 N. Y. Supp. 1031.

An indigent feeble-minded person or idiot is one who is unable to maintain himself and whose relatives liable at law for his support are unable to maintain him. *Rept. of Atty. Genl.* (1912) 425.

The term "institution" includes *Matteawan* and *Dannemora*. *Rept. of Atty. Genl.* (1911) 208.

ARTICLE II.

STATE HOSPITAL COMMISSION.

[Title of article thus amended by L. 1912, ch. 121.]

Section 3. Appointment, qualifications, terms of office and salaries of commissioners.

4. Office and clerical force of commission; medical inspector.
5. Official seal and execution of papers.
6. General powers.
7. General powers as to state hospitals.
8. Official visits.
9. Visitation and inspection of certain institutions.
10. Regulations and forms.
11. Annual report.
12. State hospital districts; how defined.
13. Change of hospital districts and reassignment of patients.
14. Record of medical examiners.
15. Record of patients.
16. Institutions to furnish information to commission.
17. Commission to provide for the prospective wants of the insane.
18. Hospital attorneys.
19. Board of alienists for examination of insane, idiotic, imbecile and epileptic immigrants, alien and nonresident insane; power and duties.
20. Powers of commission as to detention of insane or apparently insane persons prior to commitment.

§ 3. Appointment, qualifications, terms of office and salaries of commissioners.—There shall continue to be a state commission in lunacy, to be designated the state hospital commission, consisting of three members, to be designated state hospital commissioners, all of whom shall be citizens

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of this state. One of them shall be a reputable physician, a graduate of an incorporated medical college, of at least ten years' experience in the actual practice of his profession, who has had five years' actual experience in the care and treatment of the insane in an institution for the insane. One of such commissioners shall be a reputable attorney and counsellor-at-law in the courts of this state of not less than ten years' standing. The third commissioner shall be a reputable citizen. The medical commissioner shall receive an annual salary of seven thousand five hundred dollars, and twelve hundred dollars in lieu of his traveling and incidental expenses, payable semi-monthly. Each of the other commissioners shall receive an annual salary of five thousand dollars, and twelve hundred dollars, in lieu of his traveling and incidental expenses, payable semi-monthly. The commission shall choose one of its members to be chairman thereof. The medical member of the commission shall hold office during good behavior. The full term of office of a commissioner other than the medical commissioner shall be six years. Any commissioner may be removed by the governor for cause, stated in writing, after an opportunity has been given him to be heard thereon. The commissioners shall be appointed by the governor, by and with the advice and consent of the senate. The commissioners in lunacy now in office shall be continued as state hospital commissioners for the respective terms for which they were appointed. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 3, as amended by L. 1901, ch. 137; L. 1904, ch. 330; L. 1905, ch. 490; originally revised from L. 1889, ch. 283, §§ 1-5, as amended by L. 1890, ch. 273.

References.—Appointment by governor by and with the advice and consent of senate, Public Officers Law, § 7. Commissions to be signed by governor and attested by secretary of state, Id. § 8. Taking and filing constitutional oath of office, Id. § 10. Creation of vacancy, Id. § 30. Filling vacancy occurring in office during the legislature's recess, Id. § 39. Removals from office, Id. §§ 35, 37.

The word "chairman," as used in the law as amended by L. 1912, ch. 121, is synonymous with the word "president," as used in the statute, prior to said amendment. Rept. of Atty. Genl. (1912) 198.

Membership of retirement board.—The chairman of the State Hospital Commission succeeds the president of the former State Commission in Lunacy as a member of the retirement board. Rept. of Atty. Genl. (1912) 198.

Section cited.—Matter of Thaw (1913), 158 App. Div. 571, 143 N. Y. Supp. 854.

§ 4. Office and clerical force of commission; engineers, medical and other inspectors.—The commission shall be provided by the proper authorities with a suitably furnished office in the state capitol. It may employ a secretary, a stenographer, inspectors, engineers and such other employees as may be necessary. The salaries and reasonable expenses of the commission, inspectors, engineers, experts and of the necessary clerical assistants shall be paid by the treasurer of the state on the warrant of the comptroller, out of any moneys appropriated for the support of the insane.

The commission may also appoint a medical inspector, who shall be a well-

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educated physician, a graduate of an incorporated medical college, and who shall have had at least five years' actual experience in an institution for the care and treatment of the insane. Such inspector shall receive an annual salary to be fixed by the commission subject to the approval in writing of the governor and the action of the legislature, not to exceed five thousand five hundred dollars, and all his actual and necessary traveling expenses incurred by him in the performance of his duties, which shall be audited and paid in the same manner as the other expenses of the commission. He shall, subject to the direction of the commission, visit and inspect the several state hospitals and other institutions for the insane which are subject to the supervision, visitation and inspection of the commission. He shall, subject to the direction of the commission, make an examination, so far as the circumstances may permit, of the patients confined in such hospitals and institutions, especially those admitted thereto since his preceding visit, giving such as may request it suitable opportunity to converse with him apart from the officers and attendants. He shall perform such other duties as may be prescribed and directed by the commission. The commission may employ such other experts, regularly or from time to time, as may be necessary to enable it to advise the purchasing committee and the state hospitals as to purchasing, handling and consumption of supplies; the operation of the farms, and engineering matters.

The commission shall furnish the purchasing committee clerical and advisory help. Expenses of the purchasing committee shall be apportioned by the commission among the hospitals on such basis as it deems equitable. (*Amended by L. 1909, ch. 157, L. 1911, ch. 768 and L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 4, as amended by L. 1903, ch. 221; L. 1905, ch. 490; originally revised from L. 1889, ch. 283, § 6, as amended by L. 1890, ch. 273.

Reference.—Trustees of public buildings to allot offices, Public Buildings Law, § 3.

Medical inspector, appointment of successor and fixing of salary. Rept. of Atty. Genl. (1910) 700.

§ 5. **Official seal and execution of papers.**—The commission shall have an official seal. Every process, order or other paper issued or executed by the commission, may, by the direction of the commission, be attested, under its seal, by its secretary or by any member of the commission, and when so attested shall be deemed to be duly executed by the commission.

Source.—Former Insanity L. (L. 1896, ch. 545) § 5; originally revised from L. 1889, ch. 283, §§ 6, 14, as amended by L. 1890, ch. 273.

References.—Seals of state officers, Public Officers Law, § 60. Copies of papers filed in a public office having an official seal may, when duly certified, be introduced as evidence, Code Civ. Pro. § 933.

§ 6. **General powers.**—The commission is charged with the execution of the laws relating to the custody, care and treatment of the insane, as provided in this chapter, not including feeble-minded persons and epilep-

tics as such and idiots. They shall examine all institutions, public and private, authorized by law to receive and care for the insane, and inquire into their methods of government and the management of all such persons therein. They shall examine into the condition of all buildings, grounds and other property connected with any such institution, and into all matters relating to its management. For such purpose each commissioner shall have free access to the grounds, buildings and all books and papers relating to any such institution. All persons connected with any such institution shall give such information, and afford such facilities for any such examination or inquiry as the commissioners may require. The commission may, by order, appoint a competent person to examine the books, papers and accounts, and also into the general condition and management of any institution to the extent deemed necessary and specified in the order. The commission may endeavor to secure legislation from congress to provide more effectually for the removal of alien and non-resident insane, and may expend a reasonable sum therefor, from the moneys appropriated for the use of the hospitals. The commission may permit any religious or missionary corporation or society to erect a building on the grounds of any state hospital, for the holding of religious services, to be used exclusively for the benefit of the inmates and employees of the state hospital, subject to such conditions as may be imposed by the commission.

Source.—Former Insanity L. (L. 1894, ch. 545) § 6, as amended by L. 1900, ch. 380; L. 1906, ch. 107; originally revised from L. 1889, ch. 283, § 10, as amended by L. 1890, ch. 273.

References.—The state commission in lunacy is a constitutional body and power is conferred upon them to visit and inspect institutions for the insane, not including institutions for epileptics, and idiots, Const., art. 8, § 11. Maintenance of private insane asylum without a license is a misdemeanor, Penal Law, § 1122.

Application.—This section applies to both Matteawan and Dannemora. Rept. of Atty. Genl. (1911) 208.

Voluntary private patients.—State commission in lunacy has no authority over such persons as voluntarily submit to treatment in a private institution. Rept. of Atty. Genl. (1897) 144.

Section cited.—Matter of Thaw (1913), 158 App. Div. 571, 143 N. Y. Supp. 854.

§ 7. **General powers as to state hospitals.**—The commission shall, subject to the powers hereinafter granted to boards of managers:

1. Have the general oversight of the state hospitals, and the control of all the property thereof; transfer such old machinery, boilers or equipment as are not needed by the state hospital in which the same is located to some other state hospital having use for such machinery, or sell or dispose of the same or any metal or rags, in the discretion of the commission, the money received therefor to be paid into the state treasury, and see that the purposes of such hospitals are carried into effect by the boards of managers according to law. (*Subd. 1 amended by L. 1916, ch. 349.*)

2. Accept and hold in behalf of the state, if for the public interest, a grant, gift, device or bequest, of money or property, to the state of New

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York, to the commission in lunacy, or to any state hospital or the managers thereof, heretofore or hereafter made in trust for the maintenance or support of an insane person or persons in a state hospital or hospitals, or for any other legitimate purpose connected with any such hospital or hospitals. The commission shall cause each said gift, grant, devise or bequest to be kept as a distinct fund, and shall invest the same in the manner provided by the laws of this state as the same now exist, or shall hereafter be enacted, relating to securities in which the deposits in savings banks may be invested. But the commission may, in its discretion, deposit in a proper trust company or savings bank during the continuance of the trust, any fund so left in trust for the life of a single person, and shall adopt rules and regulations governing the deposit, transfer or withdrawal of such fund. The commission shall on the expiration of any trust as provided in any instrument creating the same, dispose of the fund thereby created in the manner provided in such instrument. The commission shall include in its annual report a statement showing what funds are so held by it and the condition thereof.

Source.—Former Insanity L. (L. 1896, ch. 545) § 6-a, as added by L. 1902, ch. 26, amended by L. 1905, ch. 490; L. 1907, ch. 462.

References.—Deposit of moneys by state officers, State Finance Law, §§ 10, 19. Itemized and monthly accounts of commission to be rendered to the comptroller, *Id.* § 17. Commission to approve rules and regulations adopted by board of managers, Insanity Law, § 43.

Dower; election by commission.—Subdivision 2 of this section does not authorize any election between dower and a pecuniary provision by the commission in lunacy on behalf of a widow. *Camardella v. Schwartz* (1908), 126 App. Div. 334, 337, 110 N. Y. Supp. 611.

§ 8. **Official visits.**—The commission, or a majority thereof, shall visit every such state hospital jointly or by a majority of the commission and every such private institution by one member of the commission at least twice in each calendar year. Such visits shall be made on such days and at such hours of the day or night, and for such length of time, as the visiting commissioner may choose. But each commissioner may make such other visits as he or the commission may deem necessary. Each visit shall include, to the fullest extent deemed necessary, an inspection of every part of each institution, and all the out-houses, places, buildings and grounds belonging thereto or used in connection therewith. The commissioners shall, from time to time, make an examination of all the records and methods of administration, the general and special dietary, the stores and methods of supply, and, as far as circumstances may permit, of every patient confined therein, especially those admitted since the preceding visit, giving such as may require it suitable opportunity to converse with the commissioners apart from the officers and attendants. They shall, as far as they deem necessary, examine the officers, attendants and other employees, and make such inquiries as will determine their fitness for their respective duties. At the next regular or special meeting of the commission, after any

such visit, the visiting commissioners shall report the result thereof, with such recommendations for the better management or improvement of any such institution, as they may deem necessary. But such recommendations shall not be contrary to the doctrines of the particular school of medicine adopted by such institutions. The commissioners shall, at least once each year, at a time to be appointed by the commission, meet the managers of such institutions, or as many of the number as practicable, in conference, and consider, in detail, all questions of management and improvement of the institution, and they or one or more of them with the managers shall inspect the institution or such parts thereof as they may deem necessary and shall also send to the managers, in writing, if approved by a majority of the commissioners, such recommendations in regard to the management and improvement of the institution as they may deem necessary or desirable.

Source.—Former Insanity L. (L. 1896, ch. 545) § 7, as amended by L. 1900, ch. 380; L. 1905, ch. 490, § 4; originally revised from L. 1889, ch. 283, § 11, as amended by L. 1890, ch. 273.

Reference.—Board of managers to report to commission result of visits and inspection, Insanity Law, § 43, subd. 6.

Application.—This section applies to both Matteawan and Dannemora. Rept. of Atty. Genl. (1911) 208.

No particular member of the commission is required to visit institutions. The choice is to be made by the commissioners. Rept. of Atty. Genl. (1911) 208.

§ 9. Visitation and inspection of certain institutions.—Any member of the commission or the medical inspector may visit any sanitarium or other institution, wherein sick or infirm persons are received, cared for or treated, for the purpose of ascertaining whether insane persons are confined therein without authority, and contrary to the provisions of law. All persons having charge of, and connected with, any such sanitarium or institution shall permit any member of the commission and the medical inspector to have free access to any portion thereof, and shall give such information and afford such facilities for inspection or inquiry, as the member of the commission, or the medical inspector, making such visit and inspection, may require. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 7-a, as added by L. 1905, ch. 497.

Section cited.—Matter of Thaw (1913), 158 App. Div. 571, 143 N. Y. Supp. 854.

§ 10. Regulations and forms.—The commission shall make such regulations in regard to the correspondence of the insane in custody as in its judgment will promote their interests, and it shall be the duty of the proper authorities of each institution to comply with and enforce such rules and regulations. All such insane shall be allowed to correspond without restriction with the county judge and district attorney of the county from which they were committed. The books of record and blank forms for the official use of the hospitals shall be uniform, and shall be approved by the commission.

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Source.—Former Insanity L. (L. 1896, ch. 545) § 8; originally revised from L. 1889, ch. 283, § 19, as amended by L. 1890, ch. 273; L. 1895, ch. 693.

§ 11. **Annual report.**—The commission shall, annually, report to the legislature its acts and proceedings for the year ending June thirtieth last preceding, with such facts in regard to the management of the institutions for the insane as it may deem necessary for the information of the legislature, including estimates of the amounts required for the use of the state hospitals and the reasons therefor; and also so much of the annual reports made to the commission by the State Charities Aid Association and by the boards of managers of the state hospitals as the commission may deem necessary for the consideration of the legislature. The commission shall determine from time to time the capacity of each of the state hospitals and shall incorporate a statement of such capacity in its annual report to the legislature. (*Amended by L. 1910, ch. 111, and L. 1916, ch. 118.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 9, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1889, ch. 283, § 18, as amended by L. 1890, ch. 273.

References.—Reports of boards of managers to be rendered to commission, Insanity Law, § 43, subd. 2. Printing and distribution of reports, State Printing Law, § 11. Report by state charities aid association upon matters relating to state hospitals, State Charities Law, § 32.

§ 12. **State hospital districts; how defined.**—The state commission in lunacy shall divide the state into as many state hospital districts as there are state hospitals. No county shall be divided in such classification, unless more than one of the existing state hospitals be situated within such county. Whenever the commission shall deem it necessary to more conveniently care for the insane in the various hospitals, it may change the limits of such hospital districts. When a new state hospital shall be established, it shall again divide the state into hospital districts. Before any change or re-establishment of hospital districts shall be made, the board of managers of each hospital to be affected thereby shall be notified by the commission that they may be heard in regard thereto, at a time and place to be specified in said notice. Such hospital districts shall be so defined that the number of patients in each district shall be in proportion, as nearly as practicable, to the accommodations which are or may be provided by the state hospital or hospitals within such district. The commission may provide for the commitment of patients from any part of the city of New York to any state hospital located in the city of New York, or to the Kings Park State Hospital, or to the Central Islip State Hospital, or to the Mohansic State Hospital. (*Amended by L. 1910, ch. 310.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 10, as amended by L. 1900, ch. 634; L. 1902, ch. 26, and L. 1905, ch. 490; originally revised from L. 1890, ch. 126.

Reference.—Number, name and location of state hospitals, Insanity Law, § 40.

§ 13. **Change of hospital districts and reassignment of patients.**—When a change or re-establishment of state hospital districts shall be made, or a

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new state hospital district created, the commission shall make a report thereof, designating the counties included within each district affected thereby, and file the same with the secretary of state, and send a copy to the managers and superintendent of each state hospital affected by such change, and to each judge of a court of record, each county superintendent of the poor, and each county clerk in the state, affected by such change, to be filed in his office.

Source.—Former Insanity L. (L. 1896, ch. 545) § 11, as amended by L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1890, ch. 126, § 2.

§ 14. **Record of medical examiners.**—Any physician who receives a certificate as a medical examiner in lunacy shall file such original certificate in the office of the clerk of the county where he resides, and forward a certified copy thereof to the office of the commission within ten days after such certificate is granted. The commission shall keep in its office a record showing the name, residence and certificate of each duly qualified medical examiner, and shall immediately file in its office, when received, each duly certified copy of a medical examiner's certificate, and advise the examiner of its receipt and filing. No examiner shall be qualified until he has received from the commission an acknowledgment of the receipt and filing of his certificate.

Source.—Former Insanity L. (L. 1896, ch. 545) § 12; originally revised from L. 1889, ch. 283, § 7, as amended by L. 1890, ch. 273.

Reference.—Certificate of qualifications of medical examiners, Insanity Law, § 81.

§ 15. **Record of patients.**—The commission shall keep in its office, and accessible only to the commissioners, their secretary and clerk, except by the consent of the commission or one of its members, or an order of a judge of a court of record, a record showing:

1. The name, residence, sex, age, nativity, occupation, civil condition and date of commitment of every patient in custody in the several institutions for the care and treatment of insane persons in the state, and the name and residence of the person making the petition for commitment, and of the persons signing such medical certificate, and of the judge making the order of commitment.

2. The name of the institution where each patient is confined, the date of admission, and whether brought from home or another institution, and if from another institution, the name of such institution, by whom brought, and the patient's condition.

3. The date of the discharge of each patient from such institution since the fifteenth day of May, eighteen hundred and eighty-nine, and whether recovered, improved or unimproved, and to whose care committed.

4. If transferred, for what cause and to what institution; and if dead, the date and cause of death.

Source.—Former Insanity L. (L. 1896, ch. 545) § 13; originally revised from L. 1889, ch. 283, as amended by L. 1890, ch. 273.

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Reference.—Commitment papers to be forwarded to and filed in office of commission, Insanity Law, § 82.

§ 16. **Institutions to furnish information to commission.**—The authorities of the several institutions for the insane shall furnish to the commission the facts mentioned in the last preceding section, and such other obtainable facts relating thereto as the commission may, from time to time, in the just and reasonable discharge of its duties, require of them, with the opinion of the superintendent thereon, if requested. The superintendent or person in charge of such institutions, whether public or private, must, within ten days after the admission of an insane person thereto, cause a true copy of the medical certificate and order on which such person shall have been received, to be made and forwarded to the office of the commission; and when a patient shall be discharged, transferred or shall die therein, such superintendent or person in charge shall, within three days thereafter, send the information to the office of the commission, in accordance with the forms prescribed by it.

Source.—Former Insanity L. (L. 1896, ch. 545) § 14; originally revised from L. 1889, ch. 283, § 9, as amended by L. 1890, ch. 273.

§ 17. **Commission to provide for the prospective wants of the insane.**—The commission shall provide sufficient accommodations for the prospective wants of the poor and indigent insane of the state. To prevent overcrowding in the state hospitals, it shall recommend to the legislature the establishment of other state hospitals, in such parts of the state as in its judgment will best meet the requirements of such insane. It shall also furnish to the legislature in each year, an estimate of the probable number of patients who will become inmates of the respective state hospitals during the year beginning July first next ensuing, and, unless otherwise provided by law, an estimate of the cost of all the additional buildings and equipments, if any, which will be required to carry out the provisions of this chapter relating to the care, custody and treatment of the poor and indigent insane of the state. No money shall be expended for the erection of additional buildings, or for unusual repairs or improvements of state hospitals, except upon plans and specifications to be approved by the commission and the governor. No municipality of the state shall have the power to modify or change plans or specifications for the erection, repair or improvement of state hospital buildings or the plumbing or sewerage connected therewith. The commission may secure a blanket policy of insurance covering any or all of the buildings, property or fixtures of the state hospitals. (*Amended by L. 1912, ch. 121, and L. 1916, ch. 118.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 15, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1905, ch. 490, and L. 1906, ch. 284; originally revised from L. 1890, ch. 126, §§ 10-12; L. 1894, ch. 358, p. 719, par. 1 (sentence relative to approval of plans).

§ 18. **Hospital attorneys.**—(*Repealed by L. 1912, ch. 121, § 6.*)

§ 19. Bureau of deportation for examination of insane, idiotic, imbecile and epileptic immigrants, alien and non-resident insane, and to attend to the deportation or removal thereof; powers and duties.—There shall be established by the commission a bureau of deportation for the examination of insane, idiotic, imbecile and epileptic immigrants, and alien and non-resident insane, and to attend to the deportation or removal thereof, which shall consist of a medical examiner and such number of medical or lay deputies as may be necessary, to be appointed by the commission. The medical examiner shall be a reputable physician, a graduate of an incorporated medical college, of at least ten years' actual experience in the practice of his profession, and of at least five years' experience in the care and treatment of the committed or alleged insane in the New York state hospitals, or elsewhere. The medical examiner shall receive an annual salary of five thousand dollars, to be paid in the same manner as the salaries of the assistants and clerks of the commission in lunacy. The medical examiner shall hold office during good behavior, and be removable by the commission for cause, stated in writing, after an opportunity to be heard has been given. The medical examiner and deputies shall devote their entire time to the performance of the duties hereby imposed upon them. The commission shall endeavor to arrange for the continued official recognition of such bureau by the proper authorities of the United States and other states for carrying out the purposes of this section. Arrangements may be made by the commission for suitable offices in the city of New York for the accommodation of such bureau, and the employment of such other persons as may be deemed necessary by them for the proper carrying into effect of the provisions and intent of this section. Such bureau shall maintain a careful inspection and observation of the methods and facilities for examining immigrants for mental disease and defect at the port of New York, and shall, from time to time, report to the commission upon the methods employed, and their efficiency, and shall render reports regarding the prevalence of insanity among aliens and the foreign born population of the state and shall make suitable recommendations as to means by which insane, idiotic, imbecile and epileptic aliens may be deported or returned. And such bureau shall examine and inspect alien and non-resident insane persons, and alleged insane persons in the state hospitals, other public institutions and elsewhere where such insane persons and alleged insane persons may be, for the purpose of determining whether they are suitable cases for deportation under the immigration law, or removal under the provisions of this section to other countries or states. The superintendents, or persons in charge of such hospitals, institutions or other places shall notify such bureau of all such cases coming under their jurisdiction and shall furnish all aid and information possible to accomplish the deportation or removal of such aliens and non-residents. The bureau shall notify the proper authorities having control of the enforcement of the immigration laws at the ports of entry of such immigrants

as are found to be insane, idiotic, imbecile or epileptic, and such insane aliens as are or become public charges, or who are in the country in violation of law, and shall arrange for their deportation in accordance with the provisions of such laws. And in the case of non-residents they shall notify the state commission of the location of the same and in all suitable cases the commission shall grant the board the necessary authority for the investigation and removal of such non-resident insane persons. The bureau may, upon the request of any indigent insane persons, or the written consent of their relatives, legal representatives, or qualified friends, subject to the approval of the commission, remove such patients to any country, state or place to which they may properly belong. In making such transfers and removals the bureau shall, so far as is practicable, employ nurses and shall employ female nurses or attendants to accompany female patients unless it is certified by the medical superintendent that such patients are in condition to travel alone with safety. The duties hereby imposed upon such bureau shall be performed under the supervision of the commission, and in accordance with rules adopted by it. The commission may impose such other duties on such bureau as it may deem necessary and proper for carrying out the general purposes and intent of this section, and may also from time to time, when necessary, detail the medical examiner or a medical deputy of said bureau to perform the duties of the medical inspector. The medical examiner and deputies of such bureau shall be empowered to administer an oath when necessary to persons giving information relative to cases under investigation.

The chief examiner and examiner now members of the board of alienists shall be continued as the medical examiner and a deputy examiner of the bureau of deportation, at the same salaries now received by such examiners. (*Amended by L. 1910, ch. 604 and L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 18, as added by L. 1904, ch. 326, amended by L. 1906, ch. 296; L. 1908, ch. 213.

§ 20. Powers of commission as to detention of insane or apparently insane persons prior to commitment.—The commission is charged with the duty of seeing that the laws relating to the detention, care and treatment of insane or apparently insane persons who are under examination as to their sanity or who are detained or confined pending commitment and prior to their transfer to institutions for the insane, are executed. The commission shall:

1. Make recommendations to and advise with health officers and other officers having duties to perform in respect to the detention, care and treatment of such insane or apparently insane persons, as to the performance of such duties and as to the requirements of places in which such persons are to be detained, and relating generally to the protection and promotion of the physical and mental welfare of such persons.

2. Visit or cause to be visited and inspected buildings, rooms or other places permanently established in any city, village or town, as provided

by law, for the detention or confinement of insane or apparently insane persons, pending an examination as to their sanity, and prior to their transfer to an institution for the insane.

3. Examine into the qualifications of persons employed as provided by law in the care of insane or apparently insane persons, pending their examination, commitment and transfer, and recommend the discharge, for reasons stated in writing, of persons so employed who are found by the commission to be incompetent.

4. Employ a medical inspector and such other persons as may be necessary to carry into effect the purposes of this section.

If upon an inspection, made as authorized by this section, it shall be ascertained that any building, room or place established and regularly used in any city, town or village for the detention and confinement of insane or apparently insane persons pending examination and commitment, and prior to transfer, does not conform to the requirements of law, or if the care and treatment of persons confined therein are inadequate, the commission shall make a recommendation in writing to the board or officer of the town, village or city whose duty it is to establish and maintain such building, room or place, describing the defect or failure and stating how the same shall be remedied. It shall be the duty of such board or officer to cause such defect or failure to be remedied so as to conform to such recommendations. If such defect or failure is not so remedied within a reasonable time, the commission may apply to a justice of the supreme court at special term in the judicial district in which such building, room or place is situated for an order directing that such defect or failure shall be remedied as provided therein. At least ten days' notice of such application shall be given to the board or officer to whom such recommendation was made. If upon a hearing of such application it shall be ascertained that the recommendation of the commission is reasonable and in accordance with law, and has not been complied with, an order shall be granted directing such board or officer to make such alterations and provide such changes in the building, room, place, or methods of care and treatment complained of in the application, and describing specifically the alterations and changes directed to be made by such order. For the purpose of carrying into effect the provisions of this section, each commissioner, and any duly authorized agent of the commission, shall have free access to the buildings, rooms and places provided for the detention or confinement of insane or apparently insane persons, pending an examination as to their sanity and prior to their transfer to an institution for the insane. All persons connected with any such building, room or place shall give such information, and afford such facilities for examination and visitation thereof as the commission may desire. If any health officer or superintendent of a state hospital has knowledge of any violation of the law relating to the detention or confinement, care and treatment of an insane or apparently insane person on the part of a police officer, or any other municipal officer, he shall report the same to the com-

mission, who may take such action in respect thereto as it shall deem proper. Provided that nothing in this section shall apply to pavilion F of the Albany Hospital located in the city of Albany. (*Added by L. 1914, ch. 306.*)

ARTICLE III.

INSTITUTIONS FOR THE CARE, TREATMENT AND CUSTODY OF THE INSANE.

Section 40. State hospitals for the poor and indigent insane.

- 40-a. Mohansic state hospital established.
41. Managers of state hospitals and their terms of office.
42. Appointment and removal of managers.
43. General powers and duties of boards of managers.
44. Officers.
45. General powers and duties of superintendent.
46. Special provisions relating to Brooklyn state hospital, Kings Park state hospital, Central Islip state hospital, and Manhattan state hospital.
47. Purchasing steward for Brooklyn state hospital, Kings Park state hospital, Manhattan state hospital, and Central Islip state hospital.
48. Meetings of superintendents.
49. Salaries of officers and wages of employees.
50. Salaries of certain officers and wages of certain employees prescribed.
51. Quarterly estimates of expenditures; emergency fund.
52. Powers and duties of superintendent as treasurer.
53. Monthly statement of receipts and expenditures; vouchers.
54. Action to recover moneys due the hospital.
55. General powers and duties of the steward.
56. Purchases and contracts.
57. Official oath.
58. Actions against commissioners in lunacy, managers or officers of state hospitals.
59. Private institutions for the insane.
60. Recommendations of commission.
61. Visitors to state hospitals.
62. Manhattan state hospital; lease of property.
63. Manhattan state hospital; docks, ferry-boats, and removal of dead bodies.
64. Acquisition of property for use of state hospitals by condemnation and otherwise.
65. Erection, alteration, repairs and improvements of state hospital buildings.
66. Streets and railroads through hospital lands.

§ 40. State hospitals for the poor and indigent insane.—There shall continue to be the following hospitals for the care and treatment of the poor and indigent insane of the state, who are citizens thereof, which are hereby declared to be corporations; but other insane persons, who are citizens of the state, may be admitted when there is room therein for them:

1. Utica State Hospital, in the city of Utica, in the county of Oneida.

2. Willard State Hospital, in the town of Ovid, in the county of Seneca.
3. Hudson River State Hospital, near the city of Poughkeepsie, in the county of Dutchess.
4. Buffalo State Hospital, in the city of Buffalo, in the county of Erie.
5. Middletown State Homeopathic Hospital, in the city of Middletown, in the county of Orange.
6. Binghamton State Hospital, in the city of Binghamton, in the county of Broome.
7. Rochester State Hospital, in the city of Rochester, in the county of Monroe.
8. Saint Lawrence State Hospital, in the city of Ogdensburg, in the county of Saint Lawrence.
9. Gowanda State Homeopathic Hospital, in the town of Collins, in the county of Erie.
10. Brooklyn State Hospital, at Flatbush, in the borough of Brooklyn, in the city of New York. (*Subd. 10 amended by L. 1916, ch. 608.*)
11. Manhattan State Hospital on Ward's Island, in the city of New York.
12. Kings Park State Hospital, at Kings Park, in the county of Suffolk.
13. Central Islip State Hospital, at Central Islip, in the county of Suffolk.
14. Mohansic State Hospital, at Yorktown Heights, in the county of Westchester. (*Amended by L. 1910, chs. 57, 310, and L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 30, as amended by L. 1899, ch. 481; L. 1906, ch. 490; originally revised from L. 1890, ch. 132, §§ 1-7; L. 1891, ch. 335; L. 1894, ch. 707; L. 1895, ch. 628; L. 1896, ch. 2.

Reference.—L. 1917, ch. 238 creates a hospital development commission for the purpose of ascertaining the needs of the hospitals for the insane, and adopting a general plan of hospital development and authorizing contracts for new buildings. See Hospital Development Commission, ante.

State hospital as corporation.—A state hospital for the care and treatment of the insane is declared by this section to be a "corporation" and has, therefore, a constitutional right to sue in the courts in like cases as natural persons. *Matter of Buffalo State Hospital* (1905), 47 Misc. 33, 95 N. Y. Supp. 209.

Admission to Hudson River State Hospital.—No class of incompetent persons, except those rendered incompetent by insanity, are eligible for admission and treatment at the Hudson River State Hospital. *Peck v. Burdick & Son* (1915), 166 App. Div. 362, 151 N. Y. Supp. 996.

§ 40-a. **Mohansic state hospital established.**—The Mohansic State Hospital, at Yorktown in the county of Westchester, is hereby established. The governor shall appoint, within ten days after the taking effect of this section, a board of managers for such hospital, to consist of seven members, of whom not less than two shall be women. The managers first appointed hereunder shall serve for terms of one, two, three, four, five, six and seven years, respectively, from January first, nineteen hundred and ten, and their successors shall be appointed for full terms of seven years, as pro-

vided in the insanity law. The governor in making such first appointment shall designate the terms for which each manager is appointed. All the provisions of the insanity law relating to state hospitals for the insane shall apply to the hospital hereby established, except as herein otherwise provided, to the same effect and extent and in the same manner as such provisions apply to the other state hospitals for the insane. (*Added by L. 1910, ch. 57.*)

Note.—Title of section inserted by editor. See note to § 19.

§ 41. **Managers of state hospitals and their terms of office.**—Each state hospital shall be under the control and management of a board of managers, subject to the statutory powers of the commission. The governor shall appoint such board to consist of seven members, of whom not less than two shall be women, for each state hospital. The terms of office of the members of the several boards as now constituted, of one, two, three, four, five, six and seven years, shall respectively expire on the thirty-first day of December in each year, dating from the year nineteen hundred and five. After the expiration of such terms managers shall be appointed for terms of seven years. If a vacancy occur otherwise than by expiration of term, the appointment of a manager to fill such vacancy shall be for the unexpired term of the manager whose office became vacant.

Source.—Former Insanity L. (L. 1896, ch. 545) § 31, as amended by L. 1902, ch. 26; L. 1905, ch. 490.

Consolidators' note.—Rewritten to eliminate future reference to the year 1905. No change in meaning.

§ 42. **Appointment and removal of managers.**—The members of the boards of managers shall be appointed by the governor, by and with the advice and consent of the senate, as often as a vacancy shall occur by expiration of term, or otherwise, and they may severally continue in office until their successors are appointed and have qualified; and they shall be subject to removal by the governor after having been notified in writing of the reasons for the proposed removal, and having been given an opportunity to be heard. All managers shall reside in the hospital district in which the hospital is situated for which they are respectively appointed. At least a majority of the managers of the Central Islip state hospital, and of the Kings Park state hospital, shall be residents of the city of New York. No person shall be eligible to the office of manager who is either an elective state officer or a member of the legislature, and if any such manager shall become a member of the legislature or an elective state officer, his office as manager shall thereupon be vacant. The managers of the Middletown state homeopathic hospital and of the Gowanda state homeopathic hospital may be appointed from any portion of the state, and shall be adherents of homeopathy. If any manager fails for a period of six months to attend the regular meetings of the board of which he is a member, the secretary of the board shall notify the governor of such absence, with any explanation

thereof which may be submitted by such manager, and unless the governor shall, within thirty days thereafter, notify the secretary that he has excused such manager for such absence, the office of such manager shall thereupon be deemed to be vacant; and if any manager fails for one year to attend such regular meetings, his office shall become vacant. When any such vacancy shall occur, the board by resolution shall so declare, and a certified copy of such resolution shall forthwith be transmitted by the board to the commission and to the governor. In the month of January of each year the secretary of the board of managers shall transmit to the governor a statement showing the record of attendance of each manager at meetings of the board, the number and dates of visits to the hospital, with a statement of any other work for the hospital, performed by such manager, which such manager may request to have transmitted to the governor.

Source.—Former Insanity L. (L. 1896, ch. 545) § 32, as amended by L. 1899, ch. 481; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, § 1; tit. 4, § 1; tit. 5, § 1; tit. 6, §§ 1, 2; tit. 7, § 1; L. 1876, ch. 121; L. 1879, ch. 280, as amended by L. 1889, ch. 427; L. 1887, ch. 375; L. 1895, ch. 628, § 4.

References.—Appointment of members of boards of managers by the governor and senate, Public Officers Law, § 7. Governor to sign and secretary of state to attest commissions of managers, Id. § 8. Creation of vacancy, Id. § 30. Appointments to fill vacancies, Id. §§ 28, 29.

The "six months" limitation mentioned in this section does not begin to run until there has been a failure to attend a regular meeting. Rept. of Atty. Genl. (1910) 396.

§ 43. **General powers and duties of boards of managers.**—Subject to the statutory powers of the commission, boards of managers shall have the general direction and control of all the property and internal affairs of the institutions for which they are respectively appointed, except as otherwise provided by law. The managers shall not receive any compensation for their services, but shall receive actual and necessary traveling and other expenses, to be paid after audit as other current expenditures of the hospital. Each board shall, in October of each year, elect from among its members a president and a secretary. The superintendent shall personally submit, at each monthly meeting of the board of managers, a report showing changes in population, health of patients, officers and employees; accidents, suicides, unusual sickness, infectious diseases; important occurrences relating to the welfare of the patients and to the management and discipline of the employees, and such other matters as the board may specify. Each board shall:

1. Take care of the general interests of the hospital and see that its design is carried into effect, according to law, and the by-laws, rules and regulations, made as hereinafter provided.

2. Maintain an effective inspection of the hospital, for which purpose the board, or a majority of its members, shall visit and inspect the hospital at least once each month. Each board shall make a written report to the commission and to the governor within ten days after each inspection,

such report to be signed by each member making the inspection. Such report shall state in detail the condition of the hospital and of its inmates, and such other matters pertaining to the management and affairs thereof as in the opinion of the board should be brought to the attention of the commission or the governor, and may contain recommendations as to needed improvements in the hospital or in its management.

3. Keep in a book provided for that purpose, a fair and full record of their doings, which shall be open at all times to the inspection of the governor of the state, the state hospital commissioners, or any person appointed by the governor, the commission, or either house of the legislature to examine the same.

4. Hold regular meetings at least one each month, and cause to be typewritten within ten days after each such meeting, the minutes and proceedings of such meeting, and cause a copy thereof to be sent forthwith to each member of such board, to the commission, and to the governor.

5. Enter in a book, kept at the hospital for that purpose, the date of each visit of each manager.

6. Make to the commission, in July of each year, a detailed report of the results of their visits and inspection, with suitable suggestions and such other matters as may be required of them by the commission, for the year ending on the thirtieth day of June preceding the date of such report. Such report shall be prepared by a committee of the board, subject to the approval of the board. (*Subd. 6 amended by L. 1916, ch. 118.*)

7. Investigate, hear and determine the truth of all charges made against the superintendent or other officer or employee of a hospital, issue subpoenas and take and hear testimony in respect to such charges. A witness attending before such board shall be entitled to the same fees as a witness attending before a court of record or a judge thereof, which shall be paid as other hospital charges. The resident officers shall admit such managers into every part of the hospital and its buildings, and exhibit to them on demand all the books, papers, accounts and writings belonging to the hospital, or pertaining to its business, management, discipline or government, and furnish copies, abstracts and reports whenever required by them. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 33, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, §§ 2, 27; tit. 4, §§ 2, 18; tit. 5, § 2; tit. 6, § 3; tit. 7, § 3; L. 1879, ch. 280, §§ 7, 18; L. 1887, ch. 375, § 2; L. 1890, ch. 126, § 12.

Regulations of boards of managers must be reasonable and not inconsistent with the laws or policies of the state, and in accord with the purposes of the institution for which they are made. *People ex rel. Croft v. Manhattan State Hospital* (1896), 5 App. Div. 249, 39 N. Y. Supp. 158.

Power to take testimony.—Board of managers of Kings Park state hospital may take and hear testimony concerning officers or employees and may administer oaths. *Rept. of Atty. Genl.* (1910) 698.

Jurisdiction over state property.—Boards of New York city have no jurisdiction over state property situated therein. *Rept. of Atty. Genl.* (1900) 141. *Grant of*

lands of a state hospital for highway purposes. Rept. of Atty. Genl. (1901) 339.

Erection of village fire building on hospital grounds.—The board of managers of the Kings Park State Hospital have no authority to permit on lands of the hospital the erection of a building for a village volunteer fire department. Rept. of Atty. Genl. (1913), Vol. 2, p. 467.

§ 44. **Officers.**—The commission in lunacy, pursuant to the civil service law and the rules and regulations of the state civil service commission, shall appoint, subject to the approval of the board of managers for each hospital, as often as a vacancy shall occur therein, a superintendent. Whenever a vacancy shall occur in the office of superintendent of any state hospital the commission in lunacy, with the approval of the board of managers of such hospital, may transfer to such position the superintendent of any other state hospital, subject to the civil service law, and subject to the consent of the board of managers of such other state hospital. The superintendent shall be a well educated physician and a graduate of an incorporated medical college, of at least five years' actual experience in an institution for the care and treatment of the insane. The superintendents and all assistant physicians of homeopathic hospitals for the insane shall be homeopathic physicians, but such homeopathic physicians shall not be eligible to appointment in or transfer to state hospitals that are not for homeopathic treatment. Each superintendent shall be the treasurer of the state hospital for which he is appointed, unless the commission shall designate a person to act as treasurer as hereinafter provided, and before entering upon his duties as such treasurer shall file with the comptroller of the state his undertaking to the people in an amount and with sureties to be approved by the state comptroller to the effect that he will faithfully perform his trust as such treasurer. The superintendent may be removed by a vote of a majority of the board of managers for cause stated in writing, after an opportunity has been given him to be heard thereon, and such action, when approved by the commission, shall be final. Pending the investigation of any charges against a superintendent, and the decision thereon, the board of managers may suspend such superintendent. The commission may prefer charges of misconduct or incompetency against any superintendent to the board of managers of the hospital of which he is superintendent, and the board shall thereupon investigate the truth of such charges. The powers and duties of treasurer in each of the state hospitals may be conferred upon the superintendent thereof, or the commission may designate a person in its office to act as treasurer for all the hospitals, who shall have the powers, and perform the duties of treasurer as to such hospital, as prescribed in this chapter, and shall perform such other duties as the commission may impose. The person so designated, before entering upon the performance of his duties as such treasurer, shall file with the comptroller his undertaking in an amount and with sureties to be approved by him, to the effect that he will faithfully perform his trust as such treasurer.

Source.—Former Insanity L. (L. 1896, ch. 545) § 34, as amended by L. 1900, ch.

L. 1909, ch. 32.

Institutions for the insane.

§ 45.

676; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, § 3; tit. 4, § 3; tit. 5, § 3; tit. 6, § 4; tit. 7, § 7, as amended by L. 1893, ch. 247; L. 1879, ch. 280, § 8, as amended by L. 1892, ch. 276; L. 1887, ch. 375, § 3; L. 1893, ch. 214, § 2; L. 1894, ch. 707, § 4; L. 1895, ch. 628, § 6.

Consolidators' note.—Temporary provision omitted and new matter introduced without change of meaning.

References.—Powers and duties of treasurer of hospital, Insanity Law, § 52. Requirements generally as to official undertaking of treasurer, Public Officers Law, § 11.

Appointment of officers.—See *Matter of Porter v. Howland* (1898), 24 Misc. 434, 53 N. Y. Supp. 683. Treasurer, appointment of. Rept. of Atty. Genl. (1897) 81.

Power of removal.—Rept. of Atty. Genl. (1901) 295.

§ 45. **General powers and duties of superintendent.**—The superintendent of each hospital shall be its chief executive officer, and in his absence or sickness, the first assistant physician or other officer designated by the superintendent shall perform the duties, exercise the powers, and be subject to the responsibilities of the superintendent. Subject to the by-laws and regulations established as hereinafter provided under the provisions of paragraph twelve of this section, the superintendent shall have general superintendence of the buildings, grounds and farm, together with their furniture, fixtures and stock, and the direction and control of all persons therein, and subject to such by-laws and regulations shall:

1. Personally maintain an effective supervision and inspection of all parts of the hospital and generally direct the care and treatment of the patients. To this end the superintendent shall make or cause to be made an examination of the condition of each patient, within five days after his admission to the hospital, and shall regularly visit all of the wards or apartments for patients at such times as the rules and regulations of the hospital shall prescribe.

2. Appoint such officers, including a woman physician, and such employees as he may think proper and necessary for the economical and efficient performance of the business of the hospital, and prescribe their duties and, for cause stated in writing, after an opportunity to be heard, discharge any of such employees in his discretion. The number of such officers and employees shall be determined from time to time by the commission. The commission may, with the approval of the governor, abolish the office of any such officers or employees. The superintendent may remove any officer, for cause stated in writing, after an opportunity to be heard, and such action shall be final. Upon any such removal he shall make a record thereof, with the reasons therefor, under the appropriate head in one of the books of the hospital. The commission may authorize the superintendent to appoint as officers a dentist, pharmacist, and the principal of the training school. The pharmacists already in the hospital service and participating in the benefits of the retirement fund for employees of the state hospitals as created by chapter fifty-nine of the laws of nineteen hundred and twelve, are hereby authorized to remain em-

ployees and continue to participate in the benefits of this act if they notify the retirement board as constituted by chapter fifty-nine, laws of nineteen hundred and twelve, within thirty days of the passage of this amendment of their desire to continue as participants in such fund.

The superintendent, assistant physicians, including the woman physician, steward and matron, shall constantly reside in the hospital, or on the premises, except as provided in section forty-nine of this chapter, and shall be designated the resident officers of the hospital. The assistant physicians, including the woman physician, shall be graduates of an incorporated medical college, and shall possess such other qualifications as may be required by law. (*Subd. 2, amended by L. 1915, ch. 618.*)

3. Transmit, by mail, to the commission and to the president of the board of managers, within five days after any such discharge, information of such discharge, and of the cause thereof. The commission shall preserve the name of such officer, or employee, with the facts relating to his discharge, in a book provided for that purpose.

4. Designate hospital attendants or employees to act as special policemen, whose duty it shall be, under the orders of the superintendent, to arrest and return to the hospital insane persons who may escape therefrom, and to preserve peace and good order in such hospital and to fully protect the grounds, buildings and patients. Such attendants and employees, acting as policemen, shall possess all the powers of peace officers on the grounds and premises of such hospital and to the extent of one hundred yards beyond such grounds. The designation of such attendants and employees as special policemen, in pursuance hereof, shall not be deemed to supersede, on the grounds and premises of such hospital, the authority of peace officers of the jurisdiction within which such hospital is located.

5. Give such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department of labor and expenses.

6. Maintain salutary discipline among all who are employed in the institution and enforce strict compliance with his instructions and uniform obedience to all rules and regulations of the hospital.

7. Establish and supervise a training school for attendants and nurses, under rules and regulations of the hospital.

8. Shall cause to be held at least two meetings of the medical staff each week, at which the condition of patients, especially those recently admitted, shall be considered, and matters of medical service generally shall be given attention. The superintendent shall cause a complete clinical record to be made of each patient, to be kept in such form and to comprise such matters as the commission may direct.

9. Cause full and fair accounts and records of the entire business and operations of the hospital to be kept regularly, from day to day, in books provided for that purpose.

10. See that all such accounts and records are fully made up to the last

day of June in each year, and that the principal facts and results, with his report thereon, are presented to the board of managers within thirty days thereafter, who shall incorporate it in their report to the commission. The commission may prescribe the form of and the subjects to be embraced in such reports. Such superintendent shall make other reports at such times, in such manner and in respect to such matters as the board of managers or the commission may direct. (*Subd. 10 amended by L. 1916, ch. 118.*)

11. Keep a book, in which he shall cause to be entered at the time of reception of any patient, his name, residence and occupation, and the date of such reception, by whom brought and by what authority and on whose petition committed, and an abstract of all orders, warrants, requests, petitions, certificates and other papers accompanying such persons.

11-a. Establish and maintain in connection with his hospital, subject to the approval of the state hospital commission, one or more out-patient departments or dispensaries within the hospital district of such state hospital, and assign to duty in any such department or dispensary members of the medical staff, nurses or other employees of the hospital, and make such necessary expenditures as may be required therefor, subject to the approval of the commission. (*Subd. added by L. 1913, ch. 626.*)

12. A committee consisting of three superintendents to be appointed by the commission shall establish by-laws, rules and regulations governing the appointment and duties of officers and employees of all the state hospitals, and for the internal government, discipline and management of the same. Such by-laws, rules and regulations shall be subject to the approval of the commission and of the quarterly conference of superintendents and managers with the commission as provided in section forty-eight of this act. Such by-laws, rules and regulations shall be uniform for all the state hospitals, and shall not be inconsistent with the provisions of this chapter nor with the provisions of the civil service law and the rules and regulations established thereunder. The by-laws, rules and regulations established by the state commission in lunacy and in force on the first day of April, nineteen hundred and five, shall continue in force except as they may hereafter be modified, amended or repealed as provided by this chapter. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 35, as amended by L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, §§ 10, 20; tit. 4, § 4; tit. 5, § 3; tit. 6, § 4; tit. 7, § 7; L. 1879, ch. 280, § 12; L. 1887, ch. 375, §§ 4, 10; L. 1890, ch. 273, §§ 16, 17; L. 1890, ch. 243; L. 1893, ch. 214, § 2; L. 1894, ch. 707, § 5; L. 1895, ch. 628, §§ 8, 9; L. 1895, ch. 693; L. 1895, ch. 855.

References.—Appointments of officers and employees under Civil Service Law, §§ 6-9, 12-17, 19-28. Admission of patients under special agreement, Insanity Law, § 89. Descriptive entry of each case in case book, *Id.* § 90. Advice in respect to discharge of patients, *Id.* § 94.

Appointment and removal of employees.—The superintendent is vested with the power to appoint and discharge employees; he may remove a mechanic or laborer for cause after an opportunity to be heard. *Matter of Porter v. Howland* (1898), 24 Misc. 434, 53 N. Y. Supp. 683.

§ 46. **Special provisions relating to Brooklyn State Hospital, Kings Park State Hospital, Central Islip State Hospital, and Manhattan State Hospital.**—The hospital heretofore known as the Long Island State Hospital is divided into two parts. The part located at Kings Park shall be known as Kings Park State Hospital; the part located at Flatbush in the borough of Brooklyn, city of New York, shall be known as Brooklyn State Hospital. The hospital heretofore known as the Manhattan State Hospital is divided into two parts. The part located on Ward's Island, in the city of New York, shall be known as Manhattan State Hospital. The part located at Central Islip shall be known as Central Islip State Hospital. Each part of each of such hospitals shall, except as otherwise provided in this chapter, be deemed a separate and independent state hospital and all the provisions of this chapter relating to the management, maintenance and control of state hospitals and the appointment of resident officers, attendants and employees therein shall apply to each such state hospital. Patients shall be committed to and received at the Brooklyn State Hospital, the Kings Park State Hospital, the Central Islip State Hospital, and the Manhattan State Hospital in accordance with rules to be established by the state hospital commission. The commission may also adopt rules regulating the transfer of such patients from one to another of such hospitals. (*Amended by L. 1916, ch. 608.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 36, as amended by L. 1900, ch. 634; L. 1902, chs. 26, 599; L. 1905, ch. 490; originally revised from L. 1895, ch. 628, §§ 6, 8; L. 1896, ch. 2, §§ 5, 7.

§ 47. **Purchasing steward for Brooklyn State Hospital, Kings Park State Hospital, Manhattan State Hospital, and Central Islip State Hospital.**—The office of purchasing steward for the Brooklyn State Hospital, Kings Park State Hospital, Manhattan State Hospital and Central Islip State Hospital, as heretofore established by the commission, is hereby abolished.

The resident steward or the assistant steward of each of such hospitals shall become the steward of the respective hospital which he now serves and his rank in the service shall be reckoned as though he had occupied the office of steward during the time that he has served as resident steward or assistant steward, and he shall possess all the powers and perform all the duties conferred or imposed on stewards of state hospitals by this chapter. (*Amended by L. 1911, ch. 719, and L. 1916, ch. 608.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 36-a, as added by L. 1905, ch. 490.

§ 48. **Meetings of superintendents.**—The superintendents or other officers of the several state hospitals designated by them shall meet, at least once in every three months, upon the call of the commission, at the office of the commission in Albany, or at such other place as may be designated by it, to consult with such commission with reference to matters relating to the care and operations of the state hospitals, and particularly with

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reference to the care and treatment of the insane. Each board of managers may, in its discretion, send one or more of its members to such meetings. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 37, as amended by L. 1900, chs. 380, 634; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1893, ch. 214, § 2.

§ 49. **Salaries of officers and wages of employees.**—The state hospital commission, from time to time, with the approval in writing of the governor, secretary of state and comptroller, shall fix the annual salaries of the resident officers of the state hospitals, which shall be uniform for like service. They shall classify the other officers and employees into grades, and, except as provided by section fifty of this chapter, shall determine the salaries and wages to be paid in each grade, which shall be uniform in all the hospitals. The salaries and wages shall be included in the estimates and paid in the same manner as other expenses of the state hospitals. Food supplies shall be allowed to officers and employees and the families of the superintendent, first assistant physicians, directors of clinical psychiatry, pathologists and stewards, and where quarters are available in the judgment of the superintendent, such maintenance may also be allowed senior assistant physicians, assistant physicians and assistant stewards, at state hospitals having not less than four thousand patients, subject to the approval of the commission. Such families shall consist only of the wives and minor children of such officers. No other persons, except those regularly employed, shall be allowed rooms and maintenance, except at a rate to be fixed by the commission; such supplies shall be drawn from the supplies provided for general hospital use. With the approval of the commission, officers or employees of state hospitals may be permitted to live outside of such hospitals, and shall receive such sums in lieu of the quarters or supplies furnished by the hospitals, as may be equitable. (*Amended by L. 1912, ch. 121, and L. 1915, ch. 468.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 38, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1904, ch. 714; originally revised from L. 1895, ch. 693.

Payment of clerks for extra services.—Rept. of Atty. Genl. (1903) 453.

§ 50. **Salaries of certain officers and wages of certain employees prescribed.**—The officers or employees of the state hospitals now or hereafter classified as occupying offices or positions specified in the schedule at the end of this section shall hereafter receive the salaries or wages per month indicated opposite the name or title of such officer or position, except that where a minimum and maximum rate per month is prescribed advancement from the minimum to the maximum rate shall be in accordance with the length of service, as prescribed in such schedule. If a minimum and maximum rate per month is not prescribed in such schedule, the salary or wages per month of such officer or employee shall be the amount indicated opposite the name or title of such office or position. Where an increase of salary or

wages is allowed at a certain rate per month or otherwise for continuous service, continuous service performed prior to the time this section, as hereby amended, takes effect, in the same position or employment, shall be deemed a part of the continuous service in determining the salary or wages to which such officer or employee shall be entitled under this section. When employees are allowed to board and lodge away from the hospital on account of lack of accommodations in the institution a uniform rate of not less than twenty dollars per month shall be allowed in addition to the regular monthly wages, and this amount shall be apportioned at the rate of five dollars per month for each meal and five dollars per month for lodging. Such employees shall, subject to the approval of the commission, be allowed the privileges granted to employees residing in the hospital.

SCHEDULE OF SALARIES AND WAGES.

1. ADMINISTRATION DEPARTMENT.

Position	Wages per Month.	
	Minimum	Maximum
Man stenographer	\$72 00	\$85 00
Women stenographers	57 00	73 00
Secretary and stenographer .....	.....	80 00
Clothing clerk .....	.....	55 00
Watchmen .....	.....	55 00
Policemen .....	.....	55 00
Barbers	47 00	60 00
Coachman	57 00	65 00
Drivers .....	.....	38 00
Pages and messenger boys	18 00	23 00
Chief transfer agents, men .....	.....	65 00
Chief transfer agents, women .....	.....	55 00

Increase of wages from minimum to maximum shall be made at the rate of two dollars per month for each six months of continuous service.

2. FINANCIAL DEPARTMENT.

Position	Wages per Month.	
	Minimum	Maximum
Bookkeeper	\$97 00	\$110 00
Bookkeeper—paymaster	115 00	122 00
Accountant	82 00	95 00
Voucher and treasurer's clerk	57 00	75 00
Storekeeper. Institutions having less than two thousand patients	57 00	75 00
Storekeeper. Institutions having two thousand or more patients	72 00	90 00
Man stenographer	72 00	85 00
Woman stenographer	57 00	73 00

Increase of wages from minimum to maximum shall be at the rate of two dollars per month for each six months of continuous service. Where a telegraph office is maintained in an institution an extra compensation of ten dollars per month shall be allowed to the person performing the service of operator.

3. SUPERVISORS.

Position	Wages per Month.	
	Minimum	Maximum
Chief supervisors, men	\$57 00	\$73 00
Chief supervisors, women	52 00	67 00
Supervisors, men	52 00	67 00
Supervisors, women	45 00	60 00

Increase of wages from minimum to maximum shall be at the rate of two dollars per month for each six months of continuous service.

4. NURSES AND ATTENDANTS.

Position	Wages per Month.	
	Minimum	Maximum
Charge nurses, men	\$42 00	\$52 00
Charge nurses, women	36 00	45 00
Nurses, men	37 00	48 00
Nurses, women	32 00	40 00
Charge attendants, men	37 00	48 00
Charge attendants, women	32 00	40 00
Attendants, men	28 00	39 00
Attendants, women	21 00	30 00
Special attendants, men	45 00	55 00
Special attendants, women	37 00	48 00

Increase of wages from minimum to maximum shall be at the rate of two dollars per month for each six months of continuous service. An attendant or nurse performing night service for a period of one month succeeding the first day of the month shall be entitled to two dollars per month in addition to regular wages.

All attendants and all special attendants whether in immediate charge of patients or otherwise shall receive at least the wages designated in the above schedule.

5. DOMESTIC SERVICE.

Position	Wages per Month.	
	Minimum	Maximum
Housekeepers	\$37 00	\$45 00
Waitresses and chambermaids	22 00	28 00

Increase of wages from minimum to maximum shall be at the rate of two dollars per month for each six months of continuous service.

6. KITCHEN SERVICE.

Position	Wages per Month.	
	Minimum	Maximum
Chefs, men		\$100 00
Head cooks, men		60 00
Head cooks, women		60 00
Cooks, men		40 00
Cooks, women		40 00
Assistant cooks, women		35 00
Kitchen helpers, men	\$27 00	35 00
Kitchen helpers, women	20 00	30 00

The wages of kitchen helpers shall be increased from minimum to maximum at the rate of two dollars per month for each six months of continuous service.

7. BAKERY SERVICE.

Position	Wages per month
Baker	\$73 00
Assistant baker	50 00
Bakers' helpers	40 00

8. MEAT CUTTERS.

Position	Wages per month
Meat cutters. Institutions having less than two thousand patients.	\$67 00
Meat cutters. Institutions having two thousand or more patients.	73 00

9. LAUNDRY SERVICE.

Position	Wages per month
Laundry supervisor	\$80 00
Laundry overseer	73 00
Launderers	40 00
Head laundress	40 00
Laundresses	27 00

10. ENGINEER'S DEPARTMENT.

Position	Wages per Month.	
	Minimum	Maximum
Chief engineer		\$135 00
Engineer's assistants, first grade		87 00
Engineer's assistants, second grade		73 00
Engineer's assistants, third grade		60 00
Electrical engineer		105 00
Electrical engineer's assistants, first grade		87 00
Electrical engineer's assistants, second grade		73 00
Electrical engineer's assistants, third grade		60 00
Electrical worker		82 00
Assistant electrical worker		73 00

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ENGINEER'S DEPARTMENT—Continued.

	Wages per Month,	
	Minimum	Maximum
Lineman		55 00
Plumbers and steam fitters		83 00
Assistant plumber		57 00
Plumbers and steam fitters' helpers	\$32 00	47 00
Firemen, eight-hour shifts		65 00

Plumbers and steam fitters' helpers shall receive an increase from minimum to maximum at the rate of two dollars per month for each six months of continuous service.

11. BUILDING DEPARTMENT.

Position	Wages per Month,	
	Minimum	Maximum
Master mechanic		\$135 00
Supervising carpenter		115 00
Head carpenter		83 00
Carpenters		73 00
Painters		73 00
Tinsmiths		73 00
Mason	\$90 00	110 00
Plasterer	73 00	96 00
Roofer	73 00	96 00

12. INDUSTRIAL DEPARTMENT.

Position	Wages per Month,	
	Minimum	Maximum
Shop foreman		\$69 00
Tailor	\$57 00	69 00
Shoemaker	57 00	69 00

Increase of wages of tailor and shoemaker from minimum to maximum shall be at the rate of two dollars per month for each six months of continuous service.

13. FARM AND GROUNDS DEPARTMENT.

Position	Wages per Month,	
	Minimum	Maximum
Farm supervisor		\$100 00
Farm manager		83 00
Head farmer	\$66 00	73 00
Dairyman	52 00	60 00
Farmers	37 00	48 00
Herdsmen	37 00	48 00
Gardeners	52 00	60 00
Florists	57 00	69 00
Drivers		38 00
Laborers		35 00
Blacksmiths		73 00

Increase of wages from minimum to maximum shall be at the rate of two dollars per month for each six months of continuous service. The provisions of this section with respect to the rate of wages to be paid employees in all positions named in the foregoing schedules shall supersede the provisions of any other general or special law.

14. MARINE SERVICE, MANHATTAN STATE HOSPITAL.

Position	Wages per month
Dockmaster—day	\$80 00
Assistant dockmaster	60 00
Dockmaster—night	55 00
Captain	130 00
Mate	72 00
Chief engineer, marine	130 00
Deck hand	45 00
Pilot—day	99 00
Pilot—night	93 00
Engineer, marine	93 00
Fireman, marine	65 00

15. RAILROAD DEPARTMENT, WILLARD HOSPITAL.

Position	Wages per month
Engineer, locomotive	\$60 00
Conductor	50 00
Trainman	21 00
Fireman	32 00
Brakeman	21 00
Trackman	45 00

This rate of wages, except for trackman, is fixed at one-half the amount received by these employees, the other half being paid by the railroad company operating the road pursuant to contract. (*Amended by L. 1912, ch. 43, L. 1915, ch. 549, L. 1916, ch. 608, and L. 1917, ch. 286, in effect Jan. 1, 1918.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 38-a, as added by L. 1904, ch. 714.

§ 51. Quarterly estimates of expenditures; emergency fund.—The superintendent of each of the state hospitals shall, once in each three months, as the commission may determine, cause to be prepared triplicate estimates in such detail as may be required by the commission, of the expenditures required for the hospital of which he is the superintendent, for the ensuing three months. He shall submit two of such triplicates to the commission and file the third copy in the office of the superintendent. The commission may revise estimates for supplies or other expenditures either as to quantity, quality, or the estimated cost thereof, and shall certify that it has carefully examined the same and that the expenditures contained in

such estimates, as approved or revised by it, are actually required for the use of the hospital, and shall thereupon present such estimate and certificate to the comptroller. Upon the revision and approval of such estimate by the commission, the comptroller shall authorize the superintendent as treasurer, or such other officer as the commission may designate as provided in this chapter, to make drafts on the comptroller, as the money may be required for the purposes mentioned in such estimates, which drafts shall be paid on the warrant of the comptroller, out of the funds in the treasury of the state held for the care of the insane and the maintenance of state hospitals. In every such estimate, there shall be a sum named, not to exceed one thousand dollars, as an emergency fund for which no minute detailed statement need be made. No money shall be expended for the use of any of the state hospitals, except as provided in this section. And except that a sum not exceeding two thousand dollars may, when authorized by the comptroller, be set apart by the commission to each hospital as a commutation ticket fund, to be used under the direction and control of the superintendent for the purchase of commutation tickets. Such tickets shall be sold at cost under the direction of the superintendent, for the use of the hospital. The amount received from the sale of such tickets shall be paid into such fund and shall be available for the purchase of additional tickets as above provided. Libraries may be furnished to any state hospital by the regents of the University of the State of New York, subject to regulations adopted by them and the commission, the expense of which shall be included in the quarterly estimates of the hospitals.

Any general expenses necessarily incurred by the commission for or on account of the state hospitals shall be apportioned to such hospitals on the basis of the number of patients, and included in the estimates of such hospitals, made as provided in this section under the direction of the commission. (*Amended by L. 1911, ch. 768.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 39, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1893, ch. 214, §§ 1, 2; L. 1895, ch. 693.

§ 52. Powers and duties of superintendent as treasurer.—The superintendent, as treasurer of such hospital, or such officer as may be designated as treasurer by the commission as provided in this chapter, shall, subject to the rules and regulations of the commission, pertaining to his duties as treasurer:

1. Have the custody of all moneys received from the comptroller on account of estimates made by the superintendent and revised and approved by the commission, and keep an accurate account thereof.
2. Have the custody of all bonds, notes, mortgages and other securities and obligations belonging to the hospital.
3. Receive all money for the care and treatment of private and reimbursing patients and other sources of revenue of the hospital; but where a designation of a person as treasurer is made as provided by this chapter,

the steward shall receive all such money and transmit the same, once each week, to the person so designated as treasurer, and report the amount so transmitted to the superintendent.

4. Deposit all money received from the comptroller on account of estimates in a bank designated by the comptroller, in his name as treasurer, and send each month to the comptroller and to the commission a statement, showing the amount so received and deposited, and from whom and for what received, and when such deposits were made. Such statement of deposit shall be certified by the proper officer of the bank receiving such deposit. The superintendent as treasurer, or other officer designated as treasurer by the commission, as provided in this chapter, shall make an affidavit to the effect that the sum so deposited is all the money received by him, from any source of hospital income, to the date of the last deposit appearing on such statement. A bank designated by the comptroller to receive such deposits shall, before any deposit is made, execute a bond to the people of the state, in a sum approved by the comptroller, for the safe keeping of the funds deposited.

5. Pay out the money deposited for the uses of the state hospital, upon the voucher of the steward; where a person has been designated as treasurer, as provided in this chapter, such voucher shall be countersigned by the superintendent.

6. Keep full and accurate accounts of all receipts and payments, in the manner and according to books and forms prescribed and furnished by the commission.

7. Balance all accounts on his books, annually, for the year ending on the last day of June, and make a statement thereof and an abstract of the receipts and payments of the past year and deliver the same, within thirty days, to the commission. (*Subd. 7 amended by L. 1916, ch. 118.*)

8. Render an account of the state of the books and the funds and other property in his custody, whenever required by the commission.

9. Execute a release and satisfaction of a mortgage, judgment or other lien or debt in favor of the hospital, when paid.

10. Receive all moneys for or on account of the sale of lands of the hospital, of which he is the treasurer.

Source.—Former Insanity L. (L. 1896, ch. 545) § 40, as amended by L. 1900, ch. 380; L. 1902, chs. 26, 130; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, § 15; tit. 4, § 9; L. 1879, ch. 280, § 13; L. 1887, ch. 375, § 6; L. 1893, ch. 214, § 3.

References.—Deposit of moneys by treasurer in banking institution to be designated by comptroller, State Finance Law, §§ 11, 19. Annual inventory and financial report of state hospital, Id. § 20. Treasurer to render accounts to comptroller, Id. §§ 21–24. Indebtedness not to be contracted without appropriation, Id. § 35. Specific appropriations not to be used for other purposes, Id. § 36.

§ 53. **Monthly statement of receipts and expenditures; vouchers.**—The superintendent as treasurer of each state hospital or such other officer as may be designated as treasurer by the commission, as provided in this

chapter, shall, on or before the fifteenth day of each month, make to the comptroller and to the commission a full and perfect statement of all the receipts and expenditures, specifying the several items, for the last preceding calendar month. Such statement shall be verified by the affidavit of the treasurer attached thereto, in the following form:

I,, treasurer of the state hospital, do solemnly aver that I have deposited in the bank designated by law for such purpose, all the moneys received by me on account of the hospital during the last month, and I do further swear that the foregoing is a true abstract of all the moneys received and payments made by me or under my direction as such treasurer during the month ending on the day of, 19....

There shall also be forwarded to the commission the affidavit of the steward, to the effect that all goods and other articles for which vouchers are rendered were purchased and received by him, or under his direction, at the hospital; that the goods were purchased at a fair cash market price and paid for in cash, or on credit, not exceeding sixty days, and that he, or any person in his behalf, had no pecuniary or other interest in the articles purchased; that he received no pecuniary or other benefit therefrom in the way of commission, percentage, deductions or presents, or in any other manner whatever, directly or indirectly; that the articles for which vouchers are rendered were received at the hospital; that they were conformed in all respects to the invoiced goods received and ordered by him, both in quality and quantity. Such vouchers shall be examined by the commission and compared with the estimates made for the month for which the statement is rendered, and if found correct shall be indorsed and forwarded by the commission, with the statement, to the comptroller. If any voucher is found objectionable, the comptroller shall indorse his disapproval thereon, with the reason therefor, and return it to the commission, who shall present it to the superintendent for correction, and when corrected return it to the comptroller. All such vouchers shall be filed in the office of the comptroller.

Source.—Former Insanity L. (L. 1896, ch. 545) § 41, as amended by L. 1902, chs. 26, 130; L. 1905, ch. 490; originally revised from L. 1893, ch. 214, § 4.

References.—Hospital receipts to be paid monthly to state treasurer, State Finance Law, § 37. Itemized and monthly accounts to be rendered, Id. § 17.

§ 54. Action to recover moneys due the hospital.—The superintendent or treasurer of any state hospital may bring an action or a special proceeding in the name of the hospital, to recover for the use thereof:

1. The amount due upon any note or bond in his hands belonging to the hospital.

2. The amount charged and due for support of any patient therein, or for actual disbursements made in his behalf for necessary clothing and traveling expenses, and to enforce any liability created by statute for the care and support of the insane.

3. Upon any cause of action accruing to the hospital. (*Amended by L. 1910, ch. 389.*)

Source.—Former Insanity L. (L. 1896, ch. 545, § 42, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, §§ 16, 17; L. 1887, ch. 375, §§ 7, 8; L. 1894, ch. 707, § 7.

References.—Actions against relatives to compel support of poor insane persons, Code Crim. Pro. §§ 914-920.

Application.—This section merely confers certain specified rights of action upon the superintendent or treasurer of any state hospital and in no way curtails the powers of the corporation itself. *Matter of Buffalo State Hospital* (1905), 47 Misc. 33, 95 N. Y. Supp. 209.

An action to compel the committee of a lunatic to support and maintain an insane and indigent son of the lunatic who is an inmate of a hospital, instituted in 1895, before the repeal, by chapter 545 of the Laws of 1896, of chapter 126 of the Laws of 1890, making the support of such insane pauper a charge upon the state, cannot be maintained. *Matter of Saint Lawrence State Hospital* (1897), 13 App. Div. 436, 43 N. Y. Supp. 608.

§ 55. **General powers and duties of the steward.**—The steward, under the direction of the superintendent, and subject to the rules and regulations of the hospital, shall be accountable for the careful keeping and economical use of all furniture, stores and other articles provided for the hospital, and under the direction of the superintendent, and subject to such rules and regulations, shall:

1. Make all purchases for the hospital, except as otherwise provided in this chapter, and preserve the original bills and receipts thereof, and keep full and accurate accounts of the same.
2. Prepare and keep the pay-rolls of the hospital.
3. Keep the accounts for the support of patients and expenses incurred in their behalf, and furnish the treasurer statements thereof as they fall due.
4. Notify the treasurer of the death or discharge of any reimbursing or pay patient, within five days after such death or discharge.
5. Where agricultural products are raised on grounds under the jurisdiction of the state hospital commission, the hospital, subject to the approval of such commission, may exchange such products for canned products of canning factory in the town in which such agricultural products are raised. (*Subd. 5, added by L. 1915, ch. 293.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 43, as amended by L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, § 18; L. 1879, ch. 280, § 14; L. 1887, ch. 375, § 9; L. 1893, ch. 214, §§ 2, 3; L. 1894, ch. 707, § 9; L. 1895, ch. 693.

Reference.—Duty of steward in respect to inspection of supplies and entry into books, State Finance Law, § 18.

§ 56. **Purchases and contracts.**—All purchases of supplies for the use of the hospital shall be made for cash or on credit or time, not exceeding sixty days; every voucher shall be duly filled out, and with every abstract of

vouchers paid, there shall be proof on oath that the voucher was properly filled up and the money paid. No expenditure for supplies or other purposes shall be made for the benefit of such hospital, by contract or otherwise; unless in conformity with the provisions of this chapter in relation to estimates. No member of the commission, manager or officer of a hospital shall be interested, directly or indirectly, in the furnishing of material, labor or supplies for the use of the hospital, nor shall any such manager or officer act as attorney or counsel for such hospital. The commission shall from time to time appoint a purchasing committee, to consist of three superintendents and two stewards, who shall serve as such purchasing committee and, subject to the approval of the commission, shall determine what articles of supplies it is practicable and desirable to purchase by joint contracts for the state hospitals, also the character and qualities of such supplies; and, subject to the approval of the commission, draw specifications and enter into contracts for the supplies to be purchased jointly and have samples and supplies tested chemically or otherwise for the purpose of determining their quality. Contracts shall be let to the lowest responsible bidder. All bids may be rejected. The purchasing committee shall determine the period for which such contracts shall be let, except that no contract shall be let for a period longer than one year. A determination to purchase any article by joint contract shall be binding upon all the hospitals, except that any hospital may be exempted by the commission from the requirement to purchase any such article. Such contracts shall not be let except in conformity with the provisions of this chapter relating to estimates. The state hospitals may manufacture such supplies and materials to be used in any of such hospitals as can be economically made therein. All goods for the use of the hospitals shall be bought, as far as practicable, of manufacturers or their immediate agents. All contracts, if let, shall, subject to the provisions of section fifty-one relating to estimates, be awarded to the lowest responsible bidders. A member of the commission or an officer, manager or employee of a state hospital shall not receive a gift or reward for himself or the hospital from any person, firm or corporation dealing in goods, or supplies suitable or necessary for the use of the hospital. All purchases and contracts made and executed in pursuance of law, prior to June first, nineteen hundred and five, shall thereafter be given full force and effect, notwithstanding the change in the management of the state hospital. (*Amended by L. 1911, ch. 768.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 44, as amended by L. 1900, ch. 380; L. 1902, ch. 26; L. 1905, ch. 490; originally revised from L. 1874, ch. 446, tit. 3, § 28; L. 1879, ch. 280, § 19; L. 1887, ch. 375, § 13; L. 1894, ch. 707, § 10; L. 1895, ch. 693.

References.—Contract must be let in conformity with estimates, Insanity Law, § 53. Managers and officers not to be interested in contract, Penal Law, § 1868.

Supplies.—Power of board of managers of state hospital to contract for supplies. Rept. of Atty. Genl. (1896) 125.

Manufacturing departments may be maintained by the State Hospital Commission

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from funds derived from manufacturing carried on in the state hospitals. Rept. of Atty. Genl. (1912), Vol. 2, p. 261.

§ 57. **Official oath.**—Each superintendent and steward of a hospital, before entering upon his duties as such, shall take the constitutional oath of office and file the same in the office of the secretary of state.

Source.—Former Insanity L. (L. 1896, ch. 545) § 46, as amended by L. 1902, ch. 26; originally revised from L. 1874, ch. 446, tit. 3, § 8.

References.—As to official oaths generally, Public Officers Law, §§ 10, 13, 15. Form of constitutional oath of office, Const., art. 13, § 1.

§ 58. **Actions against state hospital commissioners, managers or officers of state hospitals.**—No civil action shall be brought in any court against the commission, or a state hospital commissioner, or an officer or a manager of a state hospital, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of a judge of the supreme court, first had and obtained. Any just claim for damages against such commission or commissioner, officer, manager or employee for which the state would be legally or equitably liable, may be paid out of any moneys appropriated for the care of the insane. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 46, as amended by L. 1902, ch. 26; L. 1905, ch. 490.

§ 59. **Private institutions for the insane.**—No person, association or corporation shall establish or keep an institution for the care, custody or treatment of the insane for compensation or hire, without first obtaining a license therefor from the commission. Nor shall an insane patient be received and retained for treatment for compensation or hire in any institution for the care and treatment of persons suffering from diseases other than mental, unless such a license shall have been so obtained. Every application for such a license shall be accompanied by a plan of the premises proposed to be occupied, describing the capacity of the buildings for the uses intended, the extent and location of grounds appurtenant thereto, and the number of patients proposed to be received therein, with such other information, and in such form, as the commission may require. The commission shall not grant any such license without first having made an examination of the premises proposed to be licensed, and being satisfied that they are substantially as described, and are otherwise fit and suitable for the purposes for which they are designed to be used, and that such license should be granted. The commission may, at any and all times, examine and ascertain how far a licensed institution is conducted in compliance with the license therefor, and after due notice to the institution and opportunity for it to be heard, the commission having made a record of the proceeding upon such hearing, may, if the interests of the inmates of the institution so demand, for just and reasonable cause then appearing and to be stated in its order, amend or revoke any such license by an order

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to take effect within such time after the service thereof upon the licensee, as the commission shall determine. This section shall not apply to a public general hospital making provision in a pavilion or special wards for the care, nursing and observation or temporary detention of alleged insane patients, or patients pending commitment to a state hospital or an institution licensed by the state commission in lunacy. (*Amended by L. 1910, ch. 329.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 47; originally revised from L. 1874, ch. 446, tit. 9, §§ 1, 2; L. 1890, ch. 273, § 12.

References.—Maintenance of private institution for the insane without a license a misdemeanor, Penal Law, § 1122. Powers of commission as to detention of insane or apparently insane prior to commitment, § 20, ante.

Application for license; qualifications.—The commission of lunacy may require an applicant seeking a license under this section to have five years' experience in a hospital exclusively for the care and treatment of the insane. Rept. of Atty. Genl. (1907) 448.

A constant user of habit-forming drugs may be committed by the magistrate to a state hospital for the insane. Rept. of Atty. Genl. (1914) 309.

§ 60. Recommendations of commission.—The authorities of each institution for the insane shall place on file in the office of the institution, the recommendations made by the commissioners as a result of their visits, for the purpose of consultation by such authorities, and for reference by the commissioners upon their visits.

Source.—Former Insanity L. (L. 1896, ch. 545) § 48; originally revised from L. 1890, ch. 273, § 15.

§ 61. Visitors to state hospitals.—Justices of the supreme court are authorized to appoint visitors to state hospitals, upon nomination of the state charities aid association, as provided by law.

Source.—Former Insanity L. (L. 1896, ch. 545) § 49.

Reference.—State charities aid association may appoint visitors to state hospital, State Charities Law, § 30.

§ 62. Manhattan state hospital; lease of property.—The transfer of the institutions, formerly known as the New York city asylums for the insane, to the custody and control of the Manhattan state hospital, made pursuant to chapter two of the laws of eighteen hundred and ninety-six, and the lease and conveyance described in section two of such chapter are hereby ratified and confirmed. The lease of the island known as Ward's Island, together with all the buildings and improvements thereon and the equipment, fixtures and furniture of the asylums for the insane located on such island, executed as prescribed in section two of chapter two of the laws of eighteen hundred and ninety-six, shall continue and remain in full force and effect until the same shall either be surrendered by the state or terminated by the city of New York. Such lease may be surrendered at any time by the state, or the same may be terminated by the city of New York by fifteen years' notice, in writing, signed by the mayor of such city, to

the comptroller of the state. If such lease is terminated by the city of New York, the city shall pay, to the state, the value, at the time of such termination, of all buildings that may have been erected and of all improvements that may have been made by the state on the premises as to which the lease is terminated. The amount so to be paid shall be determined by appraisement of five competent, disinterested persons, two of whom shall be named by the governor, two by the mayor of the city of New York, and the fifth by the four persons so named. In case such lease is surrendered or terminated, as provided in this section or otherwise, adequate provision shall thenceforth be made by the state for the care and custody of all insane persons who may be inmates of the institution affected.

Source.—Former Insanity L. (L. 1896, ch. 545) § 50, as added by L. 1900, ch. 380, § 5.

§ 63. **Manhattan state hospital; docks, ferry-boats, and removal of dead bodies.**—After notice has been given to the board of managers of the Manhattan state hospital and an opportunity has been afforded them for a hearing, the commission is hereby authorized to acquire by purchase or by lease, for the use of the Manhattan state hospital, in the city of New York, at some point as nearly opposite Ward's Island as may be available, a dock which shall be suitable for the purpose of a landing and a depot for the general use of the hospital; also to purchase or lease one or more suitable steamboats to be used for the conveyance of patients and supplies to and from such hospital. Until the state provides a cemetery for the use of the hospital the commissioner of public charities of the city of New York shall continue to remove the dead bodies of insane patients from Ward's Island, and to provide for the burial of the unclaimed dead as prescribed by law prior to the passage of chapter two of the laws of eighteen hundred and ninety-six, and also to afford transportation by their steam ferry-boats for such bodies as are claimed by friends at the hospital, such removal to be made within twenty-four hours after receipt of notice from the superintendent of the Manhattan state hospital.

Source.—Former Insanity L. (L. 1896, ch. 545) § 51, as added by L. 1900, ch. 380, as amended by L. 1902, ch. 26; L. 1905, ch. 490.

§ 64. **Acquisition of property for use of state hospitals by condemnation and otherwise.**—The state hospital commission may acquire, under the condemnation law, such real estate, right or interest therein as may be necessary for the construction, maintenance and accommodation of a state hospital, if unable to agree with the owner thereof for its purchase. The proceedings for the purpose of acquiring such real estate, right or interest therein, shall be instituted and maintained in the name of the people of the state of New York, by the attorney-general or by such counsel as the governor or attorney-general may designate for that purpose, upon the certificate of such commission as to the necessity of acquiring such real estate, right or interest therein, approved and endorsed by the governor. The commission

may acquire and hold in the name of and for the people of the state of New York, by grant, gift, devise or bequest, property to be applied to the maintenance of insane persons in and for the general use of a hospital. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 52, as added by L. 1900, ch. 380, § 5, amended by L. 1905, ch. 490.

Contracts by state hospital commission.—The state hospital commission may enter into a contract with a railroad to obtain permission to cross the tracks with an underground conduit necessary to supply electric power to a state hospital, but a contract assuming to bind the State in an amount in excess of money lawfully available is not authorized or proper. Opinion of Atty. Genl. (1915) 20, 2 State Dept. Rep. 589.

§ 65. **Erection, alteration, repairs and improvements of state hospital buildings.**—All plans and specifications for the erection, alteration, repairs and improvements of state hospital buildings shall be prepared by the state architect, but the supervising engineer of the state commission in lunacy may, when directed by the commission, prepare plans and specifications for the installation, alteration, repairs and improvements of the mechanical appliances and fixtures in the existing state hospitals, which before adoption shall be approved by the state architect. The state commission in lunacy shall adopt or reject any such plans or specifications and no such work shall be begun until the plans and specifications therefor have been adopted, but before the adoption thereof the commission shall submit the same to the board of managers of such hospital, and shall allow such board a period of not less than fifteen, and not more than sixty days in which to submit a statement of their opinions and suggestions in regard thereto. Contracts for such erection, alteration, repairs and improvements as may be let by the commission, subject to the approval of the governor, and comptroller, for the whole or any part of the work to be performed, and in the discretion of the commission such contracts may be sublet. Special orders for such work in amounts less than one thousand dollars may be issued by the state architect upon authorization by the commission. The commission shall determine to what extent and for what length of time advertisements are to be inserted in newspapers for proposals for the erection, alteration, repairs or improvements of state hospital buildings. A preliminary deposit, or certified check drawn upon some legally incorporated bank in this state shall in all cases be required as an evidence of good faith upon all proposals for buildings, alterations, repairs or improvements, to be deposited with the treasurer of the hospital for which the work is to be performed, in an amount to be determined by the state architect, but the work done by special orders in an amount less than one thousand dollars need have no such deposit or check provided payment is to be made only after the work is completed and approved. All contracts in an amount greater than one thousand dollars shall have the performance thereof secured by a sufficient bond or bonds to be approved by and filed with the

commission. In all cases in which the contracts to be let are for the purpose of connecting any such institution with the system or line or lines maintained or operated by any public service corporation or repairing or improving any such connection, such public service corporation shall not be required to make the preliminary deposit or to give the certified check upon submitting its proposal as hereinbefore provided, nor to give any bond for the performance of the work, nor shall any advertising for proposals be necessary where the public service corporation is to perform the work. The work or erection, alteration, repairs or improvements of any building or plant may be done by the employment of inmates or outside labor, either or both, and by the purchase of materials in the open market whenever in the opinion of the commission and state architect such course shall be more advantageous to the state, but no compensation shall be allowed for the employment of inmate labor. Where money is appropriated for any specific purpose other than maintenance and the work, materials, furniture, apparatus or other supplies are not to be performed or purchased pursuant to contract or special order duly made therefor, such money shall be expended pursuant to special fund estimates made to the commission by the superintendent of the hospital for which such appropriation is made. The law governing the revision of estimates of the expenditures required for the state hospitals for the insane shall apply to such estimates, and when such work is to be performed in accordance with the plans and specifications prepared by the state architect or is to be paid for from appropriations for the erection, alteration, repairs or improvements of buildings or plant, such estimates shall also be subject to his approval. Except as above specified all such work shall be done by contract or special order. The form of the contract or special order shall be prescribed by the state architect. All payments on contracts or special orders shall be made on the certificate of the state architect approved by the commission as the work progresses or the purchase of material is made and upon bills duly certified. No item of an appropriation made for the performance of such work shall be available except for advertising unless one or more contracts, special orders or special fund estimates shall first have been made for the completion of such work within the appropriation therefor. All contracts for the erection, alteration, repairs or improvements of hospitals shall contain a clause that the contract shall only be deemed executory to the extent of the moneys available, and no liability shall be incurred by the state beyond the moneys available for the purpose. If an appropriation be made for the erection, alteration, repairs or improvements of buildings or plant in an appropriation act specifying two or more objects for which the appropriation is made and any one of such objects shall have been accomplished for a sum less than the amount specified in the act, the unexpended balance shall be applicable to the completion of any other work specified in the act, provided that after due advertisement no bids shall have been received within the amount specifically appropriated therefor. (*Amended by L. 1911, ch. 768.*)

L. 1909, ch. 32. Commitment, custody and discharge of insane. §§ 66, 80.

Source.—Former Insanity L. (L. 1896, ch. 545) § 53, as added by L. 1900, ch. 380, § 5; amended by L. 1902, ch. 26; L. 1905, ch. 490; L. 1907, ch. 325.

Construction of section with section 49 of the State Charities Law. Opinion of Atty. Genl. (1913) 70.

Preparation of plans and specifications; employment of engineer.—The State Hospital Commission is not authorized to employ a mechanical engineering firm for the preparation of plans and specifications and for the purpose of supervising the engineering work required for buildings at Mohansic State Hospital, Central Islip State Hospital and Manhattan State Hospital. Rept. of Atty. Genl. (1912), Vol. 2, p. 402.

Payment for work from emergency fund.—Rept. of Atty. Genl. (1910) 703.

§ 66. Streets and railroads through hospital lands.—No public street or road for railroad or other purposes shall be opened through the lands of a state hospital, unless the legislature by special law consents thereto.

Source.—Former Insanity L. (L. 1896, ch. 545) § 54, as added by L. 1902, ch. 26, § 24.

Improvement of state road.—L. 1902, ch. 275, authorizes the lunacy commission to consent to the improvement of a state road across or along the Binghamton hospital grounds, notwithstanding this section.

Grant of land of state hospital for railroad or other purposes.—Rept. of Atty. Genl. (1901) 337, 339.

ARTICLE IV.

COMMITMENT, CUSTODY AND DISCHARGE OF THE INSANE.

Section 80. Order for commitment of an insane person.

81. Medical examiners in lunacy; certificates of lunacy.
82. Proceedings to determine the question of insanity.
83. Review of proceedings and order of commitment.
84. Costs of commitment.
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87. Duties of local officers in regard to their insane.
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91. Transfer of patients when hospital is overcrowded.
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94. Discharge of patients.
95. Clothing and money to be furnished discharged patients.
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99. Voluntary patients in state hospitals.

§ 80. Order for commitment of an insane person.—A person alleged to

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be insane and who is not in confinement on a criminal charge, may be committed to and confined in an institution for the custody and treatment of the insane, upon an order made by a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district, in which the alleged insane person resides or may be, adjudging such person to be insane, upon a certificate of lunacy made by two qualified medical examiners in lunacy, accompanied by a verified petition therefor, or upon such certificate and petition, and after a hearing to determine such question, as provided in this article. The commission shall prescribe and furnish blanks for such certificates and petitions, which shall be made only upon such blanks. An insane person shall be committed only to a state hospital, a duly licensed institution for the insane, or the Matteawan state hospital, or to the care and custody of a relative or committee, as herein-after provided. No idiot shall be committed to or confined in a state hospital. But any epileptic or feeble-minded person becoming insane may be committed as an insane person to a state hospital for custody and treatment therein.

Source.—Former Insanity L. (L. 1896, ch. 545) § 60; originally revised from L. 1874, ch. 446, tit. 1, § 1.

Reference.—Enumeration of courts of record authorized to grant orders of commitment, Judiciary Law, § 2.

Jurisdiction.—The fact that this section requires the certificate to be approved by a judge of the county or judicial district in which the alleged lunatic resides does not deprive a justice of the supreme court, who approves the certificate under which the alleged lunatic is detained, of jurisdiction where she is a nonresident of the state. *Emmerick v. Thorley* (1898), 35 App. Div. 452, 54 N. Y. Supp. 791.

Insane epileptics must be committed to a state hospital for the insane in the manner prescribed in the Insanity Law. L. 1911, ch. 588, adding section 114 to the State Charities Law, applies only to a class of patients who are mentally deficient but not insane. *Rept. of Atty. Genl.* (1912) 320.

Physician's certificate.—Order for commitment of insane person cannot be made without physician's certificate setting forth the insanity. *Hurlehy v. Martine* (1890), 31 N. Y. St. Rep. 471, 10 N. Y. Supp. 92.

Notice.—An order of commitment without notice may, because of a suppression of facts, be vacated at a special term held by the judge granting it. *Matter of Egan* (1898), 36 App. Div. 47, 55 N. Y. Supp. 105.

Domicile of an insane person committed to an asylum.—Where an insane person was committed to an insane asylum by virtue of an order of commitment made in New York county, where he resided at the time of commitment, he does not lose his residence in that county by reason of the removal of the asylum and its inmates to Westchester county. The detention of such incompetent cannot be regarded as his voluntary act and the removal of the institution may not be taken as evidence of an intent on the part of either the lunatic or his committee to change his domicile. This is especially so where the incompetent has not been transferred with the sanction of the court to Westchester county in the personal custody of his committee or with a private family. Therefore his personal estate is taxable in New York county. *City of New York v. Brinckerhoff* (1909), 63 Misc. 445, 118 N. Y. Supp. 449.

Liability of judge for false imprisonment.—Where a judge in the proceeding be-

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fore him as to the commitment of an alleged insane person, errs in his judgment as to whether the facts presented to him do or do not confer jurisdiction upon him to act, he is not liable for damages for false imprisonment. *Ayers v. Russell* (1888), 50 Hun 287, 3 N. Y. Supp. 338.

Section cited.—*People ex rel. Peabody v. Chanler* (1909), 133 App. Div. 159, 168, 117 N. Y. Supp. 322, *affd.* (1909), 196 N. Y. 525, 89 N. E. 1109, 25 L. R. A. (N. S.) 946; *People ex rel. Reiblich v. Waldo* (1914), 162 App. Div. 417, 147 N. Y. Supp. 286; *City of New York v. Brinckerhoff* (1909), 63 Misc. 445, 118 N. Y. Supp. 449; *Matter of Rabinovitch* (1911), 70 Misc. 288, 128 N. Y. Supp. 567.

§ 81. **Medical examiners in lunacy; certificates of lunacy.**—The certificate of lunacy must show that such person is insane and must be made by two reputable physicians, graduates of an incorporated medical college, who have been in the actual practice of their profession at least three years, and have filed with the commission a certified copy of the certificate of a judge of a court of record, showing such qualifications in accordance with forms prescribed by the commission.

Such physicians shall jointly make a final examination of the person alleged to be insane within ten days next before the granting of the order. The date of the certificate of lunacy shall be the date of such joint examination. Such certificate of lunacy shall be in the form prescribed by the commission, and shall contain the facts and circumstances upon which the judgment of the physicians is based and show that the condition of the person examined is such as to require care and treatment in an institution for the care, custody and treatment of the insane.

Neither of such physicians shall be a relative of the person applying for the order or of the person alleged to be insane, or a manager, superintendent, proprietor, officer, stockholder, or have any pecuniary interest, directly or indirectly, or be an attending physician in the institution to which it is proposed to commit such person.

Source.—Former Insanity L. (L. 1896, ch. 545) § 61; originally revised from L. 1874, ch. 446, tit. 1, §§ 1, 2; L. 1890, ch. 273, § 7.

Reference.—Record of medical examiners, Insanity Law, § 14.

Certificate of physician does not of itself authorize commitment. *Hurlehy v. Martine* (1890), 31 N. Y. St. Rep. 471, 10 N. Y. Supp. 92. Certificate may be made by physicians of three years' practice, either within or without the state. *Rept. of Atty. Genl.* (1899) 131.

Two physicians may unite in one certificate of insanity or may make two. *Matter of Approval of Medical Certificates* (1889), 28 N. Y. St. Rep. 144, 7 N. Y. Supp. 671.

When there are two physicians' certificates of insanity they need not be sworn to on the same day or before the same judge, it being sufficient if they are approved within five days. *Matter of Medical Certificates* (1889), 28 N. Y. St. Rep. 144, 7 N. Y. Supp. 671.

The State Commission may refuse to file certificate of qualifications of a physician, where it is in possession of facts that the physician does not possess necessary requirements or has falsely sworn before the judge of a court of record. *Rept. of Atty. Genl.* (1911) 61.

Liability of physicians.—Physicians acting in the commitment of insane persons, and signing certificates to the effect that such persons are insane, are not, in theory

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of law, judicial officers, but medical experts; and they are not clothed with judicial immunity, but are chargeable for that neglect which, in the case of a professional expert, renders him liable for the failure to use the care and skill which his profession, *per se*, implies that he will bring to his professional work. *Ayers v. Russell* (1888), 50 Hun 282, 3 N. Y. Supp. 338.

For proposition generally as to liability of physician for error or malpractice and degree of care to be exercised, see *Carpenter v. Blake* (1878), 75 N. Y. 12; *Barton v. Govan* (1886), 42 Hun 655, 4 N. Y. St. Rep. 876, *affd.* (1889), 116 N. Y. 658, 22 N. E. 556; *Hurlehy v. Martine* (1890), 31 N. Y. St. Rep. 471, 10 N. Y. Supp. 92; *McCandless v. McWha* (1853), 22 Penn. St. 261; *Holtzman v. Hoy* (1886), 19 Ill. App. 459; *Long v. Morrison* (1860), 14 Ind. 595; *Jones v. Angell* (1883), 95 Ind. 376; *Hall v. Semple* (1862), 3 Fost. & Fin. 337.

A certificate and approval of a judge will protect examiners in lunacy in the absence of negligence or fraud. *Emmerick v. Thorley* (1898), 35 App. Div. 452, 54 N. Y. Supp. 791.

§ 82. Proceedings to determine the question of insanity.—1. Any person with whom an alleged insane person may reside or at whose house he may be, or the father or mother, husband or wife, brother or sister, or the child of any such person, or the next of kin available, or the committee of such person, or an officer of any well-recognized charitable institution or home, or any overseer of the poor of the town, or superintendent of the poor of the county in which any such person may be, may apply for such order, by presenting a verified petition containing a statement of the facts upon which the allegation of insanity is based, and because of which the application for the order is made. Such petition shall be accompanied by the certificate of lunacy of the medical examiners, as prescribed in the preceding section. Notice of such application shall be served personally, at least one day before making such application, upon the person alleged to be insane, and if made by an overseer or superintendent of the poor, also upon the husband or wife, father or mother or next of kin of such alleged insane person, if there be any such known to be residing within the county, and if not, upon the person with whom such alleged insane person may reside, or at whose house he may be. The judge to whom the application is to be made may dispense with such personal service, or may direct substituted service to be made upon some person to be designated by him. He shall state in a certificate to be attached to the petition his reason for dispensing with personal service of such notice, and if substituted service is directed, the name of the person to be served therewith.

The judge to whom such application is made may, if no demand is made for a hearing in behalf of the alleged insane person, proceed forthwith to determine the question of insanity, and if satisfied that the alleged insane person is insane, may immediately issue an order for the commitment of such person to an institution for the custody and treatment of the insane. If, however, it appears that such insane person is harmless and his relatives or a committee of his person are willing and able to properly care for him, at some place other than such institution, upon their written consent, the judge may order that he be placed in the care and custody of such relatives

or such committee. Such judge may, in his discretion, require other proofs in addition to the petition and certificate of the medical examiners.

Upon the demand of any relative or near friend in behalf of such alleged insane person, the judge shall, or he may upon his own motion, issue an order directing the hearing of such application before him at a time not more than five days from the date of such order, which shall be served upon the parties interested in the application and upon such other persons as the judge, in his discretion, may name. Upon such day, or upon such other day to which the proceedings shall be regularly adjourned, he shall hear the testimony introduced by the parties and examine the alleged insane person if deemed advisable, in or out of court, and render a decision in writing as to such person's insanity. If it be determined that such person is insane, the judge shall forthwith issue his order committing him to an institution for the custody and treatment of the insane, or make such other order as is provided in this section. If such judge cannot hear the application he may, in his order directing the hearing, name some referee, who shall hear the testimony and report the same forthwith, with his opinion thereon, to such judge, who shall, if satisfied with such report, render his decision accordingly. If the commitment be made to a state hospital, the order shall be accompanied by a written statement of the judge as to the financial condition of the insane person and of the persons legally liable for his maintenance as far as can be ascertained. The superintendent of such state hospital shall be immediately furnished with such commitment, and he shall, at once, make provisions for the transfer of such insane person to such hospital.

The petition of the applicant, the certificate in lunacy of the medical examiners, the order directing a further hearing as provided in this section, if one be issued, and the decision of the judge or referee, and the order of commitment shall be presented at the time of the commitment to the superintendent or person in charge of the institution to which the insane person is committed and verbatim copies shall be forwarded by such superintendent or person in charge and filed in the office of the state hospital commission. The relative, or committee, to whose care and custody any insane person is committed, shall forthwith file the petition, certificate and order, in the office of the clerk of the county where such order is made, and transmit a certified copy of such papers, to the commission and procure and retain another such certified copy.

The superintendent or person in charge of any institution for the care and treatment of the insane may refuse to receive any person upon any such order, if the papers required to be presented shall not comply with the provisions of this section, or if in his judgment, such person is not insane within the meaning of this statute, or if received, such person may be discharged by the commission. No person shall be admitted to any such institution under such order after the expiration of ten days from and inclusive of the date thereof. Notwithstanding the requirements of this

section that an alleged insane person be duly committed by an order of the court, in a case where the condition of such person is such that it would be for his benefit to receive immediate care and treatment, or where there is no other proper place available for his care and treatment, or if he is dangerously insane so as to render it necessary for public safety that he be immediately confined, he shall be forthwith received by a state or licensed private institution authorized by law to care for the insane. In such case such insane person shall be so received by such institution upon a certificate of lunacy, executed by two medical examiners in lunacy after the examination and in the manner provided in the preceding section, and upon a petition made by the person authorized by this section to apply to a court for an order of commitment. By virtue of such certificate of lunacy and such petition such insane person may be retained in such institution for a period not to exceed ten days. Prior to the expiration of such time an order for his commitment must be obtained in the manner provided by this section. The certificate of lunacy executed by such physicians must contain adequate reasons why the insane person should be immediately received in an institution for the insane for treatment. The superintendent or person in charge of any such institution may refuse to receive such insane person upon such certificate and petition, if in his judgment the reasons stated in the certificate are not sufficient or the condition of the patient is not of such character, as to make it necessary that the patient should receive immediate treatment.

2. The superintendent of any state hospital for the insane may, when requested by a health officer, receive and care for in such hospital as a patient, for a period not exceeding ten days, any person who needs immediate care and treatment because of mental derangement other than delirium tremens or drunkenness. Such request for admission of a patient shall be in writing and shall be filed at the hospital at the time of his reception, together with a statement in a form prescribed or approved by the state hospital commission giving such information as said commission may deem appropriate. Any such patient who is deemed by the superintendent not suitable for such care shall, upon the formal request of the superintendent, be removed forthwith from the hospital by the health officer requesting his reception, and, if he is not so removed, the town, city or county in which the patient has a legal settlement as provided by article four of chapter forty-six of the laws of nineteen hundred and nine, and in case such person has gained no legal settlement then the county in which such person may be previous to the time of admission, shall be liable forthwith for all reasonable expenses incurred under the provisions of this subdivision on account of such patient. Unless the patient shall sign a request to remain as a voluntary patient under the provisions of section ninety-nine of this chapter, the health officer making application shall cause such patient to be examined by two medical examiners in lunacy, qualified as provided in the preceding section, and if found insane shall cause him to be duly com-

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mitted by any judge of a court of record, or, if found sane, shall cause him to be removed therefrom before the expiration of said period of ten days. Reasonable expenses incurred for the examination of the patient and his transportation to and from the hospital shall be allowed and certified by the judge or justice ordering the commitment and shall be a charge upon the town, city or county as provided in this subdivision. A report of the admission of a patient for observation under the provisions of this subdivision together with copy of formal statement of health officer shall be mailed to the state hospital commission within twenty-four hours after such admission. (*Amended by L. 1912, ch. 121, and L. 1914, ch. 307.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 62, as amended by L. 1903, ch. 146; originally revised from L. 1874, ch. 446, tit. 1, §§ 1-4, 12; L. 1890, ch. 273, § 7.

Consolidators' note.—Last three lines rewritten without change of meaning to simplify an awkward construction.

References.—Provisions for inquisition in lunacy and the appointment, powers and duties of committees, Code of Civ. Pro. §§ 2320-2364. Duties of commission and poor officers as to commitment of persons other than the poor and indigent, Insanity Law, § 86. Hospitals to which patients are to be committed, Id. § 87. Commitment of dangerous insane persons, Id. § 88.

Constitutionality.—This section is not unconstitutional as permitting a person to be deprived of his liberty without due process of law. *Matter of Walker* (1900), 57 App. Div. 1, 67 N. Y. Supp. 647; *Parker v. Willard State Hospital* (1900), 50 App. Div. 622, 63 N. Y. Supp. 1113. This section, authorizing a commitment without notice to the alleged incompetent, is constitutional. *Matter of Andrews* (1908), 126 App. Div. 794, 799, 111 N. Y. Supp. 417.

The provision which permits a judge on committing an incompetent on petition of an overseer of the poor to dispense wholly with notice, does not deprive the incompetent of his constitutional rights. *Brayman v. Grant* (1909), 130 App. Div. 272, 114 N. Y. Supp. 336.

An *ex parte* order made under this section perpetually committing an alleged insane person to the custody of her sister, without notice of the application being given to the insane person or any direction by the court that such notice be dispensed with, and without any hearing having been had at which she was present or represented by any other person, is absolutely void, as the insane person has been deprived of her liberty without due process of law, and this section, in so far as it permits such practice, is in violation of the Constitution. *People ex rel Sullivan v. Wendel* (1900), 33 Misc. 496, 68 N. Y. Supp. 948.

Who may make application.—A son-in-law of an alleged insane person may not make an application for his commitment to an insane asylum, and where an order of commitment upon such an application is made, it constitutes no protection to a defendant against whom an action is brought for false imprisonment. *Washer v. Slater* (1901), 67 App. Div. 385, 73 N. Y. Supp. 425.

The overseer of the poor of a town or a superintendent of the poor of a county, while required to report cases of indigent insane to the health officer, may also apply direct to the court for an order for the commitment of such insane person in the manner prescribed by section 82 of the Insanity Law. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 431.

The superintendent of the Craig Colony may institute proceedings to have an inmate of said colony adjudged insane. *Rept. of Atty. Genl.* (1910) 696.

Notice of an application to place a person in an asylum or sanitarium should be given so that the person to be deprived of his liberty may have an opportunity of

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being heard. *Page v. Page* (1908), 124 App. Div. 421, 423, 108 N. Y. Supp. 864, *affd.* (1909), 195 N. Y. 540, 88 N. E. 1127.

It can only be in a case where the judge is satisfied that the condition of the alleged lunatic is such that the service of the notice or the delay would cause substantial injury to the lunatic or others that a judge is justified in making an order dispensing with notice of the application. *Matter of Egan* (1898), 36 App. Div. 47, 55 N. Y. Supp. 105.

It is within the discretion of the court to dispense with notice where it appears by the affidavit of physicians that service of notice would excite and harm the alleged incompetent. *Matter of Andrews* (1908), 126 App. Div. 794, 799, 111 N. Y. Supp. 417.

When one has been duly adjudged insane, personal notice may be dispensed with, if it appears that such service would be prejudicial to his mental condition. But for the protection of those who are sane, it ought not to be tolerated that any person should be adjudged insane, and finally committed, without either notice or actual hearing. *People ex rel. Sullivan v. Wendel* (1900), 33 Misc. 496, 68 N. Y. Supp. 948. See also *Look v. Choate* (1871), 108 Mass. 116.

Protection of lunatic.—The justice not only has the power, but it is his duty, in a proceeding which involves the detention of an individual in a lunatic asylum, to see to it that such a proceeding shall not be used in an oppressive manner or for any ulterior object. *Matter of Egan* (1898), 36 App. Div. 47, 55 N. Y. Supp. 105.

Where a commitment is made under this section, it need not be found by the judge that the incompetent is a dangerous man in the community as required by §§ 86 and 88. *Brayman v. Grant* (1909), 130 App. Div. 272, 114 N. Y. Supp. 336.

Provisions of Code of Civil Procedure not applicable.—An application for the commitment of an insane person to a state hospital is not a special proceeding as defined by § 3334 of the Code of Civil Procedure. The application is not governed by the general provisions of the Code relating to such proceedings. *Matter of Murtaugh* (1907), 117 App. Div. 302, 102 N. Y. Supp. 176.

Section cited.—*City of New York v. Brinckerhoff* (1909), 63 Misc. 445, 118 N. Y. Supp. 449. Cited in connection with section 80, *ante*. *City of New York v. Brinckerhoff* (1909), 63 Misc. 445, 118 N. Y. Supp. 449.

§ 83. **Review of proceedings and order of commitment.**—If a person ordered to be committed, pursuant to this chapter, or any relative or friend in his behalf, be dissatisfied with the final order of a judge or justice committing him, he may, within thirty days after the making of such order, obtain a rehearing and a review of the proceedings already had and of the order of commitment, upon petition to a justice of the supreme court other than the justice making the order of commitment, who shall cause a jury to be summoned as in the case of proceedings for the appointment of a committee for an insane person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the insanity of the person so committed in the same manner as provided in said proceedings. If such petition for rehearing and review be made by any other than the person so committed or the father, mother, husband, wife or child of such person or the person with whom the person committed was residing at the time of such commitment or accustomed to reside, before such rehearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses of such rehearing, review and determina-

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tion of the question of insanity by a jury as aforesaid if the order of commitment is sustained. If the verdict of the jury be that such person is sane, the justice shall forthwith discharge him, but if the verdict of the jury be that such person is insane, the justice shall certify that fact and make an order of recommitment as upon the original hearing. Such order shall be presented, at the time of the recommitment of such insane person, to, and filed with, the superintendent or person in charge of the institution to which the insane person is committed, and a copy thereof shall be forwarded to the commission by such superintendent or person in charge and filed in the office thereof. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court, and made upon a notice, and after a hearing, with provisions made therein for such temporary care or confinement of the alleged insane person as may be deemed necessary. If a judge or justice shall refuse to grant an application for an order of commitment of an insane person proved to be dangerous to himself or others, if at large, he shall state his reasons for such refusal in writing, and any person aggrieved thereby may obtain a rehearing and review and the determination of the question of insanity by a jury in the same manner and under like conditions as from an order of commitment. (*Thus amended by L. 1909, ch. 155.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 63; originally revised from L. 1874, ch. 446, tit. 1, § 11.

Right to jury trial.—The right of a person of disordered mind to a trial by jury is a statutory one and is not contemplated by the provision of the bill of rights, as adopted in our Constitution. A person in such a state is not regarded in the light of a criminal. He becomes in fact the ward of the state and is detained for no other motive than for his personal benefit. The right of trial by jury is preserved to such a person only by his complying with the requirements of the statute. *Sporza v. German Savings Bank* (1908), 192 N. Y. 8, 84 N. E. 406, affg. (1907), 119 App. Div. 172, 104 N. Y. Supp. 260; but see opinion of Willard Bartlett, J.

§ 84. **Costs of commitment.**—The costs necessarily incurred in determining the question of the insanity of a poor or indigent or other person under this chapter, or under section twenty-six of chapter four hundred and forty-six of the laws of eighteen hundred and seventy-four, including the fees allowed by the judge or justice ordering the commitment to the medical examiners or medical witnesses called by him and other necessary expenses, and in securing the admission of such person into a state hospital and the expense of providing proper clothing and proper medical care and nursing, for such person in accordance with the rules and regulations adopted by the commission, shall be a charge upon the town, city or county securing the commitment; but in the city of New York all fees of medical examiners and medical witnesses appointed or called by a judge of any court in said city for the purpose of determining the question of the insanity of any such person, and not heretofore paid, may be audited and allowed in the first instance either by the judge or justice appointing the medical examiners or by the comptroller of said city and shall be paid by the chamberlain of said

city on the warrant of the comptroller from the court fund and charged to the proper county within said city. If the person sought to be committed is not a poor or indigent person, the costs and expenses of the proceeding to determine his insanity and secure his commitment paid by any town, city or county may be collected by it from the estate of such person, or from the persons legally liable for his maintenance, and the same shall be a charge upon the estate of such person, or the same shall be paid by the persons legally liable for his maintenance. The compensation or fees and expenses of health officers for duties performed in respect to the examination, confinement, care and treatment of insane or alleged insane persons, as required by this act, shall in each case be determined and allowed by the judge or justice ordering the commitment or hearing the application, and shall be a charge upon the town, city or county in which such persons reside or may be. If the fees and expenses so determined and allowed are a charge upon the county or town, such judge or justice shall issue a certificate stating the amount thereof, to whom to be paid, and whether a charge upon the county or a town, and if the latter, the name of the town, which shall be presented to the county treasurer and be paid by him out of any moneys available for such purpose. The county treasurer shall report the amount paid by him on account of such fees and expenses to the board of supervisors, and the amount thereof which is chargeable against any town in the county shall be levied against the taxable property thereof in the same manner as other town charges are levied. If there is no money in the county treasury available for the payment of such fees and expenses, the county treasurer is hereby authorized and directed to borrow on the credit of the county a sum sufficient to pay such fees and expenses, and may issue certificates of indebtedness therefor, the principal and interest of which, at a rate not exceeding six per centum, shall be binding upon the county, and shall be paid in the same manner as other county obligations. If the compensation or fees and expenses of health officers as so determined and allowed are a charge upon a city they shall be paid in the same manner as the other expenses of the health department or bureau in such city. (*Amended by L. 1910, ch. 608.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 64, as amended by L. 1904, ch. 428.

Reference.—Costs are in discretion of Court, Code of Civ. Pro. § 3240.

Effect of amendment of 1904.—By the amendment of 1904 the provisions for awarding excessive costs against petitioner were stricken out; where such costs have been charged the petitioner is entitled to relief upon motion before the surrogate. *Matter of Murtaugh* (1907), 117 App. Div. 302, 102 N. Y. Supp. 176.

Health officers' fees.—A health officer receiving a salary is entitled to the fees specified in this section in addition to such salary. *Rept. of Atty. Genl.* (1911) 308.

Fees of medical examiners.—The commissioner of public charities of the boroughs of Brooklyn and Queens is required to take proper measures to determine as to the insanity of persons who have been committed to the custody of the sheriff of Queens county and under this section the fees of medical examiners are to be paid by the city securing the commitment. It follows, therefore, that a physician

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may recover against the city of New York for services rendered as an examiner in lunacy at the request of the sheriff of Queens county. *Strong v. City of New York* (1905), 110 App. Div. 188, 96 N. Y. Supp. 1083.

Stenographer's fees at the rate of twenty cents a folio for taking and transcribing 1,984 folios of testimony will be approved. *Matter of Murtaugh* (1911), 71 Misc. 513, 128 N. Y. Supp. 850.

§ 85. Liability for care and support of poor and indigent insane.—All poor and indigent insane persons not in confinement under criminal proceedings, shall, without unnecessary delay, be transferred to a state hospital and there wholly supported by the state. The costs necessarily incurred in the transfer of patients to state hospitals shall be a charge upon the state. The commission shall, except as hereinafter provided, secure from the patient's estate and from relatives or friends who are liable or may be willing to assume the costs of support of inmates of state hospitals supported by the state, reimbursement at the rate fixed by the commission, in whole or in part, of the money thus expended, either directly or through the superintendents or treasurers of the respective hospitals, as provided in section fifty-four of this chapter. The commission may, in its discretion, waive the whole or a portion of the claim of the state for the cost of the support of a patient against the estate of such patient, whenever the court by which a committee was appointed shall have directed such committee to apply any part of the patient's estate for the maintenance of his family. The commission may appoint agents, whose duty it shall be to secure from relatives and friends who are liable therefor, or who may be willing to assume the cost of support of any inmate of a state hospital who is being supported by the state, reimbursement, in whole or in part, of the money so expended. The compensation of each agent shall not exceed five dollars a day, except the agent in charge of collections in New York city which shall not exceed six dollars a day. Each agent shall receive his necessary traveling and other incidental expenses incurred by him, to be approved by the comptroller. The commission may fix the rate to be paid for the support of an inmate of a state hospital by the committee of such inmate or by relatives liable for such support or by those not liable for such support, but willing to assume the cost thereof; but such rate shall be sufficient to cover a proper proportion of the cost of maintenance and of necessary repairs and improvements. The maintenance of any inmate of a state hospital, committed thereto upon a court order arising out of any criminal action, shall be paid by the county from which such inmate was committed. (*Amended by L. 1910, ch. 389, L. 1911, ch. 768, and L. 1917, ch. 355, in effect July 1, 1917.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 65, as amended by L. 1900, ch. 380; L. 1901, ch. 546; originally revised from L. 1890, ch. 126, § 11.

References.—Treasurer of state hospital may maintain action to recover money for maintenance, Insanity Law, § 54. Relatives of poor and indigent insane may be compelled to pay for their maintenance, Code Criminal Procedure, §§ 914-920.

Recovery for past support.—A person receiving aid as a poor person from the

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Officers of the poor, in the absence of representation on his part as to his responsibility or physical condition, incurs no liability to repay the amount expended in his behalf; but after commitment to a state hospital for the insane, the state may recover for cost of his maintenance, from time of his reception at such institution from a committee appointed subsequent to such commitment. *City of Albany v. McNamara* (1889), 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212; *County of Oneida v. Bartholomew* (1894), 82 Hun 80, 31 N. Y. Supp. 106, *affd.* (1897), 151 N. Y. 655, 46 N. E. 1150; *Agricultural Ins. Co. v. Barnard* (1884), 96 N. Y. 525.

The maintenance of insane patients in state hospitals is to be made a charge against the state *only* where the estate of such patients is insufficient for the purpose, and the state commission in lunacy may not waive charges against such estate for the support of the husband or wife and children of such patients. *Rept. of Atty. Genl.* (1909) 932.

The care of a lunatic after the expiration of his sentence is a state charge. *Rept. of Atty. Genl.* (1900) 245.

Right of recovery statutory.—In the absence of statute, the state cannot recover from a father, the cost of support of his son. *Matter of Saint Lawrence State Hospital* (1897), 13 App. Div. 436, 43 N. Y. Supp. 608.

Preference of claim of State for maintenance of incompetent.—Where upon the accounting of the committee of an incompetent, a balance remains after the payment of expenses and disbursements, the claim of the State for maintenance of the incompetent at a State hospital is preferred over claims of general creditors, existing at the time of the appointment of the committee, although at the time the incompetent was admitted to the State hospital she was insolvent and indigent. *Matter of Wesley* (1913), 156 App. Div. 403, 141 N. Y. Supp. 1031.

§ 86. Liability for the care and support of the insane other than the poor and indigent.—The father, mother, husband, wife and children of an insane person, if of sufficient ability, and the committee or guardian of his person and estate, if his estate is sufficient for the purpose, shall cause him to be properly and suitably cared for and maintained. The commission and the health officer of the city, town or village where any such insane person may be, or in the city of New York and in the county of Albany, the commissioners of public charities, may inquire into the manner in which any such person is cared for and maintained; and if, in the judgment of any of them, he is not properly or suitably cared for, may apply, or cause application to be made, to a judge of a court of record for an order to commit him to a state hospital under the provisions of this article, but such order shall not be made unless the judge finds and certifies in the order that such insane person is not properly or suitably cared for by such relative or committee, or that it is dangerous to the public to allow him to be cared for and maintained by such relative or committee. The costs and charges of the commitment and transfer of such insane person to a state hospital shall be paid by the committee, or the father, mother, husband, wife or children of such person, to be recovered in an action brought in the name of the people by the commission, or in the name of the county, city or town, where such insane person resides or may be, by the proper officer thereof, or in the city of New York or in the county of Albany in the name of the commissioner of public charities. In all claims of the state upon relatives

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liable for the support of a patient, or upon moneys or property held by said patient, the state shall be deemed a preferred creditor. (*Amended by L. 1910, ch. 608.*

Source.—Former Insanity L. (L. 1896, ch. 545) § 66, as amended by L. 1900, ch. 380; originally revised from L. 1874, ch. 446, tit. 1, §§ 12, 13; tit. 3, § 30.

References.—Liability of relatives for support of insane persons, Code Crim. Pro. §§ 914-920.

Remedy statutory.—The remedy against relatives of a lunatic for his past expenses is statutory and must be enforced in the manner provided by the statute. *Matter of Saint Lawrence State Hospital* (1897), 13 App. Div. 436, 43 N. Y. Supp. 608; *County of Oneida v. Bartholomew* (1894), 82 Hun 80, 31 N. Y. Supp. 106, *affd.* (1897), 151 N. Y. 655, 46 N. E. 1150.

Under the act of 1874, ch. 446, it was held that the county could not recover from an insane person the cost of his support in a county asylum. *County of Oneida v. Bartholomew* (1894), 82 Hun 80, 31 N. Y. Supp. 106, *affd.* (1897), 151 N. Y. 655, 46 N. E. 1150. But in *Agricultural Ins. Co. v. Barnard* (1884), 96 N. Y. 525, under the same statute, it was held that an insane person was liable for his support in a state asylum.

The expense of supporting an indigent insane person, not a pauper, who has been sent to a lunatic asylum on the certificate of a county judge acting under the L. 1874, ch. 446, § 14, as amended by L. 1880, ch. 164, is a debt of the county, without regard to the places of residence therein of such indigent insane persons. *People ex rel. Town of Blenheim v. Supervisors of Schohairie* (1890), 121 N. Y. 345, 24 N. E. 830.

Where a resident of one county is committed to an asylum for insane criminals for an offense committed in another county, the latter county cannot recover from the former the expense of his support. *County of Jefferson v. County of Oswego* (1905), 102 App. Div. 232, 92 N. Y. Supp. 709, *affd.* (1906), 186 N. Y. 555, 79 N. E. 1108.

Payment from pension money.—The committee of an incompetent person should be directed to pay the state hospital, at which such person is supported and maintained, her pension money, to apply upon its current charges therefor, but not to apply upon arrears that existed at the time the first pension moneys were received by the committee. *Matter of Stroh* (1906), 51 Misc. 481, 101 N. Y. Supp. 688.

Liability of relative.—In *Long Island Hospital v. Stuart* (1897), 22 Misc. 48, 49 N. Y. Supp. 372, it was held that the Insanity Law does not make the relative liable for the cost of the support and maintenance of an insane person in a state hospital. But see Code Crim. Pro. §§ 914-920, as amended by L. 1898, ch. 399.

Liability of mother's estate for maintenance of daughter.—*Matter of Willis* (1916), 94 Misc. 29, 158 N. Y. Supp. 985.

Contract for support.—Where the father of a lunatic who was not a pauper for whose support the county was chargeable, but whom he was himself bound to support and maintain, took her to the county poorhouse, under an agreement made by him with the superintendents of the poor to pay them a specified sum per week, for her board, it was held that this was a valid contract enforceable against the father. *Alger v. Miller* (1868), 56 Barb. 227.

Actions must be brought in the name of the hospital. *Long Island Hospital v. Stuart* (1897), 22 Misc. 48, 49 N. Y. Supp. 372. Sufficiency of complaint in such an action. *Id.*

The surrogate's court has ample authority on the settlement of the accounts of an administratrix, the widow of the intestate, to consider and pass upon claims for moneys advanced by her for the maintenance of a child while in the insane

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asylum and the expenses incidental and preliminary to her confinement therein. *Matter of Morris* (1890), 32 N. Y. St. Rep. 145, 11 N. Y. Supp. 201.

Priority of claim of State institution.—See *Matter of Schwartz* (1911), 145 App. Div. 285, 130 N. Y. Supp. 74.

By the provision of this section, that "In all claims of the State upon relatives liable for the support of a patient, or upon moneys or property held by said patient, the State shall be deemed a preferred creditor," it was not intended to prefer a claim of the State for the care and maintenance of a person who was insolvent when committed to a State hospital for the insane over the pre-existing debts of such person, as such provision must be read in connection with that part of said section which provides that "The father, mother, husband, wife and children of an insane person, if of sufficient ability, and the committee or guardian of his person and estate, if his estate is sufficient for the purpose, shall cause him to be properly and suitably cared for and maintained." The committee of the personal property of an incompetent, who is simply a bailee of the court, should distribute the property equitably among the creditors of the incompetent existing at the time she was so adjudicated; and a claim of the State for her care and maintenance in a State hospital for the insane which accrued prior to the institution of the accounting proceeding of the committee is not entitled to priority of payment under section 86 of the Insanity Law which applies to obligations and "money or property" held by the estate after there is really and equitably an estate, ascertained and determined by the marshaling of the assets and the payment of debts. *Matter of Taylor* (1912), 75 Misc. 157, 134 N. Y. Supp. 1120.

Section cited.—*Matter of Wesley* (1913), 156 App. Div. 403, 141 N. Y. Supp. 1031.

§ 87. Duties of local officers in regard to their insane.—All county superintendents of the poor, overseers of the poor, health officers and other city, town or county authorities, having duties to perform relating to the poor, are charged with the duty of seeing that all poor and indigent insane persons within their respective municipalities, are timely granted the necessary relief conferred by this chapter. The poor officers or authorities above specified, except in the city of New York and in the county of Albany, shall notify the health officer of the town, city or village of any poor or indigent insane, or apparently insane person within such municipality whom they know to be in need of the relief conferred by this chapter. When so notified, or when otherwise informed of such fact, the health officer of the city, town or village, except in the city of New York and the county of Albany, where such insane or apparently insane person may be, shall see that proceedings are taken for the determination of his mental condition and for his commitment to a state hospital. Such health officer may direct the proper poor officer to make an application for such commitment, and, if a qualified medical examiner, may join in making the required certificate of lunacy. When so directed by such health officer it shall be the duty of the said poor officer to make such application for commitment. When notified or informed of any poor or indigent insane or apparently insane person in need of the relief conferred by this chapter, such health officer shall provide for the proper care, treatment and nursing of such person, as provided by law and the rules of the commission, pending the determination of his mental condition and his commitment and

until the delivery of such insane person to the attendant sent to bring him to the state hospital, as provided in this chapter. In the boroughs of Manhattan and the Bronx, in the city of New York, it shall be the duty of the trustees of Bellevue and allied hospitals, and in the boroughs of Brooklyn, Queens and Richmond, in the city of New York and also in the county of Albany, it shall be the duty of the commissioner of public charities to see that all poor and indigent insane or apparently insane persons in such boroughs or county, respectively, are properly cared for and treated. It shall also be the duty of such trustees of Bellevue and allied hospitals, or the commissioner of public charities of the city of New York or the county of Albany, to see that proceedings are taken for the determination of the mental condition of any such person in the boroughs or county mentioned, who comes under their observation or is reported to them as apparently insane, and when necessary, to see that proceedings are instituted for the commitment of such person to an institution for the care of the insane; provided that such report is made by any person with whom such alleged insane person may reside, or at whose house he may be, or by the father, mother, husband, wife, brother, sister, or child of any such person, or next of kin available, or by any duly licensed physician, or by any peace officer, or by a representative of an incorporated society doing charitable or philanthropic work. When the trustees of Bellevue and allied hospitals are thus informed of an apparently insane person, residing in the boroughs of Manhattan or the Bronx, or when the commissioner of public charities of the city of New York is thus informed of an apparently insane person residing in the boroughs of Brooklyn, Queens or Richmond, it shall be the duty of these authorities, respectively, to send a nurse or a medical examiner in lunacy, attached to the psychopathic wards of their respective institutions, or both, to the place where the alleged insane person resides or is to be found. If, in the judgment of the chief resident alienist of the respective psychopathic wards or of the medical examiner thus sent, the person is in immediate need of care and treatment or observation for the purpose of ascertaining his mental condition, he shall be removed to such psychopathic ward for a period not to exceed ten days, and the person or persons most nearly related to him, so far as the same can be readily ascertained by such trustees, or commissioner, shall be notified of such removal.

When an order of commitment has been made as provided in this chapter, such health officer, or, in the city of New York and in the county of Albany, the authorities above specified in their respective boroughs or county, shall see that such insane persons are, without unnecessary delay, transferred to the proper institutions provided for their care and treatment as the wards of the state. Before sending a person to any such institution, they shall see that he is in a state of bodily cleanliness and comfortably clothed with suitable or new clothing, in accordance with the regulations prescribed by the commission. Each patient shall be sent to

the state hospital, within the district embracing the county from which he is committed, except that the commission may, in its discretion, direct otherwise, but private or public insane patients, for whom homeopathic care and treatment may be desired by their relatives, friends or guardians, may be committed to the Middletown State Homeopathic Hospital, or the Gowanda State Homeopathic Hospital, from any of the counties of the state, in the discretion of the judge granting the order of commitment; and the hospital to which any patient is ordered to be sent shall, by and under the regulations made by such commission, send a trained attendant to bring the patient to the hospital. Each female committed to any institution for the insane shall be accompanied by a female attendant, unless accompanied by her father, brother, husband or son. The commission may, by order, direct that any person it deems unsuitable therefor shall not be so employed or act as such attendant. After the patient has been delivered to the proper officers of the hospital, the care and custody of the municipality from which he is sent shall cease.

In no case shall any insane person be confined in any other place than a state hospital or duly licensed institution for the insane, for a period longer than ten days, nor shall such person be committed as a disorderly person to any prison, jail or lock-up for criminals. Except in the city of New York and the county of Albany, the health officer of the town, village or city wherein an insane or alleged insane person may be shall see that such person is cared for in a place suitable for the comfortable, safe and humane confinement of such person, pending the determination of the question of his sanity and until his transfer to a state hospital or some other proper institution for the insane as provided in this chapter. Such person shall not be confined in any such place without an attendant in charge of him, and the said health officer shall select some suitable person to act as such attendant.

The proper authorities of any such town, city or county may provide a permanent place for the reception and temporary confinement, care and nursing of insane or alleged insane persons which shall conform in all respects to the rules and requirements of the commission; all poor and indigent insane persons received at any such place for investigation of their mental condition or pending commitment and transfer to a state hospital shall be maintained therein at the expense of such town, city or county. Any person apparently insane, and conducting himself in a manner which in a sane person would be disorderly, may be arrested by any peace officer and confined in some safe and comfortable place until the question of his sanity be determined, as prescribed by this chapter. The officer making such arrest shall immediately notify the health officer of the town, village or city, except in the city of New York and in the county of Albany, who shall forthwith take proper measures for the determination of the question of the insanity of such person, and for his proper care and treatment as provided in this section, pending his transfer to an institution for the

insane. Whenever in the city of New York an information is laid before a magistrate that a person is apparently insane the magistrate must issue a warrant directed to the sheriff of the county in which the information is made, or any marshal or policeman of the city of New York, reciting the substance of the information, and commanding the officer forthwith to arrest the person alleged to be insane, and bring him before the magistrate issuing the warrant. If upon arraignment it appears to the magistrate issuing the warrant that the person so arraigned before him is apparently insane it shall be the duty of the magistrate, if such information is laid in the boroughs of Manhattan and the Bronx, to commit such apparently insane person to the care and custody of the board of trustees of Bellevue and allied hospitals at Bellevue hospital, and therein kept in a safe and comfortable place until the question of his sanity be determined as prescribed by this chapter, and in the boroughs of Brooklyn, Queens and Richmond the said magistrate shall commit such apparently insane person to the care of the commissioner of public charities who shall keep such person in a safe and comfortable place until the question of his sanity be determined as herein prescribed. Whenever in the city of New York a person is committed as apparently insane as above provided it shall be the duty of the board of trustees of Bellevue and allied hospitals or the commissioner of public charities, as the case may be, to forthwith take proper measures for the determination of the question of the insanity of such person. (*Amended by L. 1910, ch. 608 and L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 67, as amended by L. 1899, ch. 481; L. 1903, ch. 146; originally revised from L. 1874, ch. 446, tit. 3, § 23; L. 1890, ch. 126; L. 1893, ch. 214, § 5.

New clothing.—Regulation, with the view to preventing contagion, that a county furnish patients with new clothes before sending them to a state hospital, must be presumed to be reasonable. *Mandamus* will lie to compel compliance with such regulation. *People ex rel. Croft v. Manhattan State Hospital* (1896), 5 App. Div. 249, 39 N. Y. Supp. 158.

Designation of examiners of alleged insane; duty to notify health officer of existence of indigent insane.—This section does not compel the designation of a health officer, who is a qualified examiner in lunacy, as one of the physicians to examine a person alleged to be insane and make the required certificate of lunacy. All city, town or county authorities, having duties to perform relating to the poor, except in the city of New York and the county of Albany, must notify the health officer of the town or of the village of any poor or indigent insane or apparently insane person within such municipality whom they know to be in need of the relief conferred by the Insanity Law. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 431.

§ 88. Duty of committee and others to care for the insane; apprehension and confinement of a dangerous insane person.—When an insane person is possessed of sufficient property to maintain himself, or his father, mother, husband, wife or children are of sufficient ability to maintain him, and his insanity is such as to endanger his own person, or the person and property of others, the committee of his person and estate, or such father, mother, husband, wife or children must provide a suitable place for his

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confinement, and there maintain him in such manner as shall be approved by the health officer of the town, village or city where he is confined, and in accordance with the rules of the commission. The health officers of towns, villages and cities, or in the boroughs of Manhattan and the Bronx in the city of New York the board of trustees of Bellevue and allied hospitals, and in the boroughs of Brooklyn, Queens and Richmond in said city, and also in the county of Albany, the commissioner of public charities are required to see that the provisions of this section are carried into effect in the most humane and speedy manner.

Upon the refusal or neglect of a committee, guardian or relative of an insane person to cause him to be confined, as required in this chapter, the officers named in this section shall apply, or cause application to be made, to a judge of a court of record of the city or county, or to a justice of the supreme court of the judicial district in which such insane person may reside or be found, who, upon being satisfied, upon proper proofs, that such person is dangerously insane and improperly cared for or at large, shall issue a precept to one or more of the officers named, commanding them to apprehend and confine such insane person in some comfortable and safe place; and such officers in apprehending such insane person shall possess all the powers of a peace officer executing a warrant of arrest in a criminal proceeding. Unless an order of commitment has been previously granted, such officers shall forthwith make, or cause to be made, application for the proper order for his commitment to the proper institution for the care, custody and treatment of the insane, as authorized by this chapter, and if such order is granted, such officer shall take the necessary legal steps to have him transferred to such institution. Pending such transfer the health officer of the proper town, village or city, and, in the city of New York and the county of Albany, the officers above named for the respective boroughs, or county, shall see that such insane person is cared for in a suitable place and is provided with proper medical care and nursing. The cost and expense incurred by the health officer in the performance of his duties under this section shall, when allowed by the judge or justice ordering the commitment, be a charge against the town, city or county liable for the costs of the commitment of an insane person under this chapter and shall be paid in the manner prescribed by section eighty-four of this chapter. (*Amended by L. 1910, ch. 608 and by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 68, as amended by L. 1908, ch. 487; originally revised from R. S., pt. 1, ch. 20, tit. 3, §§ 1-6; L. 1874, ch. 446, tit. 1, §§ 6, 8, 9, 37.

References.—Cruel or harsh treatment of insane persons a misdemeanor, Penal Law, § 1121. Force may be used when apprehending insane person, *Id.* § 246, subd. 6.

Construction; acts justifying commitment under.—The statute must be given a reasonable construction, and was undoubtedly intended to cover cases like the one at bar, where a homicide might be committed by a paranoiac before a warrant

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could be obtained. The commitment must be made by a judicial officer, and this power is one that has for years been exercised by the magistrates' court in the city of New York, apparently without serious question. Facts leading to arrest and commitment of plaintiff under the provisions of this section, at the instigation of defendant, reviewed and held not to constitute false imprisonment. *Cahill v. Michaelis* (1909), 170 Fed. 66.

Where the insane person is, or has responsible relatives, of sufficient ability to maintain him, the State Commission in Lunacy and the Local Health Officer, having upon inquiry concluded that he is being improperly cared for, may apply to a judge of a court of record for his commitment to a State Hospital for the Insane. The expense, fees and compensation in the performance of these duties shall be allowed by the judge before whom the application is heard. *Rept. of Atty. Genl.* (1912) 66.

Dangerously insane persons; duty to provide for.—This section relates to dangerously insane persons. The father is herein required to provide a suitable place for his lunatic son's confinement, and upon his refusal or neglect to do so, legal proceedings may be instituted, and a commitment ordered upon proper proof. *Long Island State Hospital v. Stuart* (1897), 22 Misc. 48, 49 N. Y. Supp. 372.

It is the duty of the committee or relatives of a lunatic to provide for his confinement if he be dangerously insane; and in case of their neglect the duty is imposed on certain public officers. *Perkins v. Mitchell* (1860), 31 Barb. 461, 473.

§ 89. **Patients admitted under special agreement.**—The commission may authorize the superintendent of a state hospital to admit thereto, under special agreement, insane patients, who are residents of the state, other than poor and indigent insane persons, when there is room for such insane therein. But no patient shall be permitted to occupy more than one room in any state hospital. Such patients, when so received, shall be subject to the general rules and regulations of the hospital. The commission shall fix the rates to be charged for the maintenance of such insane persons in a state hospital, the payment of which shall be secured by a surety company bond, which shall be approved by the commission, and bills therefor shall be collected monthly. The superintendent may recommend to the commission the removal of such insane patients to duly licensed private institutions and the commission shall have power in its discretion to compel such removal. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 69, as amended by L. 1900, ch. 380; L. 1902, ch. 26; originally revised from L. 1874, ch. 446, tit. 3, § 22; L. 1887, ch. 375, § 12; L. 1893, ch. 214, § 7; L. 1895, ch. 693.

Reference.—Treasurer may maintain action to recover upon agreement for maintenance of patient, Insanity Law, § 42.

§ 90. **Entries in case book.**—Every superintendent or other person in charge of an institution for the care and treatment of the insane, shall, within three days after the reception of a patient, make, or cause to be made, a descriptive entry of such case in a book exclusively set apart for that purpose. He shall also make or cause to be made entries from time to time, of the mental state, bodily condition and medical treatment of such patient during the time such patient remains under his care, and in the event of the discharge or death of such person, he shall state in such

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case book the circumstances thereof, and make such other entries at such intervals of time and in such form as may be required by the commission.

Source.—Former Insanity L. (L. 1896, ch. 545) § 70; originally revised from L. 1874, ch. 446, tit. 1, § 4.

§ 91. **Transfer of patients when hospital is overcrowded.**—When the building of any state hospital shall become overcrowded with patients, or the number of buildings shall be reduced by fire, or other casualties, or for other cause, the commission may, in its discretion, cause the transfer of patients therefrom, or direct that patients required to be sent thereto be transferred to another state hospital, where they can be conveniently received, or make, in special emergencies, temporary provision for their care, preference to be given in such transfers to a hospital in and adjoining rather than in a remote district. The expenses of such transfer shall be chargeable to the state, and the bills for the same, when approved by the commission, shall be paid by the treasurer of the state, on the warrant of the comptroller, out of any moneys provided for the support of the insane.

Source.—Former Insanity L. (L. 1896, ch. 545) § 71; originally revised from L. 1890, ch. 126, §§ 8, 9.

§ 92. **Investigation into the care and treatment of the insane.**—When the commission has reason to believe that any person adjudged insane is wrongfully deprived of his liberty, or is cruelly, negligently or improperly treated, or inadequate provision is made for his skilful medical care, proper supervision and safe keeping, it may ascertain the facts, or may order an investigation of the facts by one of its members. It, or the commissioner conducting the proceeding, may issue compulsory process for the attendance of witnesses and the production of papers, and exercise the powers conferred upon a referee in the supreme court. If the commission deem it proper, it may issue an order directed to any or all institutions, directing and providing for such remedy or treatment, or both, as shall be therein specified. If such order be just and reasonable, and be approved by a justice of the supreme court, who may require notice to be given of the application for such approval, it shall be binding upon any and all institutions and persons to which it is directed, and any wilful disobedience of such order shall be a criminal contempt and punishable as such. Whenever the commission shall undertake an investigation into the general management and administration of any institution for the insane, it may give notice to the attorney-general of any such investigation, and the attorney-general shall appear personally or by deputy and examine witnesses who may be in attendance. The commission, or any member thereof, may at any time visit and examine the inmates of any county or city alms-house, to ascertain if insane persons are kept therein.

Source.—Former Insanity L. (L. 1896, ch. 545) § 72; originally revised from L. 1889, ch. 283, as amended by L. 1890, ch. 273, § 13.

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Visitorial power of Supreme Court; charges of cruelty.—Charges of cruelty on the part of persons administering the Matteawan State Hospital are not ground for the transfer of one committed to that institution. The remedy in such case is by application to the State Commission in Lunacy, which is endowed with visitorial powers and may investigate and rectify such abuses. The visitorial power of the Supreme Court is not cut off by the granting of such power to the State Commission in Lunacy. *Matter of Thaw* (1910), 138 App. Div. 91, 122 N. Y. Supp. 970.

Section cited.—*Matter of Thaw* (1913), 158 App. Div. 571, 143 N. Y. Supp. 854.

§ 93. **Habeas corpus.**—Any one in custody as an insane person is entitled to a writ of habeas corpus, upon a proper application made by him or some friend in his behalf. Upon the return of such writ, the fact of his insanity shall be inquired into and determined. The medical history of the patient, as it appears in the case book, shall be given in evidence, and the superintendent or medical officer in charge of the institution wherein such person is held in custody, and any proper person, shall be sworn touching the mental condition of such person. Where a second or subsequent application is made for the discharge from custody of the same patient, any party to the proceeding may introduce in evidence any testimony, in relation to the mental condition of such patient, received upon any former hearing or trial, together with all the exhibits introduced in evidence upon such hearing or trial in connection with such testimony without calling the witnesses who gave such testimony, such evidence to have the same force and effect as if such witnesses had been called. (*Amended by L. 1913, ch. 542.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 73.

References.—Procedure upon application for writ of *habeas corpus*, Code Civ. Pro. §§ 2015-2066.

"Friend" as used in this section means "one favorably disposed" to alleged insane person. *People ex rel. Bebro v. Bond* (1905), 104 App. Div. 47, 93 N. Y. Supp. 277.

When granted.—A writ of *habeas corpus*, for the discharge of an incompetent, will not be granted pursuant to this section, unless it be shown that such incompetent has become sane. *Matter of Andrews* (1908), 126 App. Div. 794, 800, 111 N. Y. Supp. 417.

Detention after restoration to sanity is unlawful; and *habeas corpus* will issue for the purpose of securing the discharge of one who has been legally and regularly committed to a lunatic asylum, and has subsequently recovered his sanity. *Matter of Dixon* (1882), 11 Abb. N. C. 118.

Power of trial justice to impanel jury.—Where in *habeas corpus* proceedings for the release of a relative who is in custody under a valid commitment to a state hospital for insane criminals, the issue presented and to be determined is whether the relative has regained his sanity, and, therefore, is entitled to be released in accordance with the provisions of the Insanity Law, the justice of the Supreme Court, before whom the writ is returnable, may impanel a jury to aid him in deciding such issue. *People ex rel. Woodbury v. Hendrick* (1915), 215 N. Y. 339, 109 N. E. 486, affg. (1915), 168 App. Div. 553, 153 N. Y. Supp. 188.

Copies of commitment of insane persons must be supplied by the superintendent of an insane hospital to any person applying therefor. Report of Atty. Genl., May 23, 1911.

Expenses of superintendent in complying with a writ of *habeas corpus* are prop-

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erly chargeable against the general fund of the institution. Rept. of Atty. Genl. (1895) 216.

§ 94. Discharge of patients.—The superintendent of a state hospital, on filing his written certificate with the commission, may discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal offense at any time, as follows:

1. A patient who, in his judgment, is recovered.

2. A patient who, in his opinion, is a dotard, not insane.

3. Any patient who is not recovered but whose discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient; provided, however, that before making such certificate, the superintendent shall satisfy himself, by sufficient proof, that friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge.

When the superintendent is unwilling to certify to the discharge of an unrecovered patient upon request, and so certifies in writing, giving his reasons therefor, any judge of a court of record in the judicial district in which the hospital is situated may, upon such certificate and an opportunity of a hearing thereon being accorded the superintendent, and upon such other proofs as may be produced before him, direct, by order, the discharge of such patient, upon such security to the people of the state as he may require, for the good behavior and maintenance of the patient. The certificate and the proof and the order granted thereon shall be filed in the clerk's office of the county in which the hospital is situated, and a certified copy of the order in the hospital from which the patient is discharged. The superintendent may grant a parole to a patient not exceeding one year, under general conditions prescribed by the commission. The hospital paroling a patient shall not be liable for his expenses while on parole. Such liability shall devolve upon the relative, committee or person to whose care the patient is paroled, or the proper poor official of the town or county in which he may have found domicile.

The commission may, by order, discharge any patient in its judgment improperly detained in any institution. A poor and indigent patient discharged by the superintendent because he is an idiot, or a dotard not insane, or an epileptic, not insane, or because he is not a proper case for treatment within the meaning of this chapter, shall be received and cared for by the superintendent of the poor, or other authority having similar powers, in the county from which he was committed. A patient, held upon an order of a court or judge having criminal jurisdiction, in an action or proceeding arising from a criminal offense, may be discharged upon the superintendent's certificate of recovery, approved by any such court or judge.

4. Discharge of patients from licensed institutions. The superintendent or physician in charge of a licensed private institution, on filing

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his written certificate with the commission, may discharge any patient who is recovered, or, if not recovered, whose discharge will not be detrimental to the public welfare, or injurious to the patient. The superintendent or physician in charge of such institution may, subject to the approval of the commission, refuse to discharge any patient, if, in his judgment, such discharge will be detrimental to the public welfare or injurious to the patient, and if the committee or relatives of such patient refuse to provide properly for his care and treatment, the superintendent or physician in charge of such institution may apply to the commission for the transfer of the patient to a state hospital, provided the patient so sought to be transferred is a legal resident of the district in which the hospital is located, to which the transfer is sought.

The superintendent or physician in charge of a licensed private institution may grant a parole to a patient not exceeding one year, under general conditions prescribed by the commission. (*Amended by L. 1912, ch. 121, and L. 1917, ch. 335, in effect May 3, 1917.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 74, as amended by L. 1902, ch. 26; L. 1905, ch. 490; L. 1908, ch. 261; originally revised from L. 1874, ch. 446, tit. 3, § 24, as amended by L. 1895, ch. 172; L. 1879, ch. 280, § 21, as amended by L. 1889, ch. 427.

Reference.—Delivery of insane criminal upon recovery to sheriff, Code Crim. Pro. § 659.

Discharge of a patient who is not poor or indigent.—The State Commission in Lunacy may, by order, discharge from a state hospital a patient committed as a poor or indigent insane person, but who or whose committee has, in fact, sufficient property to properly and suitably care for and maintain said insane person. Rept. of Atty. Gen. (1912) 37.

The committee of the person of an incompetent may obtain her custody by a writ of *habeas corpus* pursuant to this section, although she has not been declared sane. Matter of Andrews (1908), 126 App. Div. 794, 800, 111 N. Y. Supp. 417.

Who may grant order.—Any judge of a court of record of the judicial district in which a hospital is situated may grant an order for the discharge of a patient upon such security to the people of the state as he may require for the good behavior and maintenance of the patient, after giving the superintendent an opportunity to state his reasons for refusing to certify to the discharge of such patient. Nies v. Fancher (1915), 88 Misc. 630, 151 N. Y. Supp. 155.

Complaint in action for recovery of damages.—Where, after the release of a patient from a state hospital for the insane, she threw sulphuric acid on plaintiff, the complaint in an action for damages which simply alleges that as a condition of the release of the patient a bond was required does not admit of proof of the various acts and conditions prerequisite to the requirement of the giving of the bond, and the absence of an allegation that the superintendent certified in writing his unwillingness to discharge the patient, a condition precedent to the granting of an order of discharge, upon giving security, renders the complaint demurrable as not stating a cause of action. Nies v. Fancher (1915), 88 Misc. 630, 151 N. Y. Supp. 155.

§ 95. Clothing and money to be furnished discharged or paroled patients.—No patient shall be discharged or paroled from a state hospital without suitable clothing adapted to the season in which he is discharged

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or paroled; and if it cannot be otherwise obtained, the steward shall, upon the order of the superintendent, furnish the same, and money not exceeding twenty-five dollars, to defray his necessary expenses until he can reach his relatives or friends, or find employment to earn a subsistence. (*Amended by L. 1917, ch. 320, in effect May 2, 1917.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 75; originally revised from L. 1874, ch. 446, tit. 3, § 26.

§ 96. **Transfer of nonresident patients.**—If an order be issued by any judge, committing to a state hospital a poor or indigent person, who has not acquired a legal settlement in this state, the commission in lunacy shall return such insane person, either before or after his admission to a state hospital, to the country or state to which he belongs, and for such purpose may expend so much of the money appropriated for the care of the insane as may be necessary, subject to the audit of the comptroller.

Source.—Former Insanity L. (L. 1896, ch. 545) § 76; originally revised from L. 1893, ch. 214, § 6.

§ 97. **Insane Indians.**—Poor and indigent insane Indians living within this state or upon any of the Indian reservations therein shall be committed to, confined in, and discharged from the state hospitals for the insane in the same manner and under the same rules and regulations as other poor and indigent insane persons; and all the provisions of this chapter shall apply to the Indians residing within this state the same as to other persons.

Source.—Former Insanity L. (L. 1896, ch. 545) § 77; originally revised from L. 1888, ch. 451.

§ 98. **Disposition of unclaimed personal property, including money, of discharged or deceased patients, and of interest accruing on patient's funds.**—All articles of personal property belonging to a discharged or deceased patient of a state hospital for the insane and in the custody of the superintendent or other proper officer of such hospital, may, if unclaimed by such discharged patient, or the legal representatives of such deceased patient, for a period of six months after the discharge or decease of such patient, be disposed of in such manner as the commission shall prescribe. Any moneys remaining to the credit of deceased or discharged patients, if unclaimed by their legal representatives, or such discharged patient, for a period of one year after the decease or discharge of such patient, and the interest accruing on the moneys belonging to patients still in the custody of the hospital may, subject to the approval of the commission, be paid into the amusement fund or the occupation fund of such hospital. (*Amended by L. 1915, ch. 503.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 78, as added by L. 1902, ch. 391.

§ 99. **Voluntary patients in state hospitals and licensed private institutions.**—Pursuant to rules and regulations established by the commission, the superintendent or person in charge of any state hospital or licensed private institution for the care and treatment of the insane, except the

Matteawan and Dannemora state hospitals, may receive and retain therein as a patient any person suitable for care and treatment, and who voluntarily makes written application therefor, and whose mental condition is such as to render him competent to make such application. A person thus received at such hospital or institution shall not be detained under such voluntary agreement more than ten days after having given notice in writing of his intention or desire to leave such hospital or institution. The superintendent or physician in charge of a state hospital shall, within three days after the admission of a patient by such voluntary agreement, forward to the office of the commission, the record of such patient in accordance with the provisions of section fifteen of this chapter, and such rules and regulations as may be established by the commission.

The superintendent or physician in charge of a licensed private institution for the care and treatment of the insane shall furnish the medical commissioner or the medical inspector a complete list of all voluntary cases received since the last visit of such commissioner or inspector. It shall be the duty of such commissioner or inspector to examine such cases and determine if they belong to the voluntary class, and the decision as to commitment or discharge shall be forthwith complied with by the superintendent or physician in charge of such institution. Any failure to conform to the requirements of this section shall be considered a sufficient cause for revocation of the license. (*Amended by L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 79, as added by L. 1908, ch. 261, § 2.

ARTICLE V.

[Article added by L. 1912, ch. 59.]

RETIREMENT OF STATE HOSPITAL EMPLOYEES.

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- Section 110. Retirement fund created; custody and control.
- 111. Retirement of employees.
 - 112. Proceedings for retirement; physical disability.
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 - 114. Term of service; how computed.
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 - 117. Forfeiture of right of annuity by default in making contributions.
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 - 119. Retirement board created.
 - 120. Medical examiners.
 - 121. Application blanks.
 - 122. Expenses of administration.

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§ 110. Requirement fund created; custody and control.—A permanent fund for the payment of annuities to employees of the New York state hospitals for the insane in the employ of the state of New York is hereby established, such fund to consist of moneys that may be paid in by those enti-

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tled to the benefits of the provisions of this section as hereinafter provided; moneys received from donations, gifts and bequests; moneys received from deductions for leave of absence without pay, for not less than twenty-four hours nor more than thirty days in any one year; moneys received from deductions for sickness for not less than twenty-four hours nor more than ninety days in any one year, and moneys received from other sources. The treasurer or other officer of any state hospital who collects or receives moneys, hereby declared to be part of such fund, shall pay to the comptroller of the state of New York, who shall place the same in such fund, which shall be invested by him and the money received from interest thereon shall be credited to said fund. All moneys belonging to the fund herein provided for shall be received by the comptroller of the state of New York who shall have charge of the administration thereof, and who shall pay therefrom the annuities, payable quarterly throughout life, or other benefits that may become due and payable hereunder. The retirement board provided for in this article shall from time to time establish such reasonable rules and regulations for the administration and investment of such fund as will insure the perpetuation thereof. The comptroller of the state of New York shall report annually for the fiscal year to the retirement board the condition of said fund in detail, giving all items of receipts and disbursements and his recommendation in regard thereto. This report shall be published with and as a part of the annual report of the state hospital commission. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

The term "employee," as used in this section, does not include resident officers. Rept. of Atty. Genl. (1912), Vol. 2, p. 201.

Persons bound to contribute.—Every person to whom the retirement act applies hereafter entering the employ of a state hospital, is bound by the provisions of the act and must contribute to the fund. Rept. of Atty. Genl. (1912), Vol. 2, p. 201.

Right to withdraw from participation in retirement fund.—An employee of a state hospital in the service at the time of the passage of the retirement act, who has not, within thirty days after the passage of the act, notified the retirement board of his intention not to take advantage of the act, and who subsequently decides that he does not wish to share in the fund may afterwards withdraw from participation. Such an employee who has expressly signified his desire to share in the fund, may withdraw from participation. Such an employee who has signified his unwillingness to share in the fund may afterwards be reinstated upon his application. Rept. of Atty. Genl. (1912), Vol. 2, p. 336.

The retirement fund may be deposited by the Comptroller with trust companies without exacting security, under section 190 of the Banking Law. Rept. of Atty. Genl. (1912), Vol. 2, p. 316.

§ 111. **Retirement of employees.**—Any employee of the New York state hospitals for the insane, including the Matteawan and Dannemora hospitals for criminal insane, who shall have signified his or her intention to take advantage of the provisions of this article and who shall faithfully and honestly discharge his or her duty in one or more of such state hospitals, or in any former city or county asylum, now a state hospital for the insane,

or partly in each, for twenty-five years, shall upon his or her application to the retirement board be entitled to retirement; provided, however, in the opinion of such board, there is sufficient money in the fund to warrant such retirement. Every applicant must be in the service of a state hospital for the insane, as hereinbefore provided, at the time application is made for retirement, and shall remain in the said service until notified by the retirement board of his or her retirement. Any person retired pursuant to the provisions of this section must be awarded, granted and paid from said retirement fund an annual amount equal to one-half of the wages or compensation, including maintenance, as fixed by the state hospital commission or by statute received by him or her, for the year immediately preceding the application for retirement, provided, however, that no person shall receive such annuity until he or she shall have paid into the said fund, by deductions from his or her wages, or by contribution in full, an amount equal to fifty per centum of his or her first year's annuity, and provided further that any such person who has been reduced in grade after twenty-five years of service shall be retired at the rate of wages and maintenance received by him or her during the twenty-fifth year of service. Such annuity shall become effective from the first of the month immediately subsequent to the date of the meeting of the retirement board taking action on same, and shall be for the natural life of such person and payable in quarterly installments, and shall not be revoked, repealed, diminished or subject to claim of creditors. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

§ 112. **Proceedings for retirement; physical disability.**—The retirement board shall have power upon its own motion or upon the application in writing of any person entitled to the benefit of the retirement fund to retire any such person who shall have faithfully and honestly discharged his or her duties in one or more of such state hospitals, including the Matteawan and Dannemora state hospitals for criminal insane, or former city or county asylum now a state hospital, or partly in each, for twenty-five years, or who shall have performed such duties for fifteen years or more, faithfully and honestly and who shall have become mentally or physically incapacitated by reason of accident or illness, provided, however, that reasonable notice in writing shall be given by the board or one of its members of its proposed action, to the person intended to be retired and an opportunity afforded to such person to be heard before the final action is taken by said board, and said board shall certify in writing the reason for such retirement, and that the best interests of the public service demand the same. To aid in such determination, the board may cause the person intended to be retired, to be physically examined by the medical examiners hereinafter provided for. Any person retired pursuant to the provisions of this section must be awarded, granted and paid from said retirement fund an annual amount equal to as many twenty-fifths of one-half of the

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wages or compensation, including maintenance received by him or her for the year immediately preceding the application for retirement as he or she has served years, provided, however, in the opinion of the retirement board, there is sufficient money in the fund to warrant such retirement, and provided further that no person shall receive such annuity until he or she shall have paid into said fund by deductions from his or her wages or by contribution in full an amount equal to fifty per centum of his or her first year's annuity. Such annuity shall become effective from the first of the month immediately subsequent to the date of the meeting of the retirement board taking action on same, shall be payable in quarterly * installments and shall not be diminished or subjected to the claims of creditors. Employees retired for disability under the provisions of this section shall be subject to an examination by a medical examiner or board appointed by the retirement board, or by the retirement board itself; and in the event of an employee so retired becoming able to perform active service again, he or she shall be reinstated by the superintendent on the certificate of the retirement board that such retired employee is again able to perform duty, and such annuity shall cease upon the date of such reinstatement. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

§ 113. Retirement for disability caused by injury.—Any employee of a New York state hospital for the insane who shall have signified his or her intention to take advantage of the provision of this article and who upon the report of the medical examiner hereinafter provided for to the retirement board, has become totally disabled by reason of an injury received in the line of duty or at the hands of a patient of any New York state hospital for the insane, including the Matteawan and Dannemora state hospitals for criminal insane, and incapacitated for performing the duties of the position, shall be retired with such allowances as under the circumstances may appear fitting to the retirement board, independently of length of service, but such allowance shall not be less than ten twenty-fifths of one-half of the wages, including maintenance, provided, however, in the opinion of the retirement board, there is sufficient money in the fund to warrant such retirement, and provided further that no person shall receive such annuity until he or she shall have paid into the said fund by deductions from his or her wages or by contribution in full an amount equal to fifty per centum of his or her first year's annuity. Such annuity shall become effective from the first of the month immediately subsequent to the date of the meeting of the retirement board taking action on same, shall be payable in quarterly installments, and shall not be diminished or subject to the claim of creditors. Employees retired for disability under the provisions of this section shall be subject to an examination by a medical examiner or board appointed by the retirement board, or by the retirement board itself; and in the event of an employee so retired becoming able to perform

* So in original.

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active service again, he or she shall be reinstated by the superintendent on the certificate of the retirement board that such retired employee is again able to perform duty, and such annuity shall cease upon the date of such reinstatement. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

§ 114. **Term of service; how computed.**—The term of service of an employee of the New York state hospitals for the insane shall be computed according to the time such person was upon the pay-roll of any state hospital, including the Matteawan and Dannemora state hospitals for criminal insane, or any city or county asylum now a New York state hospital for the insane. Except that the period of time during which any employee is not a participant in the fund and not entitled to the benefits of this article shall not be considered in computing his or her time of service. Any time for which any contribution may have been repaid to an employee as provided in section one hundred and sixteen shall not, in case the employee re-enters the service, be counted or considered in making retirements, unless the amount of such repayment shall be paid into the fund, with interest at the rate of four per centum from the time it was repaid to the employee. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

The period during which an employee is on leave of absence without pay cannot be considered in computing the time of service upon which the employee is entitled to retirement, and contributions cannot be required from such employee while on such leave of absence. Rept. of Atty. Genl. (1912), Vol. 2, p. 201.

§ 115. **Contributions to retirement fund.**—Every employee of the New York state hospitals for the insane who shall have signified his or her intention to take advantage of the provisions of this article shall contribute to said fund and the treasurer or other officer of any state hospital as hereinbefore provided shall at the end of the first full calendar month after this section as hereby amended takes effect deduct and retain monthly from the wages and maintenance of such persons and pay to the comptroller of the state of New York who shall credit the said fund by amounts as follows: Persons who have performed such duty for less than five years, one per centum. Persons who have performed such duty for more than five years and less than ten years, one and one-half per centum. Persons who have performed such duty for more than ten years and less than fifteen years, two per centum. Persons who have performed such duty for more than fifteen years and less than twenty years, two and one-half per centum. Persons who have performed such duty for more than twenty years, three per centum. Such payments shall cease when a person has paid for twenty-five years, or who has been retired pursuant to the provisions of this article. Every person to whom this article applies who shall have signified his or her intention to take advantage of this article, who shall continue in the employ of the New York state hospitals for the insane after this article takes effect, as well as every person to whom this article applies

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who may hereafter be appointed to a position or place, shall be deemed to consent and agree to the deductions made and provided for herein, and shall receipt in full for the wages, pay or compensation which shall be paid monthly or at any other time, and such payment shall be a full and complete discharge and acquittance of all claims or demands whatsoever for the services rendered by such person during the period covered by such payment, notwithstanding the provisions of any other law, rule or regulation affecting the wages, pay or compensation of any person or persons employed in the New York state civil service to whom this article applies. Every employee entering the service of the New York state hospitals on and after the first day of the calendar month after this section as hereby amended takes effect and who is not for any reason exempted from the benefits of this article, shall contribute and continue to contribute thereto to the retirement fund at the rate of two per centum per month of his or her wages including maintenance. All employees participating in the retirement fund at the time this section as hereby amended takes effect or employed hereafter or reinstated shall, subject to the provisions of this act, continue to participate while they remain in the state hospital service. All employees in the state hospital service prior to the twenty-second day of March, nineteen hundred and twelve, who are not participants in the retirement fund may become such by signifying their desire to do so to the retirement board within the thirty days next following the time this section as hereby amended takes effect and shall continue to be participants while they remain in the state hospital service. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

Contributions from employees must be based upon salary and maintenance and the retirement board must take into consideration the cost of maintenance of employees who are maintained by the state, in making deductions from the salary of such employees. Contributions to the fund from deductions for leave of absence without any pay can only be made to the extent of the amount deducted from the salary and maintenance of the employee. Rept. of Atty. Genl. (1912), Vol. 2, p. 201.

Every person entering the service subsequent to March 22, 1912, must contribute to the fund. Opinion of Atty. Genl. (1913) 334.

§ 116. Repayments where retirement is without fault of employee; payments in case of death.—Any person who has not become entitled to a retirement allowance, who loses his employment by reason of reduction of force or any change due to the action of the hospital authorities, and not owing to his own default or misconduct, shall be entitled to receive on retirement the aggregate amount of his contribution to the fund or funds from which the retirement allowances are to be paid, and shall not be entitled to any further benefit under this article. In case of death of an annuitant occurring between quarterly payments, the estate of the deceased annuitant shall be paid the amount due the annuitant at the day of death. Such amount shall be accepted as a complete discharge and acquittance of all claims or demands whatsoever against the retirement fund. In case of

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death of an employee who has made at least two payments, his estate shall either be reimbursed in the amount contributed by him, or in such sum as the retirement board may deem proper. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

The amount refunded under this section should not include sums contributed to the retirement fund by the State of New York on account of deductions made for leave of absence or sickness of the employee. Rept. of Atty. Genl. (1912), Vol. 2, p. 201.

§ 117. **Forfeiture of right to annuity by default in making contributions.**—Any employee who has been granted retirement pursuant to the provisions of this article and who does not make all necessary contributions required herein, within ninety days after notice of such retirement, shall forfeit his or her right to said annuity, and shall not be entitled to retirement except upon reapplication to the retirement board. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

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§ 118. **Temporary employees.**—The retirement board hereinafter provided shall exclude from the operation of this act any group of employees who receive their compensation on a temporary pay-roll and whose tenure of office is intermittent or of uncertain duration. (*Added by L. 1912, ch. 59.*)

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§ 119. **Retirement board created.**—The retirement board hereinbefore mentioned, shall be composed of the comptroller of the state of New York, the medical member and the legal member of the New York state hospital commission, which board shall have general jurisdiction over and authority to pass upon all questions that may arise under the provisions of this article. (*Added by L. 1912, ch. 59, and amended by L. 1912, ch. 283, and L. 1916, ch. 607.*)

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Membership in retirement board.—The chairman of the State Hospital Commission succeeds the president of the former State Commission in Lunacy as a member of the retirement board. Rept. of Atty. Genl. (1912) 198.

§ 120. **Medical examiners.**—The retirement board may appoint one or more boards of medical examiners hereinbefore mentioned, each of which boards shall be composed of not less than three physicians connected with the New York state hospital service, to conduct examinations. (*Added by L. 1912, ch. 59.*)

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§ 121. **Application blanks.**—All applications for retirement shall be made to the retirement board upon blanks to be provided for that purpose and shall be acted upon by said board within ninety days from the receipt thereof in order of such receipt. (*Added by L. 1912, ch. 59.*)

§ 122. **Expenses of administration.**—All of the expenses involved in the administration and operation of the fund, not performed in the respective hospitals involved, shall be paid from the retirement fund on the audit of

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the retirement board, including salaries for any positions which the board may deem necessary.

Any person who shall not have notified the retirement board to the contrary in writing on or before the twenty-first day of April, nineteen hundred and twelve, pursuant to the former provisions of this section shall continue to be deemed to have signified his or her intention at that time to take advantage of the provisions of this article. (*Added by L. 1912, ch. 59, and amended by L. 1916, ch. 607.*)

The salaries of clerks engaged in accounting and clerical work in computing payments to be made under the retirement act for the state hospital employees should be paid for out of the retirement fund established by the act. Rept. of Atty. Genl. (1912), Vol. 2, p. 479.

ARTICLE VI.

[Formerly Article 5, §§ 110-125; renumbered Article 6, §§ 130-145, by L. 1912, ch. 59.]

MATTEAWAN STATE HOSPITAL FOR INSANE CRIMINALS.

- Section 130. Establishment and purposes of the Matteawan state hospital.
- 131. Superintendent of state prisons to make rules and regulations.
 - 132. Medical superintendent.
 - 133. Medical superintendent as treasurer of the hospital.
 - 134. Salaries of resident officers.
 - 135. Powers and duties of medical superintendent and assistants.
 - 136. Monthly estimates.
 - 137. Power of removal.
 - 138. Transfer of insane convicts to the Matteawan state hospital.
 - 139. Disposal of insane convicts after expiration of term of imprisonment.
 - 140. Convicts on recovery to be transferred to prison.
 - 141. Certificate of conviction to be delivered to medical superintendent and copy filed.
 - 142. Transfers from state hospitals to Matteawan state hospital.
 - 143. Authority to recover for the support of patients. (*Repealed, L. 1912, ch. 121.*)
 - 144. Tenure of office.
 - 145. Communications with patients.

§ 130. Establishment and purposes of the Matteawan State Hospital.—The grounds, buildings and property located at Matteawan, in the county of Dutchess, and used for the purpose of the hospital for insane criminals, shall continue to be known as the Matteawan State Hospital, to be used for the purpose of holding in custody and caring for such insane persons held under any other than a civil process as may be committed to the said institution by courts of criminal jurisdiction, or transferred thereto by the state hospital commission, and for such convicted persons as may be declared insane while undergoing sentence of one year or less or for a misdemeanor at any of the various penal institutions of the state, and for all female convicts becoming insane while undergoing sentence. When a

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person is committed to the Matteawan State Hospital under the provisions of article eight, chapter five, section six hundred and fifty-nine; or title four, chapter two, section eight hundred and thirty-six of the code of criminal procedure—a copy of the minutes of the proceedings instituted to determine his mental condition shall be furnished to said hospital. (*Formerly* § 110; *renumbered* 130 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 90, as amended by L. 1904, ch. 525; originally revised from L. 1893, ch. 81, § 1.

Reference.—Examination of person charged with crime who pleads insanity, Code Crim. Pro. § 658.

A convicted person declared insane while undergoing three separate sentences of one year each for petit larceny may be committed to and received at the Matteawan State Hospital. Rept. of Atty. Genl. (1912) 147.

§ 131. Superintendent of state prisons to make rules and regulations.—The superintendent of state prisons, subject to the approval of the state commission in lunacy, shall make by-laws and regulations for the government of the hospital and the management of its affairs. (*Formerly* § 111; *renumbered* § 131, by L. 1912, ch. 59.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 91, in part; originally revised from L. 1893, ch. 81, § 2.

Consolidators' note.—Sections 111, 112 are made up of old § 91, which was divided because it related to two distinct subjects. The matter relating to the medical superintendent, which came first in § 91, has been made § 112, while the remainder constitutes § 111.

Suspension of rules.—The Supreme Court cannot order the suspension of rules of a state hospital made pursuant to statute. Matter of Thaw (1913), 158 App. Div. 571, 143 N. Y. Supp. 854.

§ 132. Medical superintendent.—The superintendent of state prisons shall, whenever there is a vacancy, appoint a medical superintendent for the Matteawan state hospital, who shall be a well-educated physician of at least five years' actual experience in a hospital for the care and treatment of the insane. (*Formerly* § 112; *renumbered* § 132, by L. 1912, ch. 59.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 91, in part; originally revised from L. 1893, ch. 81, § 2.

§ 133. Medical superintendent as treasurer of the hospital.—The medical superintendent shall be the treasurer of the hospital, and before entering upon his duties, shall file with the comptroller of the state his undertaking to the people with sureties to be approved by the superintendent of state prisons, to the effect that he will faithfully perform his trust as such treasurer. He shall have the custody of the moneys, securities and obligations belonging to the hospital and not required by law to be or remain in the custody of the comptroller or in the state treasury, and shall open with some bank, in the vicinity of the hospital, to be selected with the approval of the comptroller, an account in his name as such medical superintendent, and immediately deposit in such bank all moneys

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received by him as such medical superintendent and treasurer, and shall draw therefrom only for the use of the hospital and in the manner provided by the by-laws and upon the order of the steward, specifying the object of each payment. He shall keep a full and accurate account of the receipts and payments, as directed by the by-laws, and of such other matters as the superintendent of state prisons and the state hospital commission may prescribe, and balance all his accounts, annually, on the thirtieth day of June, and within ten days thereafter deliver to the superintendent of state prisons a statement thereof and an abstract of such receipts and payments for the past year. His books and vouchers shall at all times be open to the inspection of the superintendent of state prisons and the commission, and they may at any time require of him a statement of his accounts and of the funds and property in his custody. (*Formerly* § 113; *renumbered* § 133, *by* L. 1912, *ch.* 59, *and amended by* L. 1916, *ch.* 118.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 92; originally revised from L. 1893, ch. 81, § 3.

References.—Duties of treasurer of state hospital, Insanity Law, § 52 and references thereunder.

Deposit with State Treasurer.—Medical superintendent is not required to deposit monthly with the State Treasurer moneys received for the maintenance of patients and from sales account. Rept. of Atty. Genl. (1901) 191.

§ 134. **Salaries of resident officers.**—The superintendent of state prisons shall, from time to time, determine the annual salaries and allowances of the resident officers, and the same shall be paid in accordance with chapter three hundred and seventeen of the laws of nineteen hundred and ten, twice each month on the first and sixteenth days thereof by the treasurer of the state, on the warrant of the comptroller, out of any moneys in the treasury not otherwise appropriated, to the medical superintendent, on his presenting a bill of particulars thereof signed by the steward, and properly certified by such medical superintendent. (*Formerly* § 114; *renumbered* 134 *by* L. 1912, *ch.* 59, *and amended by* L. 1912, *ch.* 121.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 93; originally revised from L. 1893, ch. 81, § 4.

§ 135. **Powers and duties of medical superintendent and assistants.**—The medical superintendent shall be the chief executive officer of the hospital and shall:

1. Have the general superintendence of the building and grounds, together with their furniture, fixtures and stock, and the direction and control of all persons therein, subject to the rules and regulations adopted by the superintendent of state prisons, with power to assign their respective duties.

2. Appoint such number of assistant physicians, as the necessities of the institution may require, subject to the approval of the superintendent of state prisons, also a steward and matron, all of whom and the medical

superintendent, shall reside in the hospital, and shall be known as the resident officers thereof.

3. Appoint such and so many attendants and other subordinate employees as he may think proper and necessary for the economical and efficient administration of the affairs of the hospital, and prescribe their several duties and places, and fix, with the approval of the superintendent of state prisons, their compensation, and discharge any of them at his sole discretion; but in every case of discharge, so occurring, he shall, forthwith, enter the same with the reasons therefor, under an appropriate heading, in one of the record books of the hospital.

4. Give, from time to time, such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department of labor and expense.

5. Maintain salutary discipline among all who are employed by the institution, and enforce strict compliance with all instructions and orders given by him, and uniform obedience to all the rules and regulations of the hospital.

6. Cause full and fair accounts and records of all his doings, and of the entire business and operations of the institution to be kept regularly, from day to day, in books provided for that purpose, in the manner and to the extent prescribed in the by-laws.

7. See that all accounts and records are fully made up to the last day of June in each year, and present the principal facts and results, with his report thereon, to the superintendent of state prisons, within forty days thereafter. The resident officers, before entering upon their duties as such, shall severally take and file in the office of the secretary of state, the constitutional oath of office. The first assistant physician shall perform the duties and be subject to the responsibilities of the superintendent in his sickness or absence. The steward may personally purchase any supplies for the use of such hospital, but only in the name of the medical superintendent, and in each instance by his direction and not otherwise. (*Subd. 7, amended by L. 1916, ch. 118.*) [*Formerly § 115; renumbered § 135 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.*]

Source.—Former Insanity L. (L. 1896, ch. 545) § 94; originally revised from L. 1893, ch. 81, § 5.

Expenses of the superintendent, in obeying an order of *habeas corpus*, are properly a charge against the general fund of the institution. Rept. of Atty. Genl. (1895) 216.

§ 136. Monthly estimates.—The medical superintendent shall cause an estimate to be made monthly, in accordance with forms to be approved by the state comptroller, of all moneys necessary for the support and maintenance of the hospital, which may be required to supplement the deficiencies in the earnings thereof. Such estimate shall be submitted to and examined by the superintendent of state prisons, who, if he is satisfied that it is correct, and that the articles named therein are actually needed for the

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support and maintenance of the hospital, shall certify to the same, and on production of such estimate so certified, to the comptroller, he shall draw his warrant on the state treasurer for the amount thereof, and the state treasurer shall pay such amount to the medical superintendent of the hospital, out of any money in the treasury appropriated for the support of such hospital. (*Formerly § 116; renumbered § 136 by L. 1912, ch. 59.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 95; originally revised from L. 1893, ch. 81, § 6.

§ 137. Power of removal.—The superintendent of state prisons may remove the medical superintendent, for cause shown, after having given an opportunity to such superintendent to be heard thereon, and such officer shall not be reappointed to the office of medical superintendent, or to any other position in said hospital. (*Formerly § 117; renumbered § 137 by L. 1912, ch. 59.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 96; originally revised from L. 1893, ch. 81, § 7.

§ 138. Transfer of insane convicts to the Matteawan state hospital.—Whenever the physician of the state prison for women, any county penitentiary or workhouse, any reformatory for women, or of a state reformatory or any other penal institutions shall report in writing to the warden or other officer in charge thereof, that any person undergoing a sentence of one year or less or convicted of a misdemeanor, or any female convict confined therein is, in his opinion, insane, such warden or other officer shall apply to a judge of a court of record to cause an examination to be made of such person by two legally qualified examiners in lunacy, other than a physician connected with such state prison, penitentiary, reformatory or penal institution. Such examiners shall be designated by the judge to whom the application is made. Such examiners, if satisfied, after a personal examination, that such convict is insane, shall make a certificate to such effect in the form and manner prescribed by this chapter for the commitment of insane persons to state hospitals. Such warden or other person in charge shall apply to a judge of a court of record for an order transferring such convict to the Matteawan state hospital, accompanying such application with such certificate in lunacy. Such judge, if satisfied that such convict is insane, shall issue such order of transfer, and such warden or other officer in charge shall thereupon cause such convict to be transferred to the Matteawan state hospital and delivered to the medical superintendent thereof. At the time of such transfer the certificate in lunacy and order of transfer shall be presented to such medical superintendent. Such insane convict shall be received into such hospital and retained there until legally discharged. Such warden, or other officer in charge, before transferring such insane convict, shall see that he is bodily clean and is provided with a new suit of clothing similar to that furnished to convicts on their discharge from prison. The costs necessarily incurred

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in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the state or the municipality at whose expense the institution from which the transfer is made or sought to be made is maintained. (*Formerly* § 118; *renumbered* § 138 by L. 1912, ch. 59.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 97, as amended by L. 1904, ch. 525; originally revised from L. 1874, ch. 446, tit. 1, §§ 24, 26; L. 1893, ch. 81, § 8.

Consolidators' note.—Wording "the state reformatory" changed to "a state reformatory" for the reason that there are now two such institutions.

References.—Medical examiners in lunacy, Insanity Law, § 81. Inquiry into insanity of person accused of crime, Code Crim. Pro. §§ 656-662. Expenses incident to maintenance of criminal a charge upon county from which he was sent, Code Crim. Pro. § 662.

Examination of patients transferred from a penal institution to the Matteawan State Hospital. Rept. of Atty. Genl. (1906) 495.

Liability for support of insane criminal.—Where a resident of one county is committed to an asylum for insane criminals, for an offense committed in another county, the latter county cannot recover from the former the expense of his support. The action of the board of supervisors of the defendant county in auditing the claims made by the plaintiff for the support of the lunatic, did not constitute an admission of liability. *County of Jefferson v. County of Oswego* (1905), 102 App. Div. 232, 92 N. Y. Supp. 709, *affd.* (1906), 186 N. Y. 555, 79 N. E. 1108.

Where a person convicted of murder, before sentence was passed, was found to be insane, was discharged from imprisonment, and sent to the state lunatic asylum and his expenses paid by the treasurer of the county from which he was sent, it was held that the supervisors of the county could recover from the committee of the criminal's estate the amount so advanced. *Supervisors of Onondaga Co. v. Morgan* (1865), 4 Abb. Ct. of App. Dec. 335.

Expense of transferring and maintaining insane convicts in the Matteawan State Hospital is a charge upon the state. Rept. of Atty. Genl. (1896) 232.

§ 139. Disposal of insane convicts after expiration of term of imprisonment.—Whenever any convict in the Matteawan State Hospital, under and by virtue of this chapter, shall continue to be insane at the expiration of the term for which he was sentenced, he may be retained therein until he has recovered or is otherwise legally discharged. The medical superintendent of such hospital may discharge and deliver any patient whose sentence has expired, and who is still insane, but who in the opinion of the superintendent is reasonably safe to be at large, to his relatives or friends who are able and willing to comfortably maintain him, without further public charge; and such patient may, in the discretion of the medical superintendent, be provided with the whole or a portion of such allowances as are hereinafter granted to recovered convicts. Whenever any convict, who, by reason of his insanity, shall have been retained beyond the date of the expiration of his sentence shall recover, he may be discharged by the medical superintendent, and such convict shall be entitled to ten dollars in money, suitable clothing and a railroad ticket to the county of his conviction or to such other place as he may designate at no greater distance. Any convict in the Matteawan State Hospital, whose term of imprison-

§§ 140, 141. Matteawan state hospital for insane criminals. L. 1909, ch. 32.

ment has expired by commutation or otherwise, and who is not recovered, may, upon an order of the state hospital commission, be transferred to any institution for the insane. (*Formerly* § 119; *renumbered* § 139 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 98; originally revised from L. 1893, ch. 81, § 9.

Reference.—Disposal of insane person charged with crime upon his becoming sane, Code Crim. Pro. § 661.

Transfer to another hospital.—A prisoner cannot be transferred to another hospital until expiration of sentence. Rept. of Atty. Genl. (1900) 245; Rept. of Atty. Genl. (1902) 168.

Patient redelivered to authorities for further hearing not "discharged."—A patient who has recovered and been redelivered by the authorities to the county from whence he came, for the further hearing and investigation of criminal charges pending against him cannot be regarded as a "discharged" patient, within the meaning of this section, and therefore entitled to the allowance of clothes, money, railroad ticket, etc. Rept. of Atty. Genl. (1901) 217.

§ 140. Convicts on recovery to be transferred to prison.—Whenever any convict, who shall have been confined in such hospital as an insane person, shall have recovered before the expiration of his sentence, and the medical superintendent thereof shall so certify in writing to the agent and warden, or other officer in charge of the institution, from which such convict was received or to which the superintendent of state prisons may direct that he be transferred, such convict shall forthwith be transferred to the institution from which he came by the medical superintendent of the hospital, or, if received from one of the state prisons, to such state prison as the superintendent of state prisons may direct; and the agent and warden or other officer in charge of such institution shall receive such convict into such institution, and shall, in all respects, treat him as when originally sentenced to imprisonment. Any inmate not a convict, held upon an order of a court or judge, in a criminal proceeding, may be discharged therefrom, upon the superintendent's certificate of recovery, made to and approved by such court or judge. (*Formerly* § 120; *renumbered* § 140 by L. 1912, ch. 59.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 99; originally revised from L. 1893, ch. 81, § 10.

Section cited.—People ex rel. Peabody v. Baker (1908), 59 Misc. 359, 110 N. Y. Supp. 848.

§ 141. Certificate of conviction to be delivered to medical superintendent and copy filed.—Whenever any convict shall be transferred to the Matteawan state hospital, the agent and warden or other officer in charge of the prison, penitentiary, reformatory or other penal institution from which such convict is transferred, shall cause a correct copy of the original certificate of conviction of such convict to be filed in the office of the warden or officer in charge, and shall deliver the original certificate to the medical superintendent of such hospital; and whenever any such convict

L. 1909, ch. 32. Matteawan state hospital for insane criminals. §§ 142-145.

shall be transferred to any penal institution from such hospital, as hereinafore provided, the medical superintendent shall deliver to the agent and warden, or other officer in charge of such institution, such original certificate, which shall be filed in the clerk's office of the same. (*Formerly* § 121; *renumbered* § 141 by L. 1912, ch. 59.

Source.—Former Insanity L. (L. 1896, ch. 595) § 100; originally revised from L. 1893, ch. 81, § 11.

§ 142. **Transfers from state hospitals to Matteawan State Hospital.**—The commission may, by order in writing, transfer to the Matteawan State Hospital, any insane inmate of a state hospital, who was held under any other than a civil process, committed thereto upon the order of a court of criminal jurisdiction or of a judge or justice of such a court; or any patient who has previously been sentenced to a term of imprisonment in any penal institution, and who still manifests criminal tendencies, or any such patient who has previously been an inmate of the Matteawan State Hospital. All persons committed to said Matteawan State Hospital shall be a charge upon the state. (*Formerly* § 122; *renumbered* § 142 by L. 1912, ch. 59 and amended by L. 1912, ch. 121.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 101, as amended by L. 1899, ch. 260; L. 1900, ch. 380; L. 1904, ch. 525; originally revised from L. 1893, ch. 81, § 12.

Patients transferred pursuant to this section must be detained until they become sane. Rept. of Atty. Genl. (1901) 255. Matteawan State Hospital is devoted exclusively to the care and custody of insane criminals. Rept. of Atty. Genl. (1897) 80.

Commitment of persons acquitted on ground of insanity.—The insanity law makes the Matteawan state hospital the exclusive place for the commitment of persons acquitted of murder on the ground of insanity. There is no provision for transfers from Matteawan. Matter of Thaw (1910), 138 App. Div. 91, 122 N. Y. Supp. 970.

§ 143. **Authority to recover for support of patients.**—(*Formerly* § 123; *renumbered* § 143 by L. 1912, ch. 59, and repealed by L. 1912, ch. 121.)

§ 144. **Tenure of office.**—Nothing in this article shall be construed to affect the tenure of office of any of the officers of the hospital who held such office on July first, eighteen hundred and ninety-six. (*Formerly* § 124; *renumbered* § 144 by L. 1912, ch. 59.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 103; originally revised from L. 1893, ch. 81, § 14.

§ 145. **Communications with patients.**—No person not authorized by law or by written permission from the superintendent of state prisons shall visit the Matteawan state hospital, or communicate with any patient therein without the consent of the medical superintendent; nor without such consent shall any person bring into or convey out of the Matteawan state hospital any letter or writing to or from any patient; nor shall any letter or writing be delivered to a patient, or if written by a patient, be sent from the Matteawan state hospital, until the same shall have been examined

§ 150. Dannemora state hospital for insane convicts. L. 1909, ch. 32.

and read by the medical superintendent or some other officer of the hospital duly authorized by the medical superintendent. But communications addressed by such patient to the county judge or district attorney of the county from which he was sentenced, shall be forwarded, after examination by such medical superintendent, to their destination. (*Formerly* § 125; *renumbered* § 145 by L. 1912, ch. 59.)

Source.—Former Insanity L. (L. 1896, ch. 545) § 104.

Reference.—Communication with prisoner confined in any institution a misdemeanor, Penal Law, § 1691.

Private interviews contrary to rules.—The Supreme Court has no jurisdiction to order that a person so committed to a State hospital may have interviews with attorneys and relatives in private contrary to a rule of said institution adopted pursuant to statutory authority providing that such interviews must be in the presence of assistant or attendants of the institution. *Matter of Thaw* (1913), 158 App. Div. 571, 143 N. Y. Supp. 854.

ARTICLE VII.

(Formerly Article 6, §§ 140–153; renumbered Article 7, §§ 150–163 by L. 1912, ch. 59.)

DANNEMORA STATE HOSPITAL FOR INSANE CONVICTS.

- Section 150. Establishment and purposes of the Dannemora hospital.
151. Superintendent of state prisons to make rules and regulations.
 152. Medical superintendent.
 153. Medical superintendent as treasurer of the hospital.
 154. Salaries of resident officers.
 155. Powers and duties of medical superintendent and assistants.
 156. Monthly estimates.
 157. Power of removal.
 158. Transfer of prisoners in state prisons, reformatories and penitentiaries to Dannemora hospital.
 159. Retention of insane convicts after the expiration of their terms.
 160. Discharge of insane convicts after expiration of terms.
 161. Convicts on recovery to be transferred to prison.
 162. Certificate of conviction to be delivered to medical superintendent and copy filed.
 163. Communications with patients.

§ 150. Establishment and purposes of the Dannemora State Hospital.—The grounds and property located at Dannemora, in the county of Clinton, and the buildings erected thereon, shall be known as the Dannemora State Hospital. Such hospital shall be used for the purpose of confining and caring for such male prisoners as are declared insane while confined in a state prison, reformatory, or penitentiary, who has been sentenced thereto for a felony. (*Formerly* § 140; *renumbered* § 150 by L. 1912, ch. 59, and *amended* by L. 1912, ch. 121.)

Source.—L. 1899, ch. 520, § 1.

L. 1909, ch. 32. Dannemora state hospital for insane convicts. §§ 151-154.

§ 151. Superintendent of state prisons to make rules and regulations.—The superintendent of state prisons shall make by-laws and rules and regulations for the government of the hospital and the management of its affairs. (*Formerly* § 141; *renumbered* § 151 *by* L. 1912, ch. 59.)

Source.—L. 1899, ch. 520, § 2, in part.

§ 152. Medical superintendent.—The superintendent of state prisons shall, whenever there is a vacancy, appoint a medical superintendent for the Dannemora State Hospital, who shall be a well educated physician and a graduate of an incorporated medical college of at least five years' actual experience in a hospital for the care and treatment of the insane. (*Formerly* § 142; *renumbered* § 152 *by* L. 1912, ch. 59, and amended *by* L. 1912, ch. 121, in effect Apr. 3, 1912.)

Source.—L. 1899, ch. 520, § 2, in part.

§ 153. Medical superintendent as treasurer of the hospital.—The medical superintendent shall be the treasurer of the hospital, and before entering upon his duties, shall file with the state comptroller his undertaking to the people with sureties, to be approved by the superintendent of state prisons, to the effect that he will faithfully perform his trust as such treasurer. He shall have the custody of the moneys, securities and obligations belonging to the hospital and not required by law to be or remain in the custody of the comptroller or in the state treasury, and shall open with some bank, in the vicinity of the hospital, to be selected with the approval of the comptroller, an account in his name as such medical superintendent, and immediately deposit in such bank all moneys received by him as such medical superintendent and treasurer, and shall draw therefrom only for the use of the hospital and in the manner provided by the by-laws and upon the order of the steward, specifying the object of each payment. He shall keep a full and accurate account of the receipts and payments, as directed by the by-laws, and of such other matters as the superintendent of state prisons may prescribe, and balance all his accounts, annually, on the thirtieth day of June, and within ten days thereafter deliver to the superintendent of state prisons, a statement thereof and an abstract of such receipts and payments for the past year. His books and vouchers shall at all times be open to the inspection of the superintendent of state prisons, who may at any time require of him a statement of his accounts and of the funds and property in his custody. (*Formerly* § 143; *renumbered* § 153 *by* L. 1912, ch. 59, and amended *by* L. 1916, ch. 118.)

Source.—L. 1899, ch. 520, § 3.

§ 154. Salaries of resident officers.—The superintendent of state prisons shall, from time to time, determine the annual salaries and allowances of the resident officers, and the same shall be paid by the treasurer of the state, on the warrant of the comptroller, out of any moneys in the treasury appropriated for that purpose, to the medical superintendent, on his pre-

§ 155. Dannemora state hospital for insane convicts. L. 1909, ch. 32.

senting a bill of particulars thereof, signed by the steward, and properly certified by such medical superintendent. (*Formerly § 144; renumbered § 154 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.*)

Source.—L. 1899, ch. 520, § 4.

§ 155. Powers and duties of medical superintendent and assistants.—The medical superintendent shall be the chief executive officer of the hospital and shall:

1. Have the general superintendence of the building and grounds, together with their furniture, fixtures and stock, and the direction and control of all persons therein, subject to the rules and regulations adopted by the superintendent of state prisons, with power to assign their respective duties.

2. Appoint such number of assistant physicians as the necessities of the institution may require, and a steward, all of whom and the medical superintendent, shall, as soon as accommodations are provided, reside on the hospital grounds, and shall be known as the resident officers of the hospital.

3. Appoint such and so many attendants and other subordinate employees as he may think proper and necessary for the economical and efficient administration of the affairs of the hospital, and prescribe their several duties and places, and fix, with the approval of the superintendent of state prisons, their compensation, and discharge any of them at his sole discretion; but in every case of discharge, so occurring, he shall, forthwith, enter the same with the reasons therefor, under an appropriate heading, in one of the record books of the hospital.

4. Give, from time to time, such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department of labor and expense.

5. Maintain salutary discipline among all who are employed by the institution, and enforce strict compliance with all instructions and orders given by him, and uniform obedience to all the rules and regulations of the hospital.

6. Cause full and fair accounts and records of all his doings, and of the entire business and operations of the institution, to be kept regularly, from day to day, in books provided for that purpose, in the manner and to the extent prescribed in the by-laws.

7. See that all accounts and records are fully made up to the last day of June in each year, and present the principal facts and results, with his report thereon, to the superintendent of state prisons, within forty days thereafter. The resident officers, before entering upon their duties as such, shall severally take and file in the office of the secretary of state, the constitutional oath of office. The first assistant physician shall perform the duties and be subject to the responsibilities of the superintendent in his sickness or absence. The steward may personally purchase any sup-

L. 1909, ch. 32. Dannemora state hospital for insane convicts. §§ 156-158.

plies for the use of such hospital, but only in the name of the medical superintendent, and in each instance by his direction and not otherwise. (*Formerly* § 145; *renumbered* § 155 by L. 1912, ch. 59, and amended by L. 1912, ch. 121, and L. 1916, ch. 118.)

Source.—L. 1899, ch. 520, § 5.

§ 156. **Monthly estimates.**—The medical superintendent shall cause an estimate to be made monthly, in accordance with forms to be approved by the state comptroller, of all moneys necessary for the support and maintenance of the hospital, which may be required to supplement the deficiencies in the earnings thereof. Such estimate shall be submitted to and examined by the superintendent of state prisons, who, if he is satisfied that it is correct, and that the articles named therein are actually needed for the support and maintenance of the hospital, shall certify to the same, and on production of such estimate so certified, to the comptroller, he shall draw his warrant on the state treasurer for the amount thereof, and the state treasurer shall pay such amount to the medical superintendent of the hospital, out of any money in the treasury appropriated for the support of such hospital. (*Formerly* § 146; *renumbered* § 156 by L. 1912, ch. 59.)

Source.—L. 1890, ch. 520, § 6.

§ 157. **Power of removal.**—The superintendent of state prisons may remove the medical superintendent, for cause shown, after an opportunity to such superintendent to be heard thereon, and such officer shall not be reappointed to the office of medical superintendent, or to any other position in said hospital. (*Formerly* § 147; *renumbered* § 157 by L. 1912, ch. 59.)

Source.—L. 1899, ch. 520, § 7.

§ 158. **Transfer of prisoners in state prisons, reformatories and penitentiaries to Dannemora State Hospital.**—Whenever the physician of any one of the state prisons, reformatories or penitentiaries shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced thereto for a felony, is, in his opinion, insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora State Hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of bodily cleanliness, and is provided with a new suit of clothing similar to that furnished to convicts on their discharge from prison. At the time of such transfer, there shall be transmitted to the medical superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician, which shall be filed in the office of such medical superintendent, who shall file a notice of such transfer in the office of the superintendent of state prisons. (*Formerly* § 148; *renumbered* § 158 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.)

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Dannemora state hospital for insane convicts.

L. 1909, ch. 32.

Source.—L. 1899, ch. 520, § 9.

Physician's certificate not determination of incompetency.—The certificate of a physician, that a prisoner "is, in his opinion, insane" is not a determination of incompetency within either the spirit or letter of title 6 of chapter 17 of the Code of Civil Procedure. *Trust Co. of America v. State Safe Deposit Co.* (1905), 109 App. Div. 665, 96 N. Y. Supp. 585, *affd.* (1907), 187 N. Y. 178, 80 N. E. 1121.

Section cited.—*People ex rel. Stephani v. North* (1915), 91 Misc. 616, 155 N. Y. Supp. 595.

§ 159. **Retention of insane convicts after the expiration of their terms.**—When the term of a convict confined in Dannemora State Hospital has expired, and, in the opinion of the medical superintendent, such convict continues insane, the medical superintendent shall apply to a judge of a court of record to cause an examination to be made of such person, by two legally qualified examiners in lunacy, other than a physician connected with such hospital, qualified to act as medical examiners in lunacy. Such examiners shall be designated by the judge to whom the application is made. Such examiners, if satisfied, after a personal examination, that such convict is insane, shall make a certificate to such effect in the form and manner prescribed by article three of this chapter, for the commitment of insane persons to state hospitals. Such superintendent shall apply to a judge of a court of record for an order authorizing him to retain such convict at the Dannemora State Hospital, accompanying such application with such certificate in lunacy. Such judge, if satisfied that such convict continues insane, shall issue such order of retention, and such superintendent shall thereupon retain the convict at Dannemora State Hospital until discharged as provided by law. The certificate in lunacy and order of retention shall be kept by the medical superintendent in his office, and a copy thereof shall be filed in the office of the state hospital commission. The costs necessarily incurred by determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora State Hospital, and be paid in the same manner as are other expenses of such hospital. (*Formerly* § 149; *renumbered* § 159 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.)

Source.—L. 1899, ch. 520, § 10.

§ 160. **Discharge of insane convicts after expiration of terms.**—The medical superintendent of the Dannemora State Hospital may discharge and deliver any patient whose sentence has expired, and who is still insane, but who, in the opinion of the superintendent, is reasonably safe to be at large, to his relatives or friends who are able and willing to comfortably maintain him, without further public charge; and such patient may, in the discretion of the medical superintendent, be provided with the whole or a portion of such allowances as are hereinafter granted to recovered convicts. Whenever any convict, who, by reason of his insanity, shall have been retained beyond the date of the expiration of his sentence, shall

L. 1909, ch. 32. Dannemora state hospital for insane convicts. §§ 161, 162.

recover, he may be discharged by the medical superintendent, and such convict shall be entitled to ten dollars in money, suitable clothing and a railroad ticket to the county of his conviction or to such other place as he may designate at no greater distance. Any convict in the Dannemora State Hospital, whose term of imprisonment has expired by commutation or otherwise, and who is not recovered, may, upon an order of the state hospital commission, be transferred to any institution for the insane. (*Formerly* § 150; *renumbered* § 160 by L. 1912, ch. 59, and amended by L. 1912, ch. 121, in effect Apr. 3, 1912.)

Source.—L. 1899, ch. 520, § 11.

Prisoner paroled in custody of parent.—A prisoner sentenced to Elmira Reformatory and upon development of insanity committed to Dannemora State Hospital, may at the expiration of the maximum term of his criminal sentence, he being still insane, be paroled in the custody of his father under this section. Rept. of Atty. Genl. (1910) 894.

Transfer of insane convicts, as expiration of sentence, to state institution for insane. Rept. of Atty. Genl. (1903) 393.

§ 161. Convicts on recovery to be transferred to prison.—Whenever any convict, who shall have been confined in such hospital as an insane person, shall have recovered before the expiration of his sentence, and the medical superintendent thereof shall so certify in writing to the warden or superintendent of the institution, from which such convict was received, or to which the superintendent of state prisons may direct that he be transferred, such convict shall forthwith be transferred to the institution from which he came, by the medical superintendent of the hospital, or, if received from one of the state prisons, to such state prison as the superintendent of state prisons may direct; and the warden or superintendent of such institution shall receive such convict into such institution, and shall, in all respects, treat him as when originally sentenced to imprisonment. (*Formerly* § 151; *renumbered* § 161 by L. 1912, ch. 59.)

Source.—L. 1899, ch. 520, § 12.

§ 162. Certificate of conviction to be delivered to medical superintendent and copy filed.—Whenever a convict is transferred to the Dannemora State Hospital, the warden or superintendent in charge of the prison, penitentiary or reformatory from which such convict is transferred, shall cause a copy of the original certificate of conviction of such convict to be filed in the office of such warden or superintendent, and shall deliver the original certificate to the medical superintendent of such hospital; and whenever any such convict shall be transferred to any penal institution, from such hospital, as hereinbefore provided, the medical superintendent shall deliver to the warden or superintendent in charge of such institution, such original certificate, which shall be filed in the clerk's office of the same. (*Formerly* § 152; *renumbered* § 162 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.)

Source.—L. 1899, ch. 520, § 13.

§§ 163, 170, 171.

Psychiatric institute.

L. 1909, ch. 32.

§ 163. **Communications with patients.**—No person not authorized by law or by written permission from the superintendent of state prisons shall visit the Dannemora State Hospital, or communicate with any patient therein, without the consent of the medical superintendent; nor without such consent shall any person bring into or convey out of the Dannemora State Hospital any letter or writing to or from any patient; nor shall any letter or writing be delivered to a patient, or if written by a patient, be sent from the Dannemora State Hospital, until the same shall have been examined and read by the medical superintendent or some other officer of the hospital duly authorized by the medical superintendent. But communications addressed by such patient to the county judge or district attorney of the county from which he was sentenced, shall be forwarded, after examination by such medical superintendent, to their destination. (*Formerly § 153; renumbered § 163 by L. 1912, ch. 59, and amended by L. 1912, ch. 121.*)

Source.—L. 1899, ch. 520, § 14.

ARTICLE VIII.

(Formerly Article 7; renumbered Article 8 by L. 1912, ch. 59. Article (§§ 170–172) amended throughout by L. 1910, ch. 289.)

PSYCHIATRIC INSTITUTE.

Section 170. Psychiatric Institute.

- 171. Maintenance of institute.
- 172. Director of institute; residence and maintenance of staff.
- 173. Commitment of inebriates to private institutions.
- 174. Order of commitment; hearing.
- 175. Review of order.
- 176. Writ of habeas corpus.

§ 170. **Psychiatric Institute.**—The pathological institute heretofore established by the commission in connection with the Manhattan State Hospital on Ward's island is hereby continued and shall hereafter be known as the Psychiatric Institute. The object of such institute shall be the making of psychiatric and pathological researches and investigations, and the giving of instruction to the members of the medical staffs of the several state hospitals for the insane. Such institute shall be under the general supervision and control of the commission. (*Amended by L. 1910, ch. 289.*)

Source.—L. 1903, ch. 598, § 1.

§ 171. **Maintenance of institute.**—Such institute shall be maintained by the commission as part of the state hospital system, from appropriations obtained for such purpose. (*Amended by L. 1910, ch. 289 and L. 1912, ch. 121.*)

Source.—L. 1903, ch. 598.

§ 172. **Director of institute; residence and maintenance of staff.**—The director of such institute shall be appointed by the commission, after a special civil service examination therefor. He shall perform, under the direction of the commission, such duties relating to psychiatric and pathological research and the instruction of medical staffs of the several state hospitals, and such other duties as may be required by the commission. He shall have the supervision and control of such institute and of the physicians and others employed therein, subject to the general direction, supervision and control of the commission as provided in this article. He shall receive an annual salary to be fixed by the commission, subject to the approval of the governor. The state hospitals shall co-operate with the institute in such manner as the commission may from time to time direct. The director shall reside and have his office upon Ward's Island, New York city, and he shall be furnished a residence and maintenance for himself and family as provided by law in the case of the superintendents of state hospitals. The physicians of the staff of such institute shall, if required by the commission, reside upon Ward's Island, and shall be furnished with rooms and maintenance as provided by law for assistant physicians in state hospitals. (*Amended by L. 1910, ch. 289 and L. 1912, ch. 121.*)

Source.—Former Insanity L. (L. 1896, ch. 545) § 16, as amended by L. 1905, ch. 490; L. 1903, ch. 598.

Removal of director.—Commission may remove the director arbitrarily and without a hearing or trial. Rept. of Atty. Genl. (1900) 260.

§ 173. **Commitment of inebriates to private institutions.**—The judge of a court of record in the county or district where an alleged inebriate resides, or a judge of any court of record, may commit such person to any private licensed institution for the insane, in the manner hereinafter provided, upon a proper application and upon the consent in writing of the trustees, signed by their superintendent or executive officer, upon the certificates in writing made, executed and verified by at least two physicians, qualified to act as medical examiners in lunacy, showing that such person is over the age of eighteen years, and is incapable or unfit to properly conduct himself or herself, or his or her affairs, or is dangerous to himself or herself or others by reason of periodical, frequent or constant drunkenness, induced either by the use of alcoholic or other liquors, or of opium, morphine, or other narcotic or intoxicating or stupefying substance. Such certificate must further show that such person is in actual need of special care and treatment, and that his condition is such that his detention, care and treatment in such institution would be likely to effect a cure. Such certificate shall also specifically state the facts and circumstances upon which the judgment of each physician is based and shall show the result of such examination. It must appear upon the face of such certificate that each physician executing the same has made a personal examination of the person alleged to be an inebriate, and that such an examination has

been made within ten days prior to the application for the commitment. (*Added by L. 1913, ch. 526.*)

§ 174. **Order of commitment; hearing.**—The husband or wife, father or mother, brother or sister, or the child or committee of an alleged inebriate may apply for an order committing such person to the said licensed private institution for the insane, by presenting a brief petition containing a statement of the facts because of which the application for the order is made. Such petition shall be accompanied by the certificate of the physicians and the consent of the trustees as prescribed in the preceding section. Notice of the time and place of making such application shall be served personally upon the alleged inebriate at least three days before the date therein specified upon which the application will be made. A copy of the petition shall be served with such notice. The judge or justice before whom such application is made shall, in his discretion, direct the service personally or by mail of a like notice upon the husband or wife, father or mother, or next of kin, of such alleged inebriate. At the time and place mentioned in such notice or at such other time or place as the judge or justice may designate, said judge or justice shall proceed to hear the testimony introduced for and against such application, and may examine the alleged inebriate if deemed advisable. Such judge or justice may, in his discretion, require proofs in addition to the petition and certificates of the physicians. If, from the facts ascertained upon the hearing, the proofs produced, and the petition and certificates presented, the judge or justice shall determine that such person is an inebriate, or that he is so addicted to the use of opium, morphine or other narcotic or intoxicating or stupefying substance, and his condition is such that his detention in such institution would promote his interests and improve his health, he shall grant an order committing such person to such institution, to be detained therein for a period not exceeding twelve months, or for such period less than twelve months as may be necessary in the judgment of the physician in charge of such institution for the proper treatment and cure of such person, or until discharged therefrom prior to the expiration of such period, as hereinafter provided. The physician in charge may grant a parole to a patient not exceeding six months. (*Added by L. 1913, ch. 526.*)

§ 175. **Review of order.**—A person committed pursuant to this act or any relative or friend in his or her behalf may, within thirty days after any order of commitment is granted as provided in the preceding section, apply to a justice of the supreme court other than the justice making the commitment for a review of such order. Such justice shall thereupon cause a jury to be summoned as in the case of the proceedings for the appointment of the committee for an insane person, and shall try the question of the inebriety of such person in the manner provided by law for the proceedings for the appointment of such committee. If the verdict of the jury be that such person is an inebriate, such justice of the supreme

L. 1909, ch. 32.

Laws repealed.

§§ 176, 190, 191.

court to whom such application was made shall certify that fact and commit such person to the care and custody of the said institution. Proceedings under the commitment shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court made upon notice and after a hearing, containing a provision for such temporary care or confinement of the alleged inebriate as may be deemed necessary. Upon the refusal of a judge to grant an application for the commitment of an alleged inebriate he shall state his reasons for such refusal in writing, and the person making the application may apply to a justice of the supreme court in the manner specified in this section where an application is made in behalf of the alleged inebriate, and a commitment may be had after an appeal by a jury as provided herein. (*Added by L. 1913, ch. 526.*)

§ 176. **Writ of habeas corpus.**—A person who has been committed to such institution is entitled to a writ of habeas corpus upon a proper application made by him or her or by any relative or friend in his or her behalf; upon the return of such writ, the fact of the inebriety of such person and the reasons for his or her further detention in such institution shall be inquired into. The superintendent or executive, or the medical officer in charge of such institution, or any proper person, may be sworn and examined, as to the mental and physical condition of such person. If it appears upon such hearing that such person may properly be discharged, the judge or justice before whom the hearing is had shall so direct; but if it shall appear that the condition of such person is such as to render further treatment desirable, such person shall be remanded to the care and custody of such institution. (*Added by L. 1913, ch. 526.*)

ARTICLE IX.

(Formerly Art. VIII; renumbered Art. IX by L. 1912, ch. 59.)

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 190. Laws repealed.

191. When to take effect.

§ 190. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—Former Insanity L. (L. 1896, ch. 545) § 110.

§ 191. **When to take effect.**—This chapter shall take effect immediately.

Source.—Former Insanity L. (L. 1896, ch. 545) § 111.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....Part 1, chapter 20, title 3,.....All

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1788	31	6, 7	1828	21	1,
(11th Sess.)			§ 525 (2d Meet.)		
1827	294	All	1836	82	All
1828	20	15,	1838	218	All
¶¶ 35, 36 (2d Meet.)			1839	310	All

§ 190.			Laws repealed.			L. 1909, ch. 32.		
LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION			
1840	303	All	1887	375	All			
1841	278	All	1887	629	All			
1842	135	All	1888	451	All			
1843	224	All	1889	56	All			
1844	337	All	1889	283	All			
1845	357	All	1889	427	All			
1846	98	4, 5	1890	126	All			
1846	324	1-3	1890	132	All			
1850	282	All	1890	243	All			
1851	446	All	1890	273	All			
1857	650	All	1890	461	All			
1858	130	All	1891	335	All			
1859	457	All	1892	276	All			
1860	450	All	1893	81	All			
1863	139	All	1893	214	All			
1864	196	All	1893	247	All			
1864	418	All	1893	323	All			
1865	266	All	1893	565	All			
1865	342	All	1893	614	All			
1865	353	All	1894	707	All			
1865	734	All	1895	172	All			
1867	98	All	1895	628	All			
1867	113	All	1895	855	All			
1867	343	All	1896	2	All			
1867	564	All	1896	481	All			
1867	595	All	1896	545	All			
1868	228	All	1897	460	All			
1869	895	3	1898	636	All			
1870	295	All	1899	260	All			
1870	337	2-7	1899	481	All			
1870	378	All	1899	520	All			
1870	441	All	1900	380	All			
1870	474	All	1900	634	All			
1870	633	All	1900	676	All			
1871	237	All	1901	137	All			
1871	713	All	1901	546	All			
1872	733	2,	1901	644	1,			
part amending L. 1865, Ch. 342, § 3			part providing for the establishment and maintenance of a pathological hospital					
1873	587	All	1902	26	All			
1874	414	All	1902	130	All			
1874	446	All,	1902	391	All			
except title 1, §§ 21, 22, 26			1902	593	1,			
1875	264	All	part providing for the establishment and maintenance of a pathological hospital					
1875	574	All	1902	599	All			
1875	634	1,	1903	146	All			
¶ 90			1903	221	All			
1876	121	All	1903	598	1,			
1876	267	3-5	part providing for the establishment and maintenance of a pathological hospital					
1878	47	All	1904	326	All			
1878	86	All	1904	330	All			
1879	45	All	1904	428	All			
1879	280	All	1904	525	All			
1880	61	1	1904	714	All			
1880	164	All	1905	490	All			
1881	49	All	1905	497	All			
1881	190	All	1906	107	All			
1883	193	All	1906	284	All			
1884	289	All	1906	296	All			
1884	515	All	1907	325	All			
1885	178	All	1907	462	All			
1885	462	All						
1886	27	All						
1886	215	All						
1886	318	All						
1886	545	All						
1887	343	All						

Consolidators' notes.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1908	213	All	1908	487	All
1908	261	All			

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Statutes repealed which are temporary or obsolete or which have been consolidated in the "Consolidated Laws" are given with an explanatory note as follows:

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1828, ch. 20, § 15, ¶¶ 35, 36.—Directs the insertion of certain words in printing the Revised Statutes. Obsolete.

L. 1836, ch. 82.—Erection of a state asylum. Temporary.

L. 1839, ch. 310.—Same as Note to L. 1836, ch. 82.

L. 1840, ch. 303.—Same as Note to L. 1836, ch. 82.

L. 1841, ch. 278.—Temporary.

L. 1842, ch. 135.—Establishes state hospital at Utica. Portions not temporary are abrogated by provisions of L. 1874, ch. 446, with the exception of § 44, which provides that city and town assessors shall make an annual report of insane in their wards or towns, to the treasurer of said asylum at Utica. This section while technically alive is undoubtedly obsolete.

L. 1843, ch. 224.—Appropriation. Temporary.

L. 1844, ch. 337, §§ 1-7.—Relates to erection of buildings at state hospitals. Sections 1-5, 7, are temporary. Section 6 superseded by provision of L. 1874, ch. 466, tit. 3, § 34.

L. 1845, ch. 357.—Commitment of insane from Kings county to state asylum. L. 1874, ch. 446, tit. 11, § 2.

L. 1846, ch. 98, §§ 4, 5.—Section 4 abrogated by L. 1874, ch. 446, tit. 3, § 3. Balance which relates to use of Chenango canal for water purposes superseded by same, tit. 3, § 35.

L. 1846, ch. 324, §§ 1-3.—Superseded by L. 1858, ch. 130, §§ 8, 10.

L. 1850, ch. 232.—Appointment of assistant physician at state asylum and admission of paupers to said asylum. Abrogated by L. 1874, ch. 446, tit. 1, § 14, and tit. 3, § 3.

L. 1851, ch. 446.—Commitment of lunatics to county poorhouse or state asylum. Abrogated by L. 1874, ch. 446, tit. 11, § 2, because inconsistent with the provisions of tit. 1, art. 1, of said abrogating statute.

L. 1857, ch. 650.—Commitment of insane when county judge is precluded from acting by reason of relationship. Commitment no longer dependent on county judge. Obsolete.

L. 1858, ch. 130.—Establishes a state asylum for insane convicts at Auburn, partly repealed and balance superseded by L. 1874, ch. 446, tit. 8.

L. 1859, ch. 457.—Relates to use of Chenango canal for water purposes by state asylum at Utica. Section 1 so far as it added § 6 to L. 1848, ch. 98, amended by L. 1867, ch. 564, "to read as follows"; latter act and balance of former superseded by L. 1874, ch. 446, tit. 3, § 36.

L. 1863, ch. 139.—Relates to disposition of insane convicts both before and after expiration of sentence. Superseded by L. 1874, ch. 446, tit. 8, §§ 9, 10.

L. 1864, ch. 196.—Relates to New York State Inebriate Asylum which was abolished by L. 1879, ch. 280. Obsolete.

L. 1864, ch. 418.—Temporary.

L. 1865, ch. 266.—Relates to New York State Inebriate Asylum, which was abolished by L. 1879, ch. 280. Obsolete.

L. 1865, ch. 342.—Relates to state asylum at Willard. Sections 1-8, 12, temporary. Sections 9-11 repealed as appears in schedule. Section 13 superseded by L. 1874, ch. 446, tit. 4, § 1. Section 14 dependent.

L. 1865, ch. 353.—Partly temporary; balance abrogated by L. 1874, ch. 446.

L. 1867, ch. 93.—Establishment of the Hudson River State Hospital, and erection of buildings therefor. Sections 1-5 superseded by L. 1874, ch. 446, tit. 5. Balance temporary.

L. 1867, ch. 113.—L. 1865, ch. 734, amended by L. 1858, ch. 130, § 4, "to read as follows," which act was in turn amended by said L. 1867, ch. 113, "to read as follows," and latter act which relates to asylum for insane criminals at Auburn, superseded by L. 1874, ch. 446, tit. 8, §§ 4, 5.

L. 1867, ch. 343.—Amends L. 1865, ch. 353, in regard to discharge of insane from New York and Kings county asylums. Included in New York Consolidation Act, § 415.

Consolidators' notes.

L. 1867, ch. 564.—Relates to the use by Utica asylum of water from Chenango canal. Abrogated by L. 1874, ch. 446. Superseded by L. 1874, ch. 446, tit. 3, §§ 35, 36.

L. 1867, ch. 595.—Superseded by L. 1874, ch. 446, tit. 3, § 5.

L. 1868, ch. 228.—Water supply at state asylum. Temporary.

L. 1869, ch. 895, § 3.—Changes name of State Lunatic Asylum at Auburn. Covered by L. 1874, ch. 446, tit. 8, § 1.

L. 1870, ch. 295.—Provides for appointment of a pathologist at Utica State Asylum. Superseded by L. 1874, ch. 446, tit. 3, § 4.

L. 1870, ch. 337, §§ 2-7.—Relates to Hudson River Hospital. Sections 2, 3 covered by provisions of L. 1874, ch. 446, tit. 5; §§ 4, 5 repealed, as appears in schedule. Sections 6, 7 dependent on balance of statute.

L. 1870, ch. 378.—Establishes the Buffalo State Asylum. Superseded by L. 1874, ch. 446, tit. 6.

L. 1870, ch. 441.—Temporary.

L. 1870, ch. 474.—Establishes State Homeopathic Asylum at Middletown. Superseded by L. 1874, ch. 446, tit. 7.

L. 1870, ch. 633.—Relates to care of paupers in Monroe County Insane Asylum, now a state hospital. Obsolete.

L. 1871, ch. 237.—Temporary and obsolete.

L. 1872, ch. 733, § 2, pt.—Amends L. 1865, ch. 342, § 3. Temporary.

L. 1873, ch. 587.—Relates to appointment of certain officers at state lunatic asylum. Covered by provisions of L. 1874, ch. 446.

L. 1874, ch. 414.—Commitment of paupers to Middletown State Hospital. Covered by L. 1874, ch. 446, tit. 1, art. 1.

L. 1876, ch. 267, §§ 3-5.—Amends L. 1874, ch. 446, tit. 10, §§ 1 and 4, which sections are repealed by former Insanity Law, and these amendatory sections are covered by provisions of said law, being L. 1896, ch. 545, art. 1.

L. 1890, ch. 461.—Provides for the appraisal and sale of county insane asylums erected prior to the time when the insane became a state charge. Obsolete.

L. 1892, ch. 276.—Amends former L. 1879, ch. 280, § 8, which was repealed and superseded by Insanity Law. Obsolete.

L. 1893, ch. 565.—Temporary.

L. 1895, ch. 628.—Sections 2, 3 temporary and obsolete. Balance repealed as appears in schedule.

L. 1896, ch. 2.—Sections 2-8, 10-15 are repealed. Section 1 is superseded by L. 1896, ch. 545, § 50. Section 9 is obsolete.

L. 1896, ch. 481.—Temporary. Recommended for repeal.

L. 1896, ch. 545.—This statute, which is the former Insanity Law, is recommended for repeal because its live provisions have been incorporated in the Insanity Law.

L. 1899, ch. 520, which establishes and regulates the Dannemora Hospital for Insane Convicts, recommended for repeal because consolidated in Insanity Law, as follows: Section 1, as § 140. Section 2, slightly modified by omitting temporary provisions, as §§ 141, 142. Sections 3-7 as respectively §§ 143-147. Sections 9-14 as respectively §§ 148-153. Section 8 omitted as temporary.

L. 1900, ch. 380.—Parts not repealed, as indicated in schedule, consolidated in Insanity Law, as follows: Section 1, part amending § 66 in § 86. Section 5 in § 62-65. Section 6 repealing section.

L. 1900, ch. 634.—All repealed as appears in schedule except § 3, repealing section, and § 4, when to take effect.

L. 1901, ch. 546.—Consolidated in Insanity Law, § 85.

L. 1901, ch. 644, § 1, pt.—Provides for establishing and maintaining a pathological hospital and institute. Superseded L. 1902, ch. 593, § 1, pt.

L. 1902, ch. 26.—Section 1 adds § 6-a to Insanity Law, which section, as so added, was amended by L. 1905, ch. 490, § 3, "to read as follows." Section 20 consolidated in Insanity Law, § 57. Section 24 in § 66. Section 25 in § 89. Section 27, when to take effect, is dependent. Balance of act repealed by construction.

L. 1902, ch. 391.—Consolidated in Insanity Law, § 98.

L. 1902, ch. 593, § 1, pt.—Provides for establishing and maintaining a pathological hospital and institute. Superseded by L. 1903, ch. 598, § 1, pt.

L. 1903, ch. 146.—Consolidated in Insanity Law, as follows: Section 1 in § 82. Section 2 in § 87. Section 3 dependent.

L. 1903, ch. 598, § 1, pt.—L. 1903, ch. 593, being the general appropriation act for the year, contained on page 1326 a provision requiring the maintenance of a hospital for pathological and psychopathic research. This provision has been com-

Cross-references.

combined with Insanity Law, § 16, and as so combined, rewritten without change of substance and consolidated in Insanity Law, §§ 170-172.

L. 1904, ch. 428.—Consolidated in Insanity Law, § 84.

L. 1904, ch. 525.—Consolidated in Insanity Law, as follows. Section 1 in §§ 110, 118. Section 2 in § 122. Section 3 dependent.

L. 1904, ch. 714.—Consolidated in Insanity Law, as follows: Section 1 in § 49. Section 2 in § 50. Section 3 dependent.

L. 1905, ch. 490.—Consolidated in Insanity Law, as follows: Section 1 in § 3. Section 2 in § 4. Section 4 in § 8. Section 5 in § 11. Section 6 in § 12. Section 7 in § 13. (Section 8 amended "to read as follows.") Section 9 in § 172. Section 10 in § 18. Section 11 in § 40. Section 12 in § 41. Section 13 in § 42. Section 14 in § 43. Section 15 in § 44. Section 16 in § 45. Section 17 in § 46. Section 18 in § 47. Section 19 in § 48. Section 20 in § 51. Section 21 in § 52. Section 22 in § 53. Section 23 in §§ 54, 55. Section 24 in § 56. Section 25 in § 58. Section 26 in § 63. Section 27 in § 64. Section 29 in § 94. Section 30 is dependent.

L. 1905, ch. 497.—Consolidated in Insanity Law, § 9.

L. 1906, ch. 107.—Consolidated in Insanity Law, § 6.

L. 1906, ch. 284.—Consolidated in Insanity Law, § 17.

L. 1906, ch. 298.—Consolidated in Insanity Law, § 19.

L. 1907, ch. 325.—Consolidated in Insanity Law, § 65.

L. 1907, ch. 462.—Consolidated in Insanity Law, § 7.

INSECT PESTS.

Extirpation; Agricultural Law, §§ 304, 305. Temporary loans to prevent; Agricultural Law, § 320.

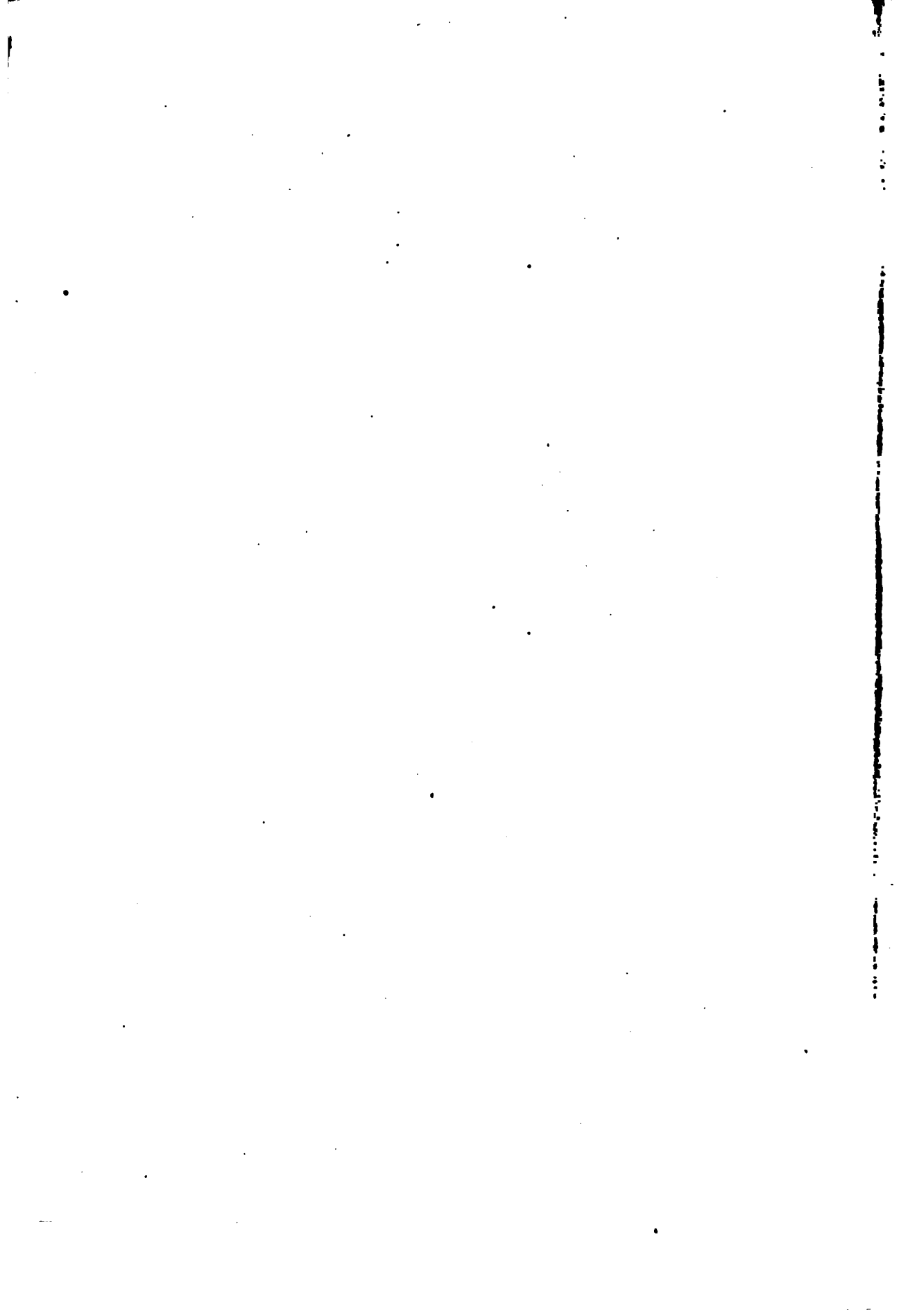
INSOLVENCY.

Fraudulent conveyances; Penal Law, § 1170. Fraudulent removal of property; Penal Law, §§ 1171, 1172. Concealment of effects of insolvent debtor; Penal Law, § 1173. See Debtor and Creditor Law.

INSURANCE CORPORATIONS.

Misconduct of officers; Penal Law, § 670. Issue of false literature; Penal Law, § 1203. Discriminations and rebates by life companies; Penal Law, § 1191. See Insurance Law.





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